



Summer 2008

## Meal and Rest Breaks – the *Brinker* Decision

In *Brinker Rest. Corp. v. Superior Court of San Diego County*, 2008 WL 2806613 (7/22/08) the California Court of Appeal made several significant determinations favorable to employers regarding the legal requirements for meal and rest periods. While the Labor Commissioner has issued a memorandum to DLSE employees to follow these directives, the case is likely to be reviewed by the Supreme Court, so keep in mind that the following conclusions could be reversed or otherwise modified.

### Rest Breaks

- Employers must only authorize and permit the rest break. There is no duty to ensure that the break is taken, but just to make the rest break available. Employees may waive their rest breaks, but the employer may not impede, dissuade or discourage employees from taking their breaks.
- The 10-minute rest break need not be in the middle of the work period if it is not practicable to do so. In those instances a rest break may also be provided even before the meal break.
- Employers must provide a rest break for every four hours worked “or major fraction thereof.” The court concluded that “a major fraction thereof” is between 3 ½ and 4 hours. Therefore, a 10- minute rest break must be given if an employee works between 3 ½ and 4 hours, but if 4 hours are worked, it need be given only every 4 hours, not 3 ½. In other words, if the workday is between 3 ½ and 7 ½ hours, only one (1) rest period would be required. Two rest periods would be required for a work day of more than 7 ½ hours up to 11 ½ hours.

### Meal Periods

- As with rest breaks, employers cannot impede, discourage or dissuade employees from taking meal periods, but need only make meal breaks “available”, not “ensure” they are taken.
- Relying on the language in the Labor Code with regard to meal periods, the court concluded that an employer is required to provide a meal period for every five (5) hours worked in a *day*, (unless waived for a six-hour day) but are not required to provide a meal break for every five consecutive hours worked. Thus, *Brinker* could provide employees with an “early lunch” even though the employee might then work more than five hours after lunch to complete the work day. This implies that the timing of the meal break is discretionary.

### Off the Clock

- Employers cannot coerce, require or compel employees to work off the clock, but they can only be held liable for off-the-clock work of employees if the employer knew or should have known that the employee was working off the clock.

### Class Actions

- Since there was no company-wide policy of not permitting rest breaks, meal periods, or off-the-clock unpaid work, the claims in this case needed to be determined on a case-by-case basis and therefore were not amenable to a class action. The court held that individualized inquiries would be necessary as to *why* each employee did not take the required rest and/or meal breaks or why he/she worked off the clock.

### Recommendations

- Because this case could be appealed to the California Supreme Court where the rulings could be subject to change, it is recommended that, for now, employers do not make significant changes with regard to providing, scheduling, recording and documenting its efforts on giving employees appropriate meal and rest periods. This case, however, will hopefully greatly reduce the number of lawsuits filed, particularly in cases in which the employee has voluntarily elected not to take meal or rest periods. It also significantly increases the possibility that the employer can prevail in a lawsuit over the number and timing of breaks.
- If you would like to consider making changes with regard to meal periods, rest breaks, and/or work performed outside the regular work day; or would like to have your current practices regarding these issues reviewed, legal counsel should be consulted.

For assistance in meeting your legal obligations with regard to meal periods and rest breaks, contact Jeanne Flaherty or Lynn Ryder at Employer's Legal Advisor, Inc.



*Jeanne Flaherty is the President and Managing Attorney of Employer's Legal Advisor, Inc., which represents and advises employers on all employment matters. The firm specializes in conducting employment practices compliance reviews and advising employers on day-to-day legal issues in the workplace.*