April 13, 2012

On April 12, 2012, the California Supreme Court issued a landmark decision, *Brinker Restaurant Corp. v. Superior Court* (2012), holding that an employer's duty with respect to providing employee meal periods is only to relieve employees of all duty, relinquish control over their activities, and permit them a reasonable opportunity to take an uninterrupted, thirty-minute meal period without impeding or discouraging them from doing so. **An employer is not, however, obligated to police meal periods or ensure that no work is performed**. The Supreme Court further held that, absent a valid waiver, the California Labor Code requires a first meal period to be provided no later than the end of an employee's fifth hour of work, and a second meal period to be provided no later than the end of the employee's tenth hour of work. The law does not require, as the plaintiff had argued, that a second meal period must always be provided within five hours of the first.

The Supreme Court also addressed the timing of rest periods under Industrial Welfare Commission ("IWC") Wage Order No. 5-2001, which applies to employees in the public housekeeping industry, including restaurants, hotels and similar businesses. The Wage Order, like many Wage Orders governing hourly employees working in other industries, requires an employer to provide employees with a ten minute paid rest period for every four hours worked "or major fraction thereof," except where an employee's total work time will not exceed three and one-half hours. The Supreme Court agreed with the California Department of Labor Standards Enforcement ("DLSE") interpretation that a "major fraction" of four hours means any amount greater than one-half, i.e. any period over two hours. Thus, an employee whose shift will exceed six hours is entitled to a second ten minute paid rest period, an employee whose shift will exceed ten hours is entitled to a third ten minute paid rest period, and so forth.

This long awaited decision affirms in part and reverses in part the 2008 decision of the California Court of Appeal.

Class action considerations

Brinker involved various wage and hour claims filed as a class action against Brinker Restaurant Corporation, which operates 137 restaurants in California, including Chili's Bar & Grill, Romano's Macaroni Grill, and Maggiano's Little Italy. Over 59,000 employees were in the class certified by the trial court, consisting of three sub-classes for claims relating to: (1) rest periods; (2) meal periods; and (3) work "off-the-clock." The Court of Appeal had reversed the trial court's certification order on the ground that the trial court failed to properly consider the elements of each legal claim in determining whether they qualified for class action treatment.

The Supreme Court disagreed in part with the Court of Appeal and provided further clarification on the standard for class certification under California law. A trial court must examine the plaintiff's theory of class recovery, assess the nature of legal and factual issues likely to arise, and determine whether individual or common issues will predominate. The Supreme Court also stressed that, "[t]o the extent the propriety of class certification depends upon disputed threshold legal or factual questions, a court may, and indeed must, resolve them. Out of respect for the problems arising from one-way intervention, however, a court generally should eschew resolution of such issues unless necessary." The impetus of the Court's language may create a hurdle for employers when opposing class certification of claims based on uniform employee policies and practices.

With respect to specific subclasses at issue in *Brinker,* the Supreme Court affirmed the denial of class certification for the "off-the-clock" subclass, holding that the plaintiff failed to identify a common policy by Brinker permitting such work off-the-clock, or a common method of proof to establish such violations. Because employers can only be held liable for work off-the-clock if they knew or should have known it occurred, individualized issues predominated and precluded class treatment. Whether an individual employee actually worked off-the-clock, and whether the employer knew or should have known that the employee was working off-

the-clock, are by nature individualized inquiries that are not suitable for resolution on a class-wide basis in the absence of evidence of a uniform policy or practice.

The *Brinker* court remanded for reconsideration the question of class certification for the meal period subclass in light of its holding that employers need only provide a second meal period no later than the employee's tenth hour of work. As defined, the plaintiff's meal period subclass included employees who were provided meal periods before their tenth hour of work, but more than five hours after their first. Because the Court held that such a practice is consistent with the requirements of the Labor Code and Wage Order 5-2001, the subclass necessarily included individuals with no possible claim.

Most significantly, the *Brinker* court disagreed with the Court of Appeal that the rest period subclass could not be certified. Brinker had a uniform written policy stating that employees working over three and one-half hours during a shift were "eligible for one ten minute rest break for each four hours worked." Under the Supreme Court's interpretation that a "major fraction" of four hours is any period exceeding two hours, class-wide liability could be established if, for example, the plaintiff demonstrated that under Brinker's uniform policy it refused to authorize and permit a second ten minute rest period for employees working for more than six but less than eight hours.

The bottom line—updated policies and compliance review

Overall, *Brinker* is an important victory for employers regarding the timing and nature of meal period obligations. On the other hand, the Supreme Court's adoption of the DLSE's interpretation regarding the timing of rest periods means that California employers should carefully review their current rest period policies and practices.

As a practical matter, California employers should confirm that their meal and rest period policies are clear, complete, and up to date. Employers must remain diligent in monitoring compliance with their policies under California law and keep accurate records regarding meal period policy compliance. Such efforts can help minimize the risks of meal and rest period class action litigation. **Although Brinker makes clear that employers are not required to "ensure" that meal periods are taken, it does not relieve an employer from its affirmative obligations to make available and permit meal periods and to keep records of meal periods taken as required by law.** Further, *Brinker* provides important clarity as to the timing of second (and third) meal and rest periods that must be provided to employees.

Our team has a great deal of experience on the forefront of these counseling and class action litigation issues. If you would like to discuss these issues further or have questions about this *Alert,* please contact one of the attorneys listed above.

Key Contacts

Michelle Doolin San Diego	mdoolin@cooley.com +1 858 550 6043