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The Impact of *Brinker Restaurant Corp. v Superior Court* on Wage and Hour Claims—A Plaintiffs' Counsel's Perspective

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Introduction

The Fourth District Court of Appeal's recent decision in *Brinker Restaurant Corp. v Superior Court* (2008) 165 CA4th 25, 80 CR3d 781, represents a significant departure from existing California authority on the issues of meal and rest periods, off-the-clock work, and class actions.

Summary of the Decision

The trial court in *Brinker* certified a class of non-exempt employees who alleged that the Brinker Restaurant Corporation had failed to provide them with meal and rest breaks and required them to work off the clock during meal periods. The class consisted of approximately 59,000 employees from 137 restaurants and three different casual eating franchises. On Brinker's writ petition challenging the trial court's class certification order, the court of appeal held that the trial court's order was erroneous because it "failed to properly consider the elements of plaintiffs' claims [*i.e.,* determine what law applied to the plaintiffs' claims] in determining if they were susceptible to class treatment." 165 CA4th at 31, 43.

But rather than simply vacating the certification order and remanding the case to the trial court, the *Brinker* panel instead took it upon itself to affirmatively decide the elements of the plaintiffs' meal and rest break and off-the-clock claims. 165 CA4th at 43. First, the court held that Lab C §226.7 requires only that employers make meal periods "available." Relying on nonbinding authority from federal district courts purporting to interpret state labor laws, and despite the surrounding statutory context to the contrary (discussed further below), the court adopted the dictionary definition of the term "provide": "to supply or make available." 165 CA4th at 55. The court also concluded that a single meal period could be provided at any time during a shift of up to 10 hours, reasoning that receipt of a meal period at any point during a shift greater than 5 hours would be in compliance with Lab C §§226.7 and 512. 165 CA4th at 51. Second, the court concluded that rest breaks were not triggered until after an employee had worked a full 4 hours. 165 CA4th at 44.

Based on this legal analysis of meal and rest breaks, the court made a sweeping conclusion that a class action based on these claims could not be certified due to the need to engage in individualized inquiries about why employees missed their meal and rest breaks. 165 CA4th at 48, 58.

The court also concluded that the plaintiffs' claims for off-the-clock work done during their meal periods were not amenable to class treatment, reasoning that these claims would require "individualized" inquiries into whether off-the-clock work was actually completed, whether managers had knowledge of this work, and whether managers coerced workers to waive their meal periods. 165 CA4th at 60.

After establishing its view of the proper elements of the plaintiffs' claims, the court took the inappropriate step of weighing the evidence presented to the trial court and applying it to those elements. Assuming the trial court's fact-finding role, the court then directed the trial court to enter an order denying with prejudice the plaintiffs' certification motion. 165 CA4th at 62.

The Impact of *Brinker* on the Plaintiffs' Bar

Brinker's flawed interpretations of the meal and rest period statutes weaken long-established protections for employees while simultaneously erecting a virtually impossible standard for class certification of these claims. Although defendants will undoubtedly seek to use this decision expansively, *Brinker*'s negative impact on plaintiffs is limited in several ways.

Brinker's Flawed Legal Analysis

As an initial matter, the *Brinker* panel had no authority to substitute its decision for that of the trial court when it improperly weighed and drew inferences from the evidence presented in the case that were contrary to the findings of the trial court. See *Sav-on Drug Stores, Inc. v Superior Court* (2004) 34 C4th 319, 328, 17 CR3d 906. By taking the unusual step of denying class certification after considering the facts, including declarations and other evidence, and doing so with prejudice, the court exceeded its appellate authority and could easily be reversed on this point alone.

On the elements of the plaintiffs' claims, the court repeatedly refused to apply the plain language of the Industrial Welfare Commission (IWC) wage order that is explicitly incorporated into the meal and rest period statutes and ignored clear and long-standing California precedent that protects employees' entitlement to meal

and rest periods. The court also purported to curtail the use of class actions to vindicate employees' important statutory rights.

In its meal period analysis, the court ignored the plain language of Lab C §§226.7 and 512 and IWC Wage Order 5–2001, all of which mandate that employers ensure that employees receive their meal and rest breaks. IWC Wage Order 5–2001, which §226.7 specifically incorporates by reference, unequivocally states that "[n]o employer *shall* employ any person for a work period of more than five (5) hours without a meal period. . . ." 8 Cal Code Regs §11020(11)(A) (emphasis added). This mandatory language requires that employers do more than simply make meal periods available. Consistent with this clear language, the Third District Court of Appeal in *Cicairos v Summit Logistics, Inc*. (2005) 133 CA4th 949, 962, 35 CR3d 243, correctly held that employers have "an affirmative obligation to ensure that workers are actually relieved of all duty."

Further, contrary to *Brinker*'s analysis, the plain language of IWC Wage Order 5–2001 also requires that a meal period be given for each work period greater than 5 hours. Providing meal periods every 5 hours is consistent not only with the language of the controlling wage order, but also with the remedial purpose of the meal period statutes, which seek to protect the health and welfare of workers by breaking their shifts into manageable work periods. See *Murphy v Kenneth Cole Prods., Inc*. (2007) 40 C4th 1094, 1113, 56 CR3d 880 ("[e]mployees denied their rest and meal periods face greater risk of work-related accidents and increased stress").

The *Brinker* analysis regarding the provision of rest periods was also flawed; it effectively eliminated employees' long-standing entitlement to two 10-minute rest periods during an 8-hour shift. See *Murphy,* 40 C4th at 1104 (noting that employees are owed two 10-minute rest periods in 8-hour workday). If *Brinker* is correct and employees are entitled to a rest break only after the 4-hour mark, an employee would complete an 8-hour shift before her second rest break would be available, rendering that break useless since she could simply go home at that point.

Finally, *Brinker*'s sweeping foreclosure of class actions for these types of claims flies in the face of recognized public policy encouraging the use of class actions to vindicate the statutory rights of workers whose claims may be too small to warrant individual litigation. See *Sav-on Drug Stores,* 34 C4th at 340. Moreover, the wholesale elimination of the use of class actions cannot be tolerated because it could "impermissibly interfere with employees' ability to vindicate unwaivable rights and to enforce the [state labor] laws." *Gentry v Superior Court* (2007) 42 C4th 443, 457, 64 CR3d 773.

These errors in *Brinker*'s analysis will likely temper the willingness of future courts to rely on this decision, particularly given the strong precedents in *Cicairos, Sav-on Drug Stores, Gentry,* and *Murphy*.

Supreme Court Review Is Likely

Precisely because *Brinker* is based on erroneous interpretations of California labor laws, it will likely be reversed. A petition for review is currently pending before the California Supreme Court, which has until October 20, 2008, to decide whether it will review the decision. If the supreme court grants review, *Brinker* immediately becomes noncitable authority, leaving *Cicairos* as the only California appellate decision on the provision of meal and rest periods, and *Sav-on Drug Stores, Murphy,* and *Gentry* as controlling authority on class action issues. Further, given the flaws in *Brinker*'s analysis, it is likely that the supreme court will rein in *Brinker*'s wide-reaching holdings if review is granted.

Brinker Is Factually Distinguishable

Brinker also can be distinguished on the basis of the unique facts presented in that case. In *Brinker,* the class consisted of almost 59,000 non-exempt employees who held various job titles and worked for three distinct restaurant franchises in 137 restaurants. Brinker also had detailed written policies that informed employees of their rights to meal and rest breaks, which employees apparently had to confirm acceptance and receipt of by signing a designated form. Much of the court's analysis appeared to be driven by the perceived unmanageability of the class, which strongly suggests that a more narrowly defined class of meal and rest period claims might be certifiable. Further, claims of employers who have no policies or inadequate policies regarding meal and rest periods, such as in *Cicairos,* do not trigger any of the individualized analysis concerns raised in *Brinker* and thus should continue to be viable as class actions.

Conclusion

Despite the errors in its analysis, *Brinker* creates a new division of authority on meal and rest period issues. This means that raising such issues will be riskier for plaintiffs because courts could opt to follow *Brinker* rather than *Cicairos*. This makes it all the more critical that plaintiffs consider where they file their claim, taking into account the individual court's viewpoint on meal and rest period claims. Plaintiffs should think carefully before bringing these claims in the Northern District Court of California, where *Brinker* has been consistently adopted (see, *e.g., White v Starbucks Corp*. (ND Cal 2007) 497 F Supp 2d 1080), or in the Fourth Appellate District, where *Brinker* is controlling authority.

Plaintiffs must also be aware that defendants will use the decision aggressively to try to dismiss meal and rest

period claims, as well as class actions involving those claims. Plaintiffs can expect a flood of motions to dismiss, motions for judgment on the pleadings, motions for summary judgment, and motions to strike class allegations, as well as motions for noncertification, all based on the holdings of *Brinker*.

Moreover, the settlement value of these claims will be temporarily reduced in the eyes of employers and many mediators, which may result in not only a low valuation, but also an increased difficulty in bringing defendants to the negotiating table to discuss settlement. Accordingly, plaintiffs should consider bringing a meal or rest period claim as one of several claims. That way, even if the court adopts or a mediator credits *Brinker,* they can rely on other claims to gain class certification or provide an alternate basis to negotiate during mediation.