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One Minute Memo®

California Supreme Court Grants Review of *Brinker*

As we advised you in a previous Management Alert, *Court Provides Better Meal Deal For California Employers*, the California Court of Appeal recently 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 helped employers by holding that trial courts must, before certifying a class, determine the elements of a cause of action. The court also reversed certification of the plaintiffs' off-the-clock claim, because there was no evidence that the employer knew or should have known that employees were working off the clock.

On October 22, 2008, the California Supreme Court granted the plaintiffs' petition for review. As a result, the *Brinker* decision no longer is citable as authority. However, three published federal court decisions that are consistent with *Brinker*'s meal period analysis remain good law. (*White v. Starbucks Corp.*, 497 F.Supp.2d 1080 (N.D. Cal. 2007); *Brown v. Fed. Express Corp.*, 249 F.R.D. 580 (C.D. Cal. 2008); *Salazar v. Avis Budget Group, Inc.*, 251 F.R.D. 529 (S.D. Cal. 2008)).

After the *Brinker* appellate court decision was published, the California Labor Commissioner issued a memorandum instructing staff to follow *Brinker*. Because *Brinker* was accepted for review, that memorandum was withdrawn on October 23, 2008 (*DLSE Memo–Court Rulings on Meal Periods*). In withdrawing the memorandum, however, the Labor Commissioner instructed staff to rely on California appellate courts, as well as persuasive federal court decisions such as *White*, *Brown*, and *Salazar*. From these cases, the Labor Commissioner finds compelling support for the position that "employers must provide meal periods to employees but do not have an additional obligation to ensure that such meal periods are actually taken." Therefore, it appears that the Labor Commissioner will continue to analyze meal period cases in accordance with *Brinker*'s interpretation of what it means to "provide" a meal period.

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