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Management Alert

Court "Provides" Better Meal Deal For California Employers

The California Court of Appeal Holds that "Provide" Means "Make Available"

On July 22, 2008, the California Court of Appeal decided *Brinker Restaurant Corp. v. Superior Court*. The court reversed a class certification decision and ruled that California employers need not ensure that meal and rest breaks are taken; rather, employers need only make those breaks available. More generally, the court's decision helps employers by holding that trial courts must, before certifying a class, determine the elements of a cause of action. Here, because an employer need only "make available" meal and rest breaks, individual issues necessarily predominate as to why particular breaks were not taken, making class certification inappropriate. The court also reversed certification of off-the-clock claims, because there was no evidence that the employer knew or should have known that employees were working off the clock.

The Claims

The plaintiffs worked in Brinker's restaurants throughout California, including Chili's Grill & Bar, Romano's Macaroni Grill, and Maggiano's Little Italy. Claiming to represent a class of current and former Brinker employees, the plaintiffs alleged that Brinker violated section 226.7 of the Labor Code and Industrial Welfare Commission (IWC) Wage Order No. 5 by failing to provide rest periods for every four hours of work and by having employees take their meal periods at the beginning of their shifts. Plaintiffs also alleged that Brinker violated the law by failing to provide a meal period for each five-hour period of continuous work. Finally, plaintiffs claimed that Brinker forced employees to work off the clock during meal periods and that Brinker modified time records to under-report the amount of time worked.

Brinker had written meal and rest-break policies that included acknowledgements by employees that they were "entitled to a 30-minute meal period when [they] work a shift that is over five hours," and that if employees "work over 3.5 hours during [their] shift, [they] understand that [they are] eligible for one ten-minute rest break for each four hours that [they] work." The policy also provided that an employee's failure to follow these policies "may result in disciplinary action up to and including termination."

Brinker also maintained a written policy regarding timekeeping, which stated that the employee must "clock in and clock out for every shift [the employee] work[s]. . . . Working 'off the clock' for any reason is considered a violation of Company policy." Additionally, employees were required to immediately notify a manager if they believed that their time records were inaccurate.

Decisions By The Lower Courts

In July 2005, before certifying a class, the trial court issued an "advisory opinion" that employers must provide employees with break periods "toward the middle of an employee's work period." The advisory opinion also stated that under Labor Code section 512, meal periods "must be given before [an] employee's work period exceeds five hours." In November 2005, Brinker appealed the advisory opinion. The Court of Appeal denied Brinker's appeal on January 20, 2006, concluding that an "advisory opinion" was not subject to the court's review.

In July 2006, the trial court granted the plaintiffs' motion for class certification. The trial court found that "common issues predominate over individual issues," and that "common questions regarding the meal and rest period breaks are sufficiently pervasive to permit adjudication in this one class action." Additionally, the trial court found that the issue of whether Brinker needed to make breaks available as opposed to ensuring that they were taken "points to a common legal issue of what [Brinker] must do to comply with the Labor Code."

Brinker sought interlocutory review of the certification decision, which was granted. In October 2007, the Court of Appeal issued an initial opinion, which the California Supreme Court transferred back to the Court of Appeal for reconsideration.

The Court Of Appeal's Decision

The court's review focused on one question: did the trial court err in certifying the class without first determining the elements of the plaintiffs' claims? The court concluded that the trial court erred and directed the trial court to enter a ruling denying class certification. The court ruled that in the absence of a threshold determination regarding the elements of the cause of action, the trial court could not properly assess whether individual or common issues predominate. The court then examined the elements of the meal-break, rest-break, and off-the-clock claims.

Analysis Of The Rest Break Claims

Section 226.7 of the Labor Code states: "No employer shall require any employee to work during any meal or rest period mandated by an applicable order of the [IWC]." The applicable section of IWC Wage Order No. 5 states:

> Every employer shall *authorize and permit* all employees to take rest periods, which insofar as *practicable* shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. 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. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages. [Emphasis added.]

The court noted that this language is intended to give employers the flexibility to avoid granting rest periods in the middle of a work period if, given the nature of the work, doing so would not be practicable. That flexibility was found to be particularly important in the restaurant industry because "the middle of a work period is often during a mealtime rush, when an employee might not want to take a rest break in order to maximize tips." The court concluded that whether it is practicable to permit a rest break during the middle of a four-hour work period cannot be determined on a class basis. Moreover, because employees are free to waive their rest breaks, and the employer need not ensure that those breaks are taken, individualized proof will be required to show whether a violation occurred, making class treatment inappropriate.

The court also rejected the plaintiffs' assertion that California law requires a ten-minute rest break for every three and one-half hours of work. The court ruled that "employees need be afforded only one 10-minute rest break every four hours 'or major fraction thereof.'" The court interpreted "major fraction thereof" as requiring a rest break for work periods of "between three and one-half hours and four hours." This interpretation rejects the prior DLSE interpretation that a "major fraction" was anything over two hours of work. Based on the court's ruling, an employee who works a shift greater than seven hours is entitled to only one rest period. It is not clear from the court's ruling whether an employee who works a shift greater than seven and one-half hours, but less than eight hours, is entitled to two rest periods.

Analysis Of The Meal-Break Claims

The plaintiffs claimed that employers have an affirmative duty under Wage Order No. 5 to "ensure" that hourly employees "receive" or "take" meal periods during which they are relieved of all duty. They also claimed that employers may not compel employees to take this break soon after the beginning of their shift, and that employees are entitled to a 30-minute meal break following each consecutive five-hour period of work ("the rolling meal period").

Section 512(a) of the Labor Code states:

> An 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, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. 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. [Emphasis added.]

The trial court's advisory opinion stated that Brinker "appears to be in violation of [section] 512 by not providing a 'meal period' per every five hours of work." The court concluded that this opinion was a misreading of the law, and therefore the trial court's certification decision was based on improper criteria. Specifically, the court concluded that the argument for a rolling meal period makes no sense in the face of the portions of section 512(a) providing for a meal period after a specified period of work "per day," and that "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."

As to the argument that Brinker illegally required that the meal break be taken near the beginning of the work shift, the court noted that unlike the Wage Order language concerning the timing of rest breaks, there is no similar provision relating to meal breaks. Therefore, the court concluded that the trial court's certification decision was based on both improper criteria regarding the elements of the rolling five-hour meal period claim, and an incorrect assumption regarding the requisite timing of meal breaks under Labor Code section 512(a). Accordingly, the trial court failed to correctly ascertain the legal elements that the putative class members must prove to establish their meal-break claims.

The Meaning Of "Provide"

The plaintiffs argued that Brinker violated Labor Code sections 226.7 and 512, as well as Wage Order No. 5, by

failing to ensure that meal breaks are taken. Citing two federal cases—*White v. Starbucks Corp.*, 497 F. Supp. 2d 1080 (N.D. Cal. 2007) and *Brown v. Federal Express Corp.*, 2008 WL 906517 (C.D. Cal. 2008)—and a dictionary definition of the word "provide," the court concluded that "provide" means that an employer need only "make available" a meal break to comply with the law.

The court distinguished the two cases on which plaintiffs relied—*Cicairos v. Summit Logistics, Inc.*, 133 Cal. App. 4th 949 (2005) and *Perez v. Safety-Kleen Systems*, 2007 WL 1848037 (N.D. Cal. 2007). *Cicairos* concluded that the employer had failed to "provide" required meal periods because the employer had made it difficult for employees to take meal breaks, and *Safety-Kleen* held that "an employer must do something affirmative to provide a meal period." The court distinguished *Cicairos* on its facts because the employer there had policies that effectively denied the plaintiffs their meal breaks, and distinguished *Safety-Kleen* because the employer had no meal-break policy and required employees to be on call at all times.

Finally, the court concluded that "public policy does not support the notion that meal breaks must be ensured." Reading the law to require "ensuring" that employees take meal breaks would necessitate that employers police their employees, and "[w]ith thousands of employees working multiple shifts, this would be an impossible task."

Analysis Of The Off-The-Clock Claims

The court also concluded that the off-the-clock claims were not appropriate for class treatment. Resolving those claims would require an inquiry into 1) whether a given employee actually performed off-the-clock work, 2) whether the work was performed at the employee's choice, and 3) whether the employer knew about the work. Individualized questions also predominated as to the claim that Brinker improperly modified employee time cards.

Specifically, the court noted that it would be necessary to determine why a time card was modified, and whether the justification for the modification was proper.

For these reasons, the court concluded that individual issues predominated with regard to the off-the-clock claims, and therefore a class should not have been certified.

What *Brinker* Means For You

This decision is a procedural boon to employers defending class actions asserting meal, rest, and off-the-clock claims, establishing these key points:

(1) Trial courts must determine the essential elements of plaintiffs' claims before deciding class-certification issues. Too often judges have skipped over this critical preliminary analysis. Now, with judges forced to spend more time thinking about this threshold inquiry, they may be less likely to certify.

(2) Because an employer need only "provide" (i.e., "make available") meal and rest breaks, class certification should require affirmative evidence that the employer generally prevented employees from taking meal and rest breaks. In this respect, the court rejected the plaintiffs' proposal to use statistics to show that employees frequently skipped meal and rest breaks, because—with "provide" meaning only "make available"—that method of collective proof would fail to show "why" breaks were not taken. This ruling will complicate plaintiffs' use of survey evidence in their efforts to seek certification of meal and rest claims.

(3) An employer must authorize and permit a rest period for employee shifts greater than three and one-half hours. The rest break does not need to be provided in the middle of a shift, or before the first meal period, if doing so would be impracticable.

(4) Claims for working off the clock will not be certified unless the employer's managers knew or had reason to know of employees working off the clock.

A few notes of caution: the court limited its decision on the rest break claims to the facts presented to the trial court, suggesting different facts (such as additional evidence of a lack of company policies allowing for meal and rest breaks or requiring proper timekeeping) could lead to a different result in a subsequent case. And the decision likely could be reviewed by the California Supreme Court, whose review would make the decision not citable as precedent while the appeal is pending.

For more information, please contact the Seyfarth Shaw attorney with whom you work or any Labor and Employment attorney on our website (www.seyfarth.com/LaborEmployment).

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