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# Management Alert

## Court of Appeal: A Common Unlawful Policy May Be Sufficient For Class Certification

In 2012, the California Supreme Court issued its long-awaited decision in *Brinker Restaurant Corp. v. Superior Court* addressing employers' obligations to "provide" meal and rest breaks. One often overlooked portion of *Brinker* is language suggesting, to the plaintiffs' bar, that class-wide liability may be established by demonstrating that a uniform policy is consistently applied to a group of individuals.

In *Faulkinbury v. Boyd & Associates, Inc.*, the Court of Appeal has applied that language to uniform meal-and rest-break practices, as well as a consistent method of calculating overtime premium pay. The Court of Appeal ordered the trial court to certify three subclasses on the grounds that employer liability could be established by demonstrating that these practices were unlawful. The degree to which these practices affected individuals, e.g., whether they were actually denied breaks, was held to be a question of damages, not class certification.

### The Facts

Security guards brought a class action alleging that their employer denied them off-duty meal-and rest-breaks, and miscalculated their overtime rate of pay. The security guards worked in a variety of different locations, including commercial buildings, retail stores, hospitals, and gated residential communities. All security guards had to sign on-duty meal agreements and take their meals on-duty. Although the company did not have a rest-break policy, it required employees to remain at their posts at all times, absent relief from another guard.

The company paid employees an allowance for the cost of cleaning their work uniforms and for gasoline, as well as a non-discretionary bonus for longer-term employees. But it excluded these payments when calculating the guards' overtime rate of pay.

The plaintiffs challenged these policies and practices and proposed three sub-classes for certification: (1) a meal-break class, (2) a rest-break class, and (3) an overtime class.

### Procedural History

The trial court denied certification of all three subclasses. The plaintiffs appealed. The Court of Appeal issued its first opinion before the Supreme Court's *Brinker* decision. In *Faulkinbury I*, the Court of Appeal affirmed the trial court's order denying certification of the meal-and rest-break subclasses, but reversed the order denying certification of the overtime class.

The Court of Appeal reasoned that the employer could be held liable only in where employees were actually denied meal-and rest-breaks, an issue that could be determined only on an individualized basis. Thus, the claims were not suitable for resolution on a class-wide basis. The overtime claim, however, stemmed from a challenged calculation that applied identically to all employees, creating a suitable issue for resolution on a class-wide basis.

The California Supreme Court held the case pending its decision in *Brinker*, and transferred the case back to the Court of Appeal with an order to reconsider its decision in light of *Brinker*.

## The Court of Appeal Opinion

Upon reconsideration, the Court of Appeal began with the thought that "*Brinker* teaches that we must focus on the *policy* itself and address the issue of whether the legality of the policy can be resolved on a class-wide basis." On this stated basis the Court of Appeal reversed the trial court's earlier decision denying certification of all three subclasses. As to meal-breaks, the court found evidence of a common policy of requiring all employees to sign an on-duty meal agreement and to take meals on duty. Because the policy consistently applied to class members, inquiries into its lawfulness could be considered on a class-wide basis, the court concluded.

The Court of Appeal reached the same conclusion on the rest-break subclass, even in the absence of an actual policy. The evidence demonstrated that the company forbade all security guards to leave their work stations. The lawfulness of that practice, in light of the legal requirement to provide off-duty rest breaks, could also be resolved on a class-wide basis. The Court of Appeal reasoned that individualized questions over whether employees were actually prevented from taking breaks was a question relevant to damages, not certification

Finally, as to the issue of overtime pay, the Court of Appeal held that the company's across-the-board application of this policy was suitable for class certification, as the employer uniformly applied its practice of calculating overtime pay with a formula that excluding consideration of uniform and gasoline reimbursements and annual bonus payments.

## What *Faulkinbury II* Means for Employers

Unless vacated by the Supreme Court, this unwelcome decision potentially lowers the certification bar for plaintiffs pursuing class claims based on an employer's common unlawful policy. Some employers have avoided class certification by demonstrating that a general policy was applied so variably that individualized questions predominated over the common fact that the same policy applied to all employees. *Faulkinbury II* now holds that class certification may be determined solely upon the basis of whether an employer's uniform policies violate legal requirements for meal and rest breaks, or other legal protections.

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