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# CALIFORNIA EMPLOYMENT LAW UPDATE

**JULY 2008**

## Court of Appeal Holds that California Employers Need Only Provide Meal and Rest Breaks, Not Ensure that Employees Take Them

The plaintiffs, hourly employees of several Brinker-owned restaurants in California, filed a class action against the restaurant chain, alleging rest break violations, meal break and "early lunching" violations, as well as uncompensated off-the-clock work and "time shaving" violations (when managers "shave" time by adjusting employee payroll records to reflect shifts of less than five hours). The trial court certified a class of nearly 60,000 employees, finding that the issues were common to all class members and could be litigated collectively.

By way of background, California law requires employers to provide hourly employees with a thirty-minute unpaid meal break and two ten-minute rest breaks. Cal. Labor Code § 512. Under California Labor Code section 226.7, for every meal or rest period an employer fails to provide an employee, the employer is fined an hour's worth of pay. In addition, the California Industrial Welfare Commission Wage Orders require that employers provide ten minutes of paid rest time for every four hours worked or "major fraction thereof." That means that if an employee works an eight-hour shift, the employer must grant two ten-minute rest breaks, which are paid time.

The Court of Appeal, Fourth District, unanimously reversed the lower court's decision, ruling that employers are only required to provide meal and rest breaks for their workers, not ensure that breaks are actually taken, and that class treatment was inappropriate. In its ruling, the court stated that employers cannot impede, discourage or dissuade employees from taking meal periods or rest breaks. Moreover, the employers are obligated to provide employees the opportunity to take meal periods and rest breaks. However, the court eschewed a requirement that employers ensure that each worker takes every break. The court did so with practicality in mind -- requiring employers to "police" employees would create a virtually impossible task for large employers and create incentives for employees to manipulate the system by intentionally missing breaks.

The court also overturned the lower court's ruling that Brinker was required to provide meal breaks on a "rolling" five-hour schedule, i.e., provide a thirty-minute break for each five hours worked. The court held that employers only need to provide one meal break for employees who work between five and ten hours during a shift, regardless of when the meal period is taken. The court also rejected the argument that employees need to take their rest breaks in the middle of each four-hour period. The court found that the restaurant chain did not violate rest break requirements by allowing employees to take their meal period in the first hour of an eight-hour shift and then to take their two rest breaks later in the shift. Finally, the court held that while employers cannot coerce,

require or compel employees to work off the clock, they cannot be held liable for their employees working off the clock unless they know or should have known they were doing so.

The *Brinker* decision recognizes the practical realities of the workplace and gives broader flexibility to employers as to when and whether employees take their breaks. Employers will not have to pay the one-hour premium pay to employees who take an "early lunch," a break at the wrong time, or a break of less than thirty minutes, as long as the employer provided a meal period and the employee did not work more than ten hours total. In addition to clarifying several unsettled areas of wage and hour law, the ruling may serve as a significant barrier to class certification in most meal and rest break cases. The *Brinker* decision suggests that in order to certify a class, there must be a showing of a regular policy to prevent employees from taking breaks.

The California plaintiffs' bar likely will make every effort to de-publish *Brinker* and obtain review of the decision by the California Supreme Court. In the meantime, the California Division of Labor Standards Enforcement issued a memorandum to its deputy labor commissioners on July 25, 2008, instructing them to follow the rulings in the *Brinker* decision effective immediately and apply the decision to pending matters. Whether or not *Brinker* survives, employers should take a fresh look at their meal and rest break policies and practices, and consider the following:

- Make sure they are not acting in a way that impedes, discourages or dissuades employees from taking legally required meal and rest breaks.

- Confirm that meal and rest break policies make it clear to all non-exempt employees that they are entitled to their meal and rest breaks and no supervisor or other person has authority to ask them to skip breaks.

- Periodically audit meal and rest break practices, overtime policies and practices, and time clock, time card, and payroll practices.

- Require all employees to record meal and rest breaks in their time sheets or other time records.

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