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Management Alert

California Court Of Appeal Twice Confirms Difficulty In Certifying Meal And Rest Break Claims Post-*Brinker*

In April, the California Supreme Court issued its decision in *Brinker Restaurant Corp. v. Superior Court of San Diego*, which clarified standards for certifying a class in a claim alleging an employer's failure to provide meal and rest breaks. Notwithstanding this guidance, some members of the plaintiffs' bar have persisted in seeking class certification of these claims.

The Court of Appeal has now published its first decisions discussing *Brinker* - *Hernandez v. Chipotle Mexican Grill, Inc.* (August 29, 2012) and *Lamps Plus Overtime Cases* (September 5, 2012). In each case the Court of Appeal applied *Brinker* to uphold a decision denying class certification. *Hernandez* and *Lamps Plus* originally were not officially published, and thus could not be cited as precedential authority in other cases. Seyfarth Labor & Employment lawyers filed amicus letters requesting the Court of Appeal to certify both cases for publication.

The *Hernandez* Decision

The employees in *Hernandez* contended that *Brinker* approvingly cited *Cicairos v. Summit Logistics, Inc.*, which concluded that employers have "an affirmative obligation to ensure that workers are actually relieved of all duty." The Court of Appeal rejected this contention, noting first that the *Cicairos* decision had relied on an opinion letter by the Department of Labor Standards Enforcement, which the DLSE has now withdrawn. The court also stated that *Brinker* "conclusively resolved" that employers need only "provide" meal breaks (rather than "ensure" they are taken).

The *Hernandez* plaintiffs also contended that *Brinker's* citation to *Jaimez v. Daiohs USA, Inc.*, suggests that the trial court should not have addressed the legal issue of "provide" versus "ensure" at the class certification stage. In *Jaimez*, the trial court found it unnecessary to decide whether employers need only "provide" meal breaks because predominant common factual issues "made it impossible" for employees to take breaks. The Court of Appeal in *Hernandez* rejected the plaintiffs' argument, confirming that *Brinker* established that "[t]o the extent the propriety of certification depends upon disputed threshold legal or factual questions, a court may, and indeed must, resolve them."

Applying *Brinker's* standards to the employee declarations submitted to the trial court, the Court of Appeal in *Hernandez* explained that the employees' varying experiences suggested the need for individualized analyses, "perhaps supervisor-by-supervisor," to determine whether the employer violated the requirement to provide breaks. The Court of Appeal also rejected the plaintiffs' contention that a 92% incidence of employees missing at least one break demonstrated a "pattern or practice of missed breaks," which is what *Brinker* requires. Finally, the Court of Appeal affirmed the trial court's reliance on something *Brinker* did not address - a conflict of interest within the proposed class. The trial court permissibly had concluded that a conflict arose because some putative class members held supervisory roles with responsibility for providing meal and rest breaks to other class members.

The *Lamps Plus* Decision

The *Lamps Plus* plaintiffs asserted that the trial court had erred in denying class certification, as none of their asserted claims required individualized inquiries. The Court of Appeal in *Lamps Plus* disagreed: "any debate about an employer's obligation regarding meal breaks has been squarely resolved by *Brinker,*" and *Brinker* foreclosed the plaintiffs' arguments by establishing that employers need only "provide" meal breaks.

The *Lamps Plus* decision (written by the same justice who wrote the *Hernandez* opinion) also rejected the plaintiffs' reliance on the *Brinker* court's citation to the *Cicairos* and *Jaimez* decisions. The Court of Appeal explained that in *Cicairos* "the work environment effectively deprived [employees] of an opportunity to take breaks." So, while an employer may not pressure employees to skip breaks, that obligation is not tantamount to an obligation to ensure that employees actually take their breaks. Distinguishing *Jaimez*, the Court of Appeal explained that the employer's practices in *Jaimez* - such as deducting 30 minutes of pay per shift regardless of whether a meal break was taken - presented common and predominant issues that did not exist here.

In applying *Brinker* to the evidence before it, the Court of Appeal in *Lamps Plus* affirmed the trial court's denial of certification on the basis that the employer "did not have a universal practice of denying employees their breaks." Dismissing the employees' contention that "chronic understaffing" led to classwide violations (as they allegedly did in *Jaimez*), the *Lamps Plus* court stated the evidence showed only that employees had difficulty taking breaks during certain busy periods.

The *Lamps Plus* court also rejected the plaintiffs' reliance on time records, explaining that this evidence did not show a "universal practice," absent explanations of why breaks were not taken. As a result, it was unnecessary to address evidence that 91.9% of a sample of employees experienced meal break violations. Similarly, the court rejected expert evidence that failed to address why breaks were not taken in specific instances.

The *Lamps Plus* court also affirmed the trial court's denial of class certification for off-the-clock claims even though one-half of the employees reported working off the clock. Although not citing *Brinker*, the *Lamps Plus* court confirmed that, because the employer had a policy requiring employees to record their hours worked, "[d]etermining whether [an employer's] managers knew or should have known about off-the-clock work will be a fact-intensive inquiry, necessarily involving investigation of the individual circumstances of each employee's off-the-clock work."

The *Lamps Plus* court also affirmed the denial of class certification for waiting-time penalty claims. Acknowledging that the employer had failed to document the date of payment for final wages, the court explained (1) that an employer does not have an obligation to record those dates, and (2) that *Brinker*'s concurrence (suggesting an employer's failure to keep time records creates a rebuttable presumption that violations existed) is *not* the law.

Finally, in affirming the denial of class certification for itemized wage-statement claims, the *Lamps Plus* court noted that such claims require demonstrable "injury" (leading to individualized inquiries), and the derivative nature of the claim meant that it failed along with the other claims as to the certification issue.

Though affirming that the trial court's denial of class certification for all claims was proper, the *Lamps Plus* court also upheld the trial court's conclusion that the class representatives were inadequate. The court noted its concerns regarding their credibility, as the evidence indicated the class representatives demonstrated unreliable memories, a "lack of candor," and a lack of "sincerity in trying to honestly answer questions."

What *Hernandez* And *Lamps Plus* Mean For Employers

Although *Brinker* did the heavy lifting, *Hernandez* and *Lamps Plus* confirm that Brinker "conclusively resolved" that an employer's obligation is only to "provide" breaks and not "ensure" they are taken. While this point was established by *Brinker*, the publication of *Hernandez* and *Lamps Plus* now provides controlling authority for how *Brinker* is to be applied to

other types of meal and rest break policies and its impact on class certification of such claims. Moreover, *Hernandez* and *Lamps Plus* highlight the importance of factors showing how even an otherwise certifiable class can be rejected because of the inadequacy of the proposed class representatives.

However, as *Hernandez* and *Lamps Plus* acknowledge, *Brinker* did rely on *Cicairos* for the proposition that "an employer may not undermine a formal policy of providing meal breaks by pressuring employers to perform their duties in ways that omit breaks." As a result, meal and rest break claims are not "categorically uncertifiable." Thus, *Hernandez* and *Lamps Plus* should remind employers with lawful meal and rest break policies that class meal and rest break claims may still be certified if some other "company-wide policy and practice" effectively deprives employees of the opportunity to take breaks. *Lamps Plus*, however, importantly rejected a "chronic understaffing" theory asserting that the employer's staffing model prevented employees from taking breaks, regardless of that employer's lawful policy. As a result, to avoid potential meal and rest break class actions, employers should ensure that no company-wide policy or practice could be construed as leading to a "universal practice of denying employees their breaks."

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