BREAK TIMING

BY JANET GRUMER and AARON COLBY

Brinker provides employers with some clarity on their responsibilities in providing meal and rest breaks

SINCE THE CALIFORNIA SUPREME Court's decision in April in *Brinker Restaurant v. Superior Court*,[1] employers have been grappling with how to manage employee meal and rest periods. The decision goes a long way toward clarifying what employers must do and not do to avoid meal and rest period litigation and reduce the likelihood of class certification, but the decision leaves many questions unanswered.

Class action litigation over missed meal and rest periods began in earnest in 2000, after California's Industrial Welfare Commission adopted monetary penalties of one hour of pay for every day on which an employee is denied a meal period and another for every day on which a rest period is denied.[2] In 2007, the pace of wage and hour class action filings quickened after the California Supreme Court ruled in *Murphy v. Kenneth Cole Productions* that the so-called meal and rest period "penalties" were actually wage "premiums"[3] and that the longer statute of limitations for unpaid wages applies.[4] Until the supreme court's decision in *Brinker Restaurant*, the controversy over what it means to provide[5] meal periods and to "authorize and permit"[6] rest periods led to conflicting state and federal court holdings and caused employers confusion. The decision was widely anticipated as the final word on the longstanding controversy, and it did resolve some issues, but many others are open for continued debate and more class action litigation.

Brinker Restaurant addressed claims that a chain of restaurants failed to provide a class of restaurant employees with meal and rest periods, as required by the Labor Code and wage orders.[7] It also addressed when and how it is appropriate for a court to examine the facts to determine whether class certification should be granted.

In the months since *Brinker Restaurant* was decided, employers statewide were at first grateful for the supreme court clarification, but are now scrambling to fashion new meal and rest period policies and figure out how to enforce them. The troublesome "rolling five" rule, enforced by the Division of Labor Standards Enforcement (DLSE), which required that employees work no more than five consecutive hours without a meal period, is gone. Also gone are the DLSE rules that a rest period must always take place

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before the first meal period and the rule that missed meal or rest periods automatically result in employer liability for meal and rest period penalties. But in their place are new compliance issues, including what it means to properly "relieve" employees of duty, what actions improperly "impede" the ability of employees to take meal and rest periods, and how an employer will prove that employees voluntarily chose not to take some or even all of the meal and rest periods they were entitled to.

Meal Periods

Prior to *Brinker Restaurant*, the DLSE and the courts required employers whose employees worked through meal or rest periods to pay meal and rest period premiums, regardless of whether the employees violated company policy or even the direct orders of management by doing so. Relying on opinion letters issued by the DLSE, rather than the statutes and regulations, the *Brinker Restaurant* plaintiff claimed that his employer had violated the Labor Code by failing to ensure that restaurant employees took all meal and rest periods and that they performed no work during meal and rest periods. *Brinker Restaurant* argued that neither the statute nor the wage orders require more than permitting meal periods for those who choose to take them, and that the legislature did not intend otherwise.[8]

As most employers can attest, forcing unwilling employees to take meal and rest periods on a timely basis is a tall order, especially in restaurants and retail establishments, where customers often come in large numbers during narrow time frames. That problem is compounded in restaurants where tips are at stake and employees have more to gain by working through a break than taking one.

In response to the conflicting rulings from state and federal courts, the supreme court gave employers the most important item on their wish lists—a ruling that although employers must relieve employees of all duty for meal periods, they need not ensure that employees do no work during meal periods.[9] Finding no statutory or regulatory support for the DLSE's position, the court held that employers are not required to pay meal and rest period penalties when employees choose not to take meal periods, providing that the employer has relieved employees of work, provided a reasonable opportunity to take the meal periods, and has not impeded employees from taking meal periods.[10]

Despite the good news, many questions about meal periods remain. The court left open for interpretation what it means to relieve employees of duty, explaining only that an employer satisfies this obligation if it relinquishes control over employee activities, permits employees a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so.[11] The court also confirmed that employees must be "free to leave the premises" and attend to personal business during meal periods.[12]

What it means to "impede" employees from taking breaks also is unclear. With many employers expecting fewer employees to do more work in less time, the line between requiring good and efficient performance and actually impeding the ability of employees to take meal periods is not sharply drawn. The supreme court cites a few existing cases to assist employers with that analysis but falls short of marking a clear path for employers. For example, in one case in which a meal period penalty was due, the employer paid employees for accomplishing tasks in a manner that would effectively monetarily penalize them if they took meal and rest periods.[13] In another case resulting in penalties, the employer's scheduling policy made taking breaks extremely difficult.[14] In another case, an informal policy against meal breaks, enforced through ridicule or reprimand, also resulted in penalties.[15]

The court also held that proof that an employer had knowledge that employees were working through meal periods is not enough to create liability for penalties (although it is sufficient to require employers to pay for the work).[16] The court held that employees may not "manipulate the flexibility granted to them by employers to generate liability for penalties."[17] The same is true for rest periods, as long as the employer has authorized and permitted them. Because employers must pay for and record all time worked, the practice of deducting 30 minutes from all nonexempt employees' time, regardless of whether they clock out, will likely result in claims that employers permitted unpaid, off-the-clock work and should be discontinued.

That leaves an open question as to whether programs offering pay for increased performance will fall into the category of impeding employees from taking breaks, because employees could make more money and gain employer approval by skipping them. Similarly, it is not clear at what point performance goals or the threat of discipline becomes an impediment to taking meal and rest periods.

Allowing employees to opt to work through meal breaks, while helpful, may also turn out to be difficult for employers to manage. Most employers have no records of whether or not an employee chose, on any particular day, to take or forego a meal or rest period. And most have no means of tracking that information. The result is that employers, who bear the burden of proving compliance, may face substantial overtime and meal period premium liability when they permit employees to decide whether or not to take meal periods.

In addition to claiming that the defendant failed in its duty to police meal periods, the plaintiff in *Brinker Restaurant* also claimed that the defendant's uniform policy violated the Labor Code by failing to provide, for shifts exceeding 10 hours, a second meal period no later than 5 hours after the end of a first meal period.[18] Finding no support in the statute, the supreme court declined to enforce the DLSE's rolling-five rule. This rule had created a scheduling nightmare for employers trying to balance operational needs, employee preferences, and difficult-to-predict quitting times. Instead, the court found that the first meal period must begin no later than the end of the 5th hour of work, but that there was no requirement that a second meal period begin within 5 hours of the end of the first.[19] For example, if an employee takes a first meal break in the 2nd hour of a 12-hour shift, the second meal period is now required no later than the 10th hour of work, thus easing the scheduling burden on employers.

Employers should keep in mind that when employees work through meal periods and the end of their shifts are not adjusted, the additional time worked may result in an overtime bill.

Rest Periods

Rest period requirements and timing have also long been a source of misunderstanding for California employers. The regulation requires that employers "authorize and permit" employees to take paid 10-minute rest periods, when practicable, in about the middle of each 4-hour work period "or major fraction thereof." Rest periods need not be given when the total time worked on a day is less than 3½ hours.[20] Although the requirement appears simple, there has long been controversy surrounding what "a major fraction thereof" means, how rest periods must be scheduled in conjunction with meal periods, and whether employers must ensure employees take rest periods.

The plaintiff in *Brinker Restaurant* argued that employees were deprived of appropriate rest periods because Brinker Restaurant's policy did not provide for as much rest period time as employees were entitled to. At the time, Brinker Restaurant's policy provided for 10 minutes of break time for every 4 hours worked. But the regulations provide for more than that.

An employee must be permitted to take a second rest break if he or she works more than 6 hours (not 8), and a third rest break if he or she works more than 10 hours (not

12). Thus, the employer's policy failed to account for the "major fraction" language and failed to provide sufficient breaks on work days lasting between 3½ and 4 hours.[21] Relying on a DLSE opinion letter interpreting a wage order not at issue in the case, the plaintiff also argued that employers have a legal duty to provide a rest break before any meal period and that the defendant's policy failed to comply with this duty.[22]

On this issue, the court held that employers are subject to a duty to make a "good faith effort" to authorize and permit rest breaks in the middle of each work period, but that they may deviate from that where practical considerations render it unfeasible. Furthermore, the court held that nothing in the Labor Code or wage orders requires that rest periods fall before or after a first meal period, though "as a general matter" one rest break should fall on either side of the meal break, subject to factors that might make this impractical.[23] In addition, the court provided a bright-line rule on the "major fraction thereof" language, finding that on shifts of 3½ to 6 hours, 10 minutes of paid rest period time is due, that for shifts of more than 6 and up to 10 hours, 20 minutes of paid rest period time is due, and that for shifts of more than 10 hours, 30 minutes of paid rest time is due.[24]

The court also clarified that rest period penalties are due only when the employer fails to make rest periods available to employees and not when an employee chooses to skip a rest period.

Class Certification

The court also provided specific guidance on how common policies and individualized proof should be considered in granting or denying class certification in wage and hour class action matters. The court reasoned that any "peek" into the merits of a case for purposes of deciding the propriety of class certification must be narrowly circumscribed to include only those aspects of the merits necessary to determine if the elements required to establish liability are susceptible to common proof. If they are not, a court should consider whether there are ways to effectively manage individualized proof within a class action proceeding.[25] As a result, a noncompliant policy may be sufficient to establish class certification, as long as the individualized proof of claims is manageable within a class action setting.

Brinker Restaurant's rest period policy incorrectly stated that a 10-minute rest period was provided for every 4 hours worked.[26] Because the policy was wrong and the employer had conceded that it was uniformly applied to all nonexempt employees, the court remanded, finding that a common policy was at issue and that class certification was appropriate.[27]

Taking the same approach with the "off the clock" class claims, the court reached the opposite conclusion. In granting certification of these claims, the trial court had considered no common employer policy and only "a handful of individual instances when employees worked off the clock."[28] The court held that the certification of off-the-clock claims was properly vacated by the court of appeal.

Finally, on the issue of certification of the meal period class claims, the court examined the class and determined that it likely included a substantial number of participants who had no possible claims, because it included all nonexempt employees who had worked in excess of five hours in a row without a meal period (including those with only rolling-five violations). As a result of the flaw in the class definition and the likelihood that the grant of certification was based on the trial court's erroneous consideration of rolling-five violations, the court reversed and remanded the grant of certification for the meal period class.[29]

Decisions after *Brinker Restaurant*

At least two trial courts have already denied class certification based on the *Brinker Restaurant* decision. In one Los Angeles Superior Court case citing *Brinker Restaurant*, the trial court declined to certify a class of nurses who claimed that their hospital employer had denied them meal periods.[30] The court held that the claims of the nurses, who occasionally worked double shifts, were not suitable for class treatment because a determination would require substantial individualized inquiry.[31]

In another Los Angeles Superior Court case, the trial court denied class certification for the same reason, finding that the claims of a group of more than 700 telecommunications workers who worked for the most part unsupervised at hundreds of locations were not suitable for class treatment.[32] The declarations submitted were inconsistent, showing that some employees took all breaks, others chose to leave early, and others worked straight through. The court held that there was no way to tell who was owed what without individualized inquiry.[33]

Now that the supreme court has decided the basics, there will be additional clarification as its ruling is tested in the courts. Notwithstanding the open questions, employers would be unwise to wait for more information and should already be modifying policies and practices and working to dispel the now commonly held belief that employers and employees no longer have to worry about meal and rest period issues.

In many respects, the *Brinker Restaurant* decision has merely changed the threshold

question to determine when meal and rest period penalties are due from *whether* employees missed their meal or rest periods to *why* they missed meal or rest periods. As a result of the decision, employers must determine, with the help of counsel, whether they wish to permit employees to skip meal and rest periods and if so, how they will later prove whether the choice to skip was the employee's, or was instead motivated by the employer's expectations, work load, lack of sufficient staff, or other factors within the control of the employer.

The supreme court has made it abundantly clear that a noncompliant, uniformly applied policy is a path to class certification. Uniform rest period policies like that of Brinker Restaurant, which provides 10 minutes of break for every 4 hours worked, are common in employee handbooks statewide. The first line of defense to wage and hour class action litigation is to update meal and rest period policies with the clear bright-line rules provided by the court and to review and update other policies and practices to ensure compliance.

Finally, employment defense attorneys should work with their clients to plan for the defense of the next wave of class action litigation. That work should include recommendations to disseminate new *Brinker*-compliant policies, together with an agreement in which employees agree to waive meal periods that can be waived, report meal or rest periods missed due to employer needs (so that the penalty can be paid on those instances), and agree that if a missed meal or rest period is not reported, it will be considered the employee's voluntary choice to skip the required break.

In the wake of the *Brinker Restaurant* decision, there are many unanswered questions that will likely create liability for employers and opportunity for plaintiffs, including incomplete or noncompliant policies, management's failure to follow compliant policies, permitting off-the-clock work during meal periods, assigning work in a way that makes meal or rest periods difficult to take or rewarding employees who do not take them, lacking proof of waived meal periods and voluntarily skipped meal and rest periods, and failing to pay meal and rest period penalties when the employer interferes with them. These mistakes can be avoided, but employers should start now, before the next wage and hour class action is filed. ■

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[1] Brinker Rest. Corp. v. Superior Court, 53 Cal. 4th 1004 (2012).
[2] Murphy v. Kenneth Cole Prods., Inc., 40 Cal. 4th 1094, 1105-06 (2007); LAB. CODE §226.7.
[3] The supreme court used the words "premiums" and "penalties" for missed meal and rest periods interchangeably. Brinker, 53 Cal. 4th at 1017.
[4] Murphy, 40 Cal. 4th at 1105-06; Brinker, 53 Cal. 4th at 1017.
[5] LAB. CODE §512(a).
[6] *See, e.g.*, CAL. CODE REGS. tit. 8, §11050(12)(A).
[7] Brinker, 53 Cal. 4th at 1019.
[8] *Id.* at 1033, 1038.
[9] *Id.* at 1034, 1038.
[10] *Id.* at 1040.
[11] *Id.*
[12] *Id.* at 1036.
[13] Cicairos v. Summit Logistics, Inc., 133 Cal. App. 4th 949, 962-63 (2005).
[14] Jaimez v. Daiohs USA, Inc., 181 Cal. App. 4th 1286, 1304-05 (2010).
[15] Dilts v. Penske Logistics, LLC, 267 F.R.D. 625, 638 (S.D. Cal. 2010).
[16] Brinker, 53 Cal. 4th at 1040.
[17] *Id.*
[18] *Id.* at 1042.
[19] *Id.* at 1048-49.
[20] CAL. CODE REGS. tit. 8, §11050(12)(A).
[21] Brinker, 53 Cal. 4th at 1028, 1032.
[22] *Id.* at 1031.
[23] *Id.*
[24] *Id.* at 1029, 1031.
[25] *Id.* at 1024.
[26] *Id.* at 1017.
[27] *Id.* at 1032-33.
[28] *Id.* at 1051-52.
[29] *Id.* at 1049-51.
[30] Kimani v. Healthcare Investments Inc., No. BC432360 (L.A. Super. Ct. May 11, 2012).
[31] *Id.*
[32] Booker v. Tanintco Inc., No. BC349267 (L.A. Super. Ct. May 11, 2012).
[33] *Id.*