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# CALIFORNIA EMPLOYMENT LAW UPDATE

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### California Employers Await Definitive Answer from California Supreme Court on Meal and Rest Break Obligations

On October 22, 2008, the California Supreme Court granted review of and de-published *Brinker Rest. Corp. v. Superior Court*, 165 Cal.App.4th 25 (2008), an important recent decision that addressed employee meal period and rest break requirements under California law. As reported in our July 2008 *Employment Law Update*, the *Brinker* decision held that employers are only required to provide meal and rest breaks to their employees, not ensure that breaks are actually taken. *Brinker* further held that, in the absence of evidence of uniform policies and practices that violate California wage and hour laws, courts should not certify class action claims seeking meal and rest break premium pay or compensation for work performed "off the clock." With the California Supreme Court granting review of *Brinker*, the decision may no longer be cited as precedent and the validity of its holding is cast into doubt until the Court issues its final decision.

In response to the Court's grant of review, the California Division of Labor Standards Enforcement ("DLSE") withdrew a memorandum issued on July 25, 2008, in which it instructed its deputy labor commissioners to apply the decision in *Brinker* to pending matters. In its place, the DLSE issued a new memorandum on October 23, 2008. The memorandum relies on recent federal court cases, many of which were decided after the *Brinker* decision was issued, but before the California Supreme Court granted review. Although that memorandum provides that the DLSE will no longer rely on the *Brinker* decision, its guidance is consistent with the holding of *Brinker*. That is, employers need not guarantee that employees take meal and rest breaks, as long as they are providing meal and rest breaks consistent with law and not interfering with or discouraging employees from taking them.

On October 28, 2008, only six days after the Supreme Court's decision to review *Brinker*, a different California Court of Appeal (Second Appellate District) reached the same conclusions as the *Brinker* court regarding employers' obligation to provide meal and rest breaks. In *Brinkley v. Public Storage, Inc.*, a class of plaintiffs sued their employer alleging, among other things, that the company had failed to provide adequate meal and rest breaks. The Court of Appeal found that the employer was under no obligation to "ensure" that employees take meal or rest breaks. Instead, employers need only make sure that meal and rest breaks are "made available" to employees. Reviewing the evidence, the court agreed that although some employees may have missed meal and rest breaks at times, there was no evidence that any of the plaintiffs were actually denied an opportunity to take such breaks.

While the DLSE's October 23 memorandum and *Brinkley v. Public Storage, Inc.* give employers some basis for applying the "provide" rather than "ensure" standard, the future of California's meal

and rest break requirements ultimately rests with the California Supreme Court. Until the Court resolves the issues raised by *Brinker*, which could take up to a year or longer, employers should make sure that all employees are taking meal and rest breaks.

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