

April 26, 2012

## **Brinker: The Implications for Employers**

As we noted in a recent client [Alert](#), the California Supreme Court issued its long-awaited decision in *Brinker Restaurant Corp. v. Superior Court*, No. S166350 on April 12, 2012, resolving a split among California courts regarding an employer's obligations with respect to providing meal periods and rest breaks to California employees. This follow-up Alert briefly reviews the Court's holdings and addresses the impact of *Brinker* on meal period and rest break policies and practices.

### **Summary of the Court's Decision**

In *Brinker*, the California Supreme Court:

- Held that employers need not ensure that meal periods are taken -- they only must provide a meal period;
- Held that employers are not required to provide a meal period for every five consecutive hours worked;
- Explained what it means for employers to provide a rest break for every four hours worked or major fraction thereof;
- Held that employers are not required to provide a rest break before a meal period; and
- Explained the requirements for class certification and upheld the trial court's certification of the rest break subclass and remanded for reconsideration the certification of the meal period subclass.

### **Implications for Employers**

What does the case mean for employers moving forward? Most importantly, employers should review and update policies, procedures, and practices to make sure they comply with the *Brinker* decision. The *Brinker* decision underscores the benefit of having compliant policies, procedures, and practices, particularly as a defense to class action litigation. It's also important for employers to note that, even though *Brinker* is largely a "win" for employers, it should not be seen as a license for employers to be lax about meal period and rest break compliance.

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Recommended actions for employers in light of *Brinker* include:

- Update meal period policies to:
  - clearly state that employees are entitled to take a 30-minute off duty meal period when they will work more than five hours and a second 30-minute off duty meal period when they will work more than 10 hours, during which time they will be relieved of all duty;
  - specify that the meal period is to start no later than the end of the employee's fifth hour of work (and for the second meal period, no later than the end of the employee's tenth hour work). For example, an employee whose shift begins at 9:00 a.m. must be provided the opportunity to start their first meal period no later than 1:59 p.m.; and
  - explain that, as a matter of policy and practice, the employer will not discourage employees from taking their meal periods or otherwise prevent or interfere with employee meal periods.
- Update rest break policies to:
  - specify that employees are entitled to a 10-minute rest break for every four hours worked, *or major fraction thereof* (provided the employee's total work time is more than three and one-half hours) and that the rest break should be taken in the middle of the four-hour work period, *insofar as practicable*; and
  - specify the number and length of rest breaks, as set out by the Court in *Brinker*, *i.e.*, one 10-minute rest break for shifts between three and one-half to six hours in length, two 10-minute rest breaks for shifts of more than six hours up to 10 hours, three 10-minute rest breaks for shifts of more than 10 hours up to 14 hours, and so forth.
- Train managers and supervisors not to prevent, discourage, or otherwise interfere with employee meal periods and rest breaks. Likewise, managers and supervisors should not encourage their employees to skip their meal periods or rest breaks. Such actions (particularly if widespread) could be used by plaintiffs to support class certification of meal period and rest break violations.
- Adopt a clear policy that prohibits off-the-clock work.
- Be certain to comply with applicable record-keeping requirements. (As a reminder, employees should be clocking in and out for their meal periods, but employers need not keep time records of rest breaks.)

In addition, employers should:

- Carefully consider keeping documentation and records for those employees who are provided meal periods and rest breaks but who, nonetheless, voluntarily choose to work through them, take a shorter meal or break, or take a meal period later in the day (for example, a meal period beyond the end of the fifth hour of work). Indeed, the concurring opinion in *Brinker* emphasized that where records show that no meal period was taken, a presumption will arise that the employer did not provide the meal period, and it will be the employer's burden in the event of a complaint to establish that an employee voluntarily worked through the meal period and was not required to do so.
- Remember that employees are entitled to take rest breaks in 10-minute increments. Accordingly, as a matter of policy, employers should not encourage employees to combine their rest breaks or to combine rest breaks with their meal period.
- Consider adopting policies for disciplining employees who violate the policies and procedures pertaining to meal periods and rest breaks, including those employees who try to manipulate or otherwise abuse the system to try to generate liability.
- Adopt procedures to allow an employee to report when they have not been provided their meal period or otherwise were not given a reasonable opportunity to take it.
- Adopt procedures to pay out the premium pay, as required by Labor Code section 226.7, where an employee misses a meal period or rest break due to work demands. The *Brinker* decision explained that the premium is not due if the employee chooses to skip a meal period or rest break. Likewise, the premium would not be due if the employee chooses to take a late meal period or to take a meal period or rest break that is shorter than what they are entitled to. However, some employers may decide to more strictly enforce meal periods and rest breaks and pay out the premium pay whenever a meal period is missed, to avoid disputes over why a meal period or rest break was not taken.
- Remember that the premium pay required is one hour at the employee's regular rate for *each type of violation, i.e.*, one hour for a rest break violation and one hour for a meal period violation regardless of the number of rest breaks or meal periods missed in one day. For example, an employee who is forced to work through one meal period and one rest break would be entitled to two hours of premium pay.

An employee who was forced to work through two meal periods and two rest breaks in one day would also be entitled to two hours of premium pay. (Again, the Labor Code provides for one hour of premium pay for each kind of violation.)

### **Reminder Regarding Waivers and On-Duty Meal Periods**

Employers should also keep in mind that *Brinker* did not change anything with respect to meal period waivers or the circumstances in which you can have a lawful on-duty meal period. As a reminder:

- A *meal period waiver* is permissible only in certain situations. When a meal period waiver is in place, the employee and the employer have agreed that the employer need not provide a meal period. Meal period waivers are permitted in two situations: (1) where the employee works more than 5 hours but less than 6 hours; and (2) where the employee works more than 10 hours but less than 12 hours and the first meal period was not waived. For employers that choose to implement a meal period waiver policy, we suggest consulting outside counsel as there are particular requirements to ensure compliance with the Labor Code.
- An *on-duty meal period* is the exception to the general rule that the employee must be relieved of all duty during the meal period. Under *very narrow circumstances*, California law authorizes an employer and employee to enter into an on-duty meal period agreement, which allows the employee to be “on-duty” during a meal period without subjecting the employer to premium pay obligations under the Labor Code. Of course, employers must still be sure to pay the employee for the time worked as straight time (and any overtime that may occur as a result of the employee working through his or her meal period). Again, this is a very limited exception and we strongly suggest consulting outside counsel before using on-duty meal period agreements.

For more details about the *Brinker* case, see our prior [Alert](#) (“*Brinker* Has Arrived: The California Supreme Court Issues Its Long-awaited Decision on Meal Periods and Rest Breaks,” April 12, 2012). Also, the recordings of our recent two-part webinar on the *Brinker* decision are now available online. To access the recorded webinars (held on April 19 and April 25), [click here](#).



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