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## BRINKER REDUX: California Superior Court Certifies Meal Break Class and Denies Decertification of Rest Period Class

By Alison Hightower

After the tortuous appellate process that finally resulted in the seminal California Supreme Court *Brinker Restaurant Corporation*<sup>1</sup> decision defining the legal duty to provide a meal period and authorize rest breaks, you might have thought the battle was over, at least for Brinker Restaurants. You would be wrong. That was just Round One. In Round Two, last week San Diego County Superior Court judge William Dato addressed the question the California Supreme Court did not decide during the multi-year appellate process: whether a class should be certified to litigate whether meal periods were “provided” to thousands of employees of restaurants owned and operated by Brinker throughout California. While the California Supreme Court decision was widely viewed as a victory for employers on the meal break requirement under California law, last week’s decision gave the green light to employees to continue this now nine-year fight as a class action to seek premium pay, penalties and possibly injunctive relief from their employer for failure to provide meal and rest breaks.

### Meal and Rest Period Rules

To briefly review how we got to this point: California law requires that employers provide employees with at least one 30-minute off-duty meal period if the employee works at least five hours in the day, although the employee can waive that meal period if the shift lasts no more than six hours. If the employee works at least 10 hours in a day, a second meal period must be provided, although the second meal period can also be waived under certain circumstances. If the requisite meal periods are not provided to non-exempt employees, the employer must pay the employee not only for the time worked, but also an additional one hour of “premium pay.” The Labor Code and the Wage Orders do not, however, define the meaning of “provide.”

In Round One, the plaintiffs argued that the term “provide” required an employer to **ensure** that each employee actually stopped working for 30 minutes. The California Supreme Court disagreed, finding instead that the employer’s duty was more limited: “to relieve its employee[s] of all duty, with the employee thereafter at liberty to use the meal period for whatever purpose he or she desires, but the employer need not ensure that no work is done.” If an employee is relieved of all

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<sup>1</sup> *Brinker Restaurant Corporation v. Superior Court*, 53 Cal. 4th 1004 (2012).

duty but chooses instead to work during the 30-minute meal period, the employer would not be liable for premium pay, but would be required to pay for the time worked if it knew, or should have known, that the employee worked during the meal break.

Regarding rest breaks, California law states simply that employers must “authorize and permit” employees to take a 10-minute rest break for each four hour period of work or “major fraction thereof.” If a rest period is not permitted, non-exempt employees are entitled to one additional hour of premium pay.

In Round One, the Supreme Court surprised employers by holding that “employees are entitled to 10 minutes rest for shifts from three and one-half to six hours in length, 20 minutes for shifts of more than six hours up to 10 hours, 30 minutes for shifts of more than 10 hours up to 14 hours, and so on.” Previously, many employers had provided a second rest break only after seven hours of work.

## Meal Break Class Certification

As to class certification, the California Supreme Court decided the meal break class defined by plaintiffs was too broad because it included employees who, based on the definition of “provide” announced by the court, no longer had a claim against Brinker. Accordingly, the court did not decide the certification question but instead remanded the case and instructed the trial court to reconsider the issue in light of its guidance.

On remand, the plaintiffs filed a new motion for class certification. In Round Two, plaintiffs narrowed the class they sought to certify to include only those employees who were not provided with a 30-minute off-duty meal period and not compensated with one hour of premium pay when not provided with lawful meal periods (as opposed to all non-exempt employees). Using this class definition, the San Diego Superior Court examined whether plaintiffs’ theories of liability could be established by class-wide proof. Plaintiffs asserted that Brinker’s meal break policies were common to all class members and provided grounds for class certification on three issues: 1) whether Brinker’s failure to adopt any written corporate meal period policy between October 2000 and 2002 was unlawful; 2) whether the written policy Brinker adopted in 2002 and modified following the California Supreme Court’s decision was lawful; and 3) whether various company policies unlawfully impeded or discouraged employees from taking meal breaks.

Brinker first argued that class certification should be denied because plaintiffs failed to establish “that class members suffered a common injury as a result of a facially invalid policy that applied to all putative class members.” The court rejected that argument, stating that the existence of a uniform written policy “is a prototypical instance where proof as to one will provide proof for all, and the ‘common injury’ is the lack of premium pay if class members were not provided with a required meal period.” The court held that whether the meal period policy was unlawful was a merits dispute to be resolved after class certification. Second, Brinker argued that certification was inappropriate because assessment of liability would hinge on individualized proof regarding whether each employee was given an opportunity to take a 30-minute off-duty meal period. In rejecting the second argument, the court stated that the individualized issues related to damages only and did not warrant denial of class certification.

The court concluded that common evidence of a uniform written meal period policy (or lack thereof) was sufficient to try the meal period claim on a class-wide basis. This approach fails to recognize that liability for failure to permit employees an off-duty 30-minute meal break depends on the real-life experience of hundreds of employees in numerous different facilities throughout the state, and does not depend on the policy alone. For example, some supervisors might have told the employees they supervised to take lunch every day and those employees may have in fact stopped working for half an hour each day to take walks, run errands or eat in a nearby park. Other supervisors may have taken a different approach. Thus, liability, as well as damages, for failing to provide employees with a 30-minute off-duty meal period depends on the treatment of employees by individual supervisors and cannot be determined on a class-wide basis.

## Rest Break Class Certification Revisited

As to the rest break claims, the California Supreme Court held that a class claiming the company’s rest period policy was unlawful should have been certified, reversing the court of appeal. Noting that Brinker had conceded the existence of a common, uniform rest break policy equally applicable to all Brinker employees, the California Supreme Court held that assessing the validity of the employer’s corporate rest period policy was an issue common to all class members and therefore certification of a rest break class was appropriate.

In Round Two, Brinker asked the superior court to reverse or “decertify” the rest break subclass on the grounds that plaintiffs’ theory had “evolved” since the supreme court’s decision. The trial court was not receptive to this argument. Judge Dato remarked that the court “would tread cautiously before undoing what the Supreme Court has approved based on similar evidence and repackaged arguments.” Applying logic similar to that applied in certifying the meal break class, the trial court also stated that determining whether the rest break policy itself was unlawful was a matter of common proof and therefore was a sufficient basis for class certification. The individualized issues posited by Brinker were merely damages issues that would not defeat certification. Judge Dato was also unsympathetic to Brinker’s practical concerns regarding the difficulty of identifying employees who were denied rest breaks because there is no legal requirement that a company maintain rest break records. The court brushed these concerns away, commenting that it would be “procedurally innovative in managing individual issues that may arise in the class action context” without giving any hint of what “innovations” it intended to adopt as the case goes forward.

## Lessons Learned

The trial court’s ruling is a setback for Brinker, but not a death knell. Brinker may still win any number of procedural and substantive battles before the end of the day. In the meantime, the court’s reasoning underscores the importance for all employers with operations in California of not only having lawful written meal and rest break policies, but also maintaining records demonstrating that such meal breaks were taken and, if not, that employees were paid for the time worked and, where appropriate, were provided premium pay. These types of policies and practices minimize the risk of class certification and liability, making it more difficult for plaintiffs’ counsel to amass common evidence that meal or rest breaks were not provided to its employees.

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