



# Employment Law Alert

## Legal developments affecting human resource management

A publication of Nixon Peabody LLP

August 11, 2008

### A major break for California employers: Court rules on long-standing meal and rest period issues

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At long last, in a published decision, California's courts have directly answered several long-standing questions concerning California's meal and rest period requirements. The result in *Brinker Restaurant Corp. v. Superior Court*, issued by a panel of the California Court of Appeal in San Diego, is a major victory for employers. Among the important issues addressed, the court determined what an employer must do to meet its obligation of "providing" a meal period. It held that a meal period must only be **made available**, rejecting an argument that an employer has a further affirmative obligation to ensure that the meal period actually is taken by employees. The court also answered questions on the frequency of meal periods, waiver of meal periods, and the timing of rest periods—all in favor of employers. Finally, the court held that the trial court erroneously certified this meal and rest period case as a class action, in an analysis that may make class certification in other meal and rest period cases more difficult.

#### California's Meal Period Requirements

Under Labor Code section 512(a) "[a]n employer may not employ an employee for a work period of more than five hours *per day* without *providing* the employee with a meal period of not less than 30 minutes. . . ." (Italics added.) The statute further requires a second meal period in some cases: "An employer may not employ an employee for a work period of more than 10 hours *per day* without *providing* the employee with a second meal period of not less than 30 minutes, except that if the *total hours* worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived." (Italics added.)

## **The Requirements For “Providing” A Meal Period**

The issue of what an employer must do to satisfy its obligation of “providing” a meal period has vexed employers for several years. Employee advocates have argued that there is an obligation not only to make a meal period available, but also an affirmative obligation to ensure that the employee actually takes the meal period. The California Labor Commissioner unfortunately adopted that rationale.

However, the *Brinker Restaurant* court has now rejected this position. It interpreted “provide” to mean “to supply or *make available*.” (Italics added.) “Thus, from the plain language of section 512(a), meal periods need only be made available, not ensured, as plaintiffs claim.” The court held that an employer meets its obligations by making a meal period available in accordance with California’s requirements, without forcing employers actively to ensure that employees are taking these breaks. To prevail, an employee must show that he or she was forced to forego meal periods, rather than simply showing that they were not taken, regardless of the reason.

### **A Meal Period For Each Five-Hour Period**

*Brinker Restaurant* addressed how frequently an employer must provide a meal period. As noted, Labor Code section 512(a) precludes an employer from having an employee work “a work period of more than five hours *per day*” without a meal period, as well as for “a work period of more than 10 hours *per day*” without a second meal period unless that second meal period can be, and is, waived.

This language has led to frustration and confusion. The plaintiffs argued that it requires a meal period for every five consecutive hours worked, meaning that no more than five hours can elapse after the completion of a meal period before the next meal period would be required. Thus, they contended that the alleged “early lunching” policy in *Brinker Restaurant* violated the statute. Under this policy, employees would take a meal period after, for example, working for one hour and then work a full shift, resulting in employees working more than five hours after the end of their meal periods. The plaintiffs argued that a second meal period was due no later than five hours after the employees returned to work from the first meal period.

Looking at the plain language of the statute, the court rejected this interpretation. The court emphasized that the statute refers to a work period “*per day*,” not simply to any work period of five hours. Thus, a meal period only must be provided by the fifth hour, with a second meal period by the tenth hour, if not waived. Furthermore, the court also rejected the argument that a meal period must be scheduled in the middle of a shift. While rest periods must be scheduled in the middle of a work period to the extent practicable, the court made clear that “No such restriction on the timing of meal periods is contained in the wage order concerning meal periods.”

### **Written Waiver Of Meal Periods Not Required**

Labor Code section 512(a) allows waiver of meal periods in two instances: (1) when the employee’s total work for the day is “no more than six hours,” or (2) when the employee’s total hours worked for the day is “no more than 12 hours” and “the first meal period was not waived.” These waivers must be by “mutual consent” of the employer and the employee. The court rejected plaintiff’s argument that they must be in writing, because the statute does not require it: “Had the Legislature intended such a requirement, they could have, and would have, placed such a requirement in the statute.”

## **Rest Period Requirements Clarified**

Further, the court clarified California's rest period requirements. The Industrial Welfare Commission wage orders generally require rest periods of 10 minutes "per four (4) hours or major fraction thereof," based on the "total hours worked daily." However, "a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours." An employer need only "authorize and permit" rest periods, not ensure that employees actually take them.

The court rejected the argument that a rest period must be given every three and one-half hours. Rather, the wage order requires a rest period for every four hours of work. As the court held, "It is only when an employee is scheduled for a shift that is more than three and one-half hours, but less than four hours, that he or she is entitled to a rest break before the four hour mark." The court also interpreted the meaning of "major fraction thereof" in the wage order. Previously, the Labor Commissioner had interpreted the term to mean any amount of time beyond the midpoint of a four-hour time period, or more than two hours. The court rejected this interpretation, holding that the term "can only be interpreted as meaning the time period between three and one-half hours and four hours." Thus, rest periods must be given if an employee works between three and one-half hours and four hours. If an employee works more than four hours, a rest period needs to be given only every four hours.

## **Class Certification Rejected**

In *Brinker Restaurant*, the employer challenged by writ petition the trial court's decision to certify a class action. The Court of Appeal granted the writ because it determined the trial court relied on erroneous interpretations of the meal and rest period requirements. There was no showing of a common policy prohibiting meal periods. The evidence showed some employees took meal breaks, while others did not, but the reasons why not required individualized determinations. The appellate court held that individual issues predominated on the meal period claims and would have to be decided on a case-by-case basis "whether a missed or shortened meal period was the result of an employee's personal choice, a manager's coercion, or, as plaintiffs argue, because the restaurants were so inadequately staffed that employees could not actually take permitted meal breaks." Importantly, the court rejected the use of time card evidence for a class determination: "While time cards might show when meal breaks were taken and when there were not, they cannot show *why*."

## **Responses To Decision And Possible Further Developments**

*Brinker Restaurant* was the first published California appellate decision to confront most of these issues directly. On the issue of whether an employer must make a meal period available or ensure that it is taken, the decision may be in conflict with the 2005 decision from a different appellate court in *Cicairos v. Summit Logistics, Inc.* The court in *Brinker Restaurant*, like some federal courts to consider the same question, distinguished *Cicairos* as a situation in which the employer failed to provide meal periods. An appeal by plaintiffs to the California Supreme Court is expected. While the analysis in *Brinker Restaurant* appears correct, the California Supreme Court may grant review in the case because of the importance and recurring nature of the issues. A grant of review by the California Supreme Court would depublish the *Brinker Restaurant* decision, so the opinion could not be cited in the meantime. In addition, it would be prudent to expect efforts to overturn *Brinker Restaurant* through legislation.

Immediately after the decision, the Labor Commissioner updated that agency's *Enforcement Policies and Interpretations Manual* to reflect the holdings in *Brinker Restaurant*. The Labor Commissioner also instructed the agency's staff to follow the decision in enforcement and pending cases. Governor Arnold Schwarzenegger issued a statement praising the decision. He stated: "Today's decision promotes the public interest by providing employers, employees, the courts and the labor commissioner the clarity and precedent needed to apply meal and rest period requirements consistently."

For more information on this issue or any other labor or employment law matter, please contact your regular Nixon Peabody attorney or:

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