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## California Supreme Court Clarifies Employer Meal & Rest Period Duties

By Julie Dunne and Alison Hightower

After three years, the California Supreme Court has finally issued its much-anticipated decision regarding how employers must manage meal periods and rest breaks. On April 12, 2012, the state's highest court issued its unanimous decision in *Brinker Restaurant Corporation v. Superior Court*, clarifying California employers' obligations to "provide" meal periods and "authorize or permit" rest periods. To hear a detailed discussion of the decision and its implications for employers, please join Littler's webinars on April 17, 2012, from 10 to 11 a.m. PST, and on April 26 from 10:00 to 11:00 a.m. PST.

The decision is a major victory for employers because it definitively rejects the theory advanced by employees that employers must affirmatively **ensure** that each employee is actually relieved of duty for 30 minutes or they will owe one hour's pay for each instance that does not occur. The decision also highlights the critical need that all California employers have legally compliant meal and rest break policies to minimize the risk of expensive class litigation.

### Premium Pay Fuels Class Actions in California

Litigation over allegedly missed meal and rest breaks has proliferated in California because employees may sue in court – usually on behalf of a class of all "similarly-situated employees" – to recover one hour's pay for each meal period an employer did not provide and potentially another hour of pay for each rest break that was not authorized. These one hour premiums are on top of the regular wages due for time worked during meal periods and rest breaks. In addition to this premium pay, employees may also recover penalties and attorneys' fees. Yet for the past decade, the precise nature of an employer's meal and rest break obligation has remained hotly contested. The court clarified an employer's obligations in several important respects.

### Meal Periods: No Duty to Ensure Employees Do No Work

First, the California Supreme Court held that an employer's duty to "provide" meal periods is a duty to relieve employees of all duty, empowering employees to decide how to use the meal period. Importantly, the court rejected the plaintiffs' contention that employers have a duty to ensure that no work is done during a meal period.

The court stated employers have three potential choices for employees working at least 5 hours in a day: (1) to “afford an off-duty meal period;” (2) to obtain consent to a mutual waiver if the shift is no more than 6 hours; or (3) to obtain a written agreement to an on-duty meal period if circumstances permit. If an employee continues to work after an employer relinquishes control, the employer will be liable for regular wages “only when it ‘knew or reasonably should have known’” that the worker was working through the meal period. The court thus clarified that premium pay (an extra one hour’s wage) is **not** owed when an employer relinquishes control and an employee nevertheless decides to continue working.

The court strove to strike a balance between the obligations of employees and employers. In order to obtain an additional hour’s pay, employees may not “manipulate the flexibility granted them by employers to use their breaks as they see fit to generate such liability.” Employees, in other words, cannot earn extra money simply by choosing to work when relieved of duty. And employers are not obligated to “police meal breaks.” But employers cannot pressure employees to perform their duties in ways that omit breaks or “coerce,” create incentives, or otherwise “encourage[e] the skipping” of meal periods. The court added an interesting caveat: “What will suffice [to satisfy the meal period obligation] may vary from industry to industry, and we cannot in the context of this class certification proceeding delineate the full range of approaches that in each instance might be sufficient to satisfy the law.” Further case law thus will need to scope out the full range of acceptable methods of compliance in myriad workplaces.

## When Meal Periods Must Be Provided

Next, the court resolved when employers must make meal periods available. The plaintiffs contended that employers must provide meal periods on a rolling-five-hour basis, meaning that an employee obtains a second meal period if he or she works more than five hours after his or her first meal period (e.g., starts work at 9:00 a.m., takes a 30-minute meal period from 11:00 to 11:30 a.m., then works more than five hours to end the shift at 5:30 p.m.).

The court rejected that argument, finding that the obligation to provide a second meal period arises only if an employee works more than 10 hours in a day. The court concluded generally that the first meal must be afforded no later than the end of the employee’s fifth hour of work, and a second meal period must be provided no later than the end of an employee’s 10th hour of work. The court also noted that, due to differing language in other Wage Orders, the first meal period may be offered after six hours of work to employees governed by Wage Order No. 12 (motion picture industry) and those unionized employees governed by Wage Order No. 1 (manufacturing industry) who collectively bargain for that variance.

## Number of Rest Breaks to Provide

Regarding rest breaks, the court considered what is meant by the phrase “major fraction” as used in the rest break law. Wage Order No. 5 states the “authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours *or major fraction thereof.*” The court held that a “major fraction” of a four-hour work period is anything more than two hours over and above the prior four-hour work period.

Consequently, an employer is obligated to authorize or permit rest breaks as follows: an employee who works a shift of only 3.5 hours or less is not entitled to a rest break; an employee who works 3.5 to 6 hours is entitled to one 10-minute rest break; an employee who works more than 6 and up to 10 hours is entitled to two 10-minute rest breaks, and an employee who works more than 10 hours and up to 14 hours is entitled to three 10-minute rest breaks.

### When Rest Break Must Be Permitted

The court also sided with Brinker regarding the timing of rest breaks, holding 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 may deviate from that preferred course where practical considerations render it infeasible.” The court rejected the plaintiffs’ contention that the rest period must in all situations be authorized before the meal period.

## When Class Certification Should Be Granted

As noted above, employees often seek to certify a class to litigate their entitlement to premium pay for missed meal and rest periods. The trial court here certified three subclasses to litigate liability related to rest breaks, meal periods, and off-the-clock work. The Court of Appeal reversed certification of all three subclasses. The California Supreme Court affirmed the denial of certification as to the “off-the-clock” sub-class but reversed as to the rest and meal period subclasses.

The California Supreme Court clarified what a trial court’s approach must be in determining whether to certify meal period and rest break claims. A trial court must resolve threshold legal or factual issues that are *necessary* to a determination whether class certification is proper. But a trial court is not required to resolve the merits of the dispute in all instances; only when the issues affecting the merits of a case are enmeshed with class action requirements. The crux of a trial court’s analysis should be to determine whether the elements necessary to establish liability are susceptible of common proof, and, if not, whether the proof of elements that may require individualized evidence can be effectively managed.

Addressing the rest break subclass, the court focused on Brinker’s common and uniform rest break policy to authorize breaks only for each full four hours worked. Because Brinker’s uniform rest break policy itself was alleged to violate the law because it did not authorize and permit rest breaks for every major fraction of a four-hour work period, the court held that class certification should have been affirmed.

As for the meal period subclass, the court concluded that the trial court had applied an incorrect standard of law when it certified a class based on a rolling-five-hour meal period standard. The court therefore remanded the case to the trial court to reconsider its certification. The court did not offer any opinion on whether the statistical, survey, declarations or other evidence offered by both sides weighed in favor or against certification.

Finally, the court held that the trial court erred in certifying a class to litigate whether Brinker required employees to perform work while clocked out during their meal periods. Because Brinker had a policy to pay for all hours worked that facially complied with the law, and because the plaintiffs did not offer substantial evidence of a systematic company policy to pressure or require employees to perform off-the-clock work, the court held that common issues did not predominate and such claims could not be litigated as a class. Anecdotal evidence of a handful of instances in which employees nevertheless performed off-the-clock work was not sufficient to show a uniform, company-wide policy to show that common questions predominate.

## What Employers Should Now Expect

Employers should revise their meal period and rest break policies as necessary to reflect the *Brinker* court’s rulings. In addition, employers should train managers to provide meal periods and rest breaks in compliance with company policies. Finally, employers should train nonexempt employees regarding when they are entitled to take meal periods and rest breaks.

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