COURT DECISION ON MEAL PERIODS, REST PERIODS AND OFF-THE-CLOCK WORK IS ABSOLUTELY ATTENTION-GETTING

By

Richard J. Simmons, Attorney

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

On July 22, 2008, the California Court of Appeal issued its long-awaited decision in Brinker Restaurant Corp. v. Superior Court of San Diego (Hohnbaum), __ Cal. App.4th __ (2008), regarding meal periods, rest periods, and off-the-clock work. It is anticipated that the plaintiffs who lost the case will ask the California Supreme Court to review and depublish the decision. For the time-being at least, it is a published decision that should influence other courts required to evaluate similar claims.

In reviewing the Brinker decision, it is readily apparent that it has a **dual personality**. First, it addresses the **inappropriateness of class actions** from a procedural perspective as a means to litigate many, if not most, meal period, rest period and off-the-clock claims. At the same time, it examines the standards used to measure **compliance with the law** and thus to determine when violations occur that trigger the statutory sanctions. It should be remembered that the Supreme Court decided in April of 2007 in Murphy v. Kenneth Cole that the sanctions for violations are a type of "wages" that can be pursued for a statute of limitations period of three or four years. It did not, however, resolve the question of **when** the sanctions are owed. The Brinker decision tackles this issue.

The California Division of Labor Standards Enforcement ("DLSE") has already weighed in on an interpretation of the Brinker case. On July 25, 2008, the DLSE issued a memorandum to its staff entitled, "Binding Court Ruling on Meal and Rest Period Requirements." The memorandum advised the DLSE staff that the Court decided several significant issues in a published decision that is binding upon the DLSE. Some of the lessons of the case and the DLSE interpretations are summarized below.

1. Compliance Issues

California law requires that employers pay a sanction when a violation of the meal or rest period provisions of the California Wage Orders occurs. The sanction is described in Labor Code Section 226.7 and is considered a "wage" based on the Supreme Court's 2007 decision in Murphy v. Kenneth Cole. While the Supreme Court planted some hints in the Murphy decision regarding **when the sanctions are owed**, it was not called upon to resolve that issue in the Murphy case. The issue has remained open ever since and, as noted in other articles in this issue of the ALERT, has been tackled by a number of federal courts tasked with the need to examine California law. Brinker is the

first California Court of Appeal to grapple with these critical issues in a published decision. By defining the scope of an employer's duties, the case identifies when violations occur and the need to pay sanctions arises.

a. **Meal Periods:** As construed by the DLSE, Brinker made the following assessments regarding **meal period compliance**:

(1) The meal period requirements set forth in the applicable Wage Order "mean that employers must provide meal periods **by making them available**, but need not ensure that they are taken. Employers, however, cannot impede, discourage or dissuade employees from taking meal periods."

(2) The Court rejected the so-called "rolling five-hour" requirement as being inconsistent with the plain meaning of Labor Code Section 512 and the applicable Wage Order. "An employer must make a first 30-minute meal period available to an hourly employee who is permitted to work more than five hours *per day*, unless (1) the employee is permitted to work a total work period per day" that is six hours or less, and (2) both the employee and the employer agree by "mutual consent" to waive the meal period.

(3) The Court also found Section 512 to provide that an employer must make a second 30-minute meal period available to an hourly employee who has "a work period of more than 10 hours *per day*" unless (1) the "total hours" the employee is permitted to work per day is 12 hours or less, (2) both the employee and the employer agree by "mutual consent" to waive the second meal period, and (3) the first meal period "was not waived." (The Court was not required to consider the special language in Wage Orders 4 and 5 regarding the ability of healthcare employees to waive a second meal period.)

(4) Employers are not required to provide a meal period for *every five consecutive hours worked*. The Court held that the employer's practice of providing employees with an "**early lunch**" within the first few hours of an employee's arrival at work did not violate California law, even though that would mean that the employee might then work in excess of five hours without an additional meal period.

(5) The Court emphasized that public policy considerations did not support the standard advocated by many plaintiffs that would impose a burden on employers to "ensure" that meal periods were actually taken. It stated: "If this were the case, employers would be forced to police their employees and force them to take meal breaks. With thousands of employees working multiple shifts, this would be an impossible task. If they were unable to do so, employers would have to pay an extra hour of pay any time an employee voluntarily chose not to take a meal period, or to take shortened one."

b. **Rest Periods:** The DLSE made the following assessments regarding **rest period compliance**:

(1) The Court held the rest period requirements set forth in the applicable Wage Order mean that **employers must provide rest periods, but need not ensure that they are taken**. Employers, however, cannot impede, discourage or dissuade employees from taking rest periods.

(2) The Court held that employers need only **authorize and permit** rest periods every four hours or major fraction thereof and they need not, *where impracticable*, be in the middle of each work period. The Court interpreted the phrase "major fraction thereof" to mean the time period between three and one-half hours and four hours and not to mean that rest period must be given every three and one-half hours. In so doing, the Court "rejected as incorrect a 1999 interpretation by the Labor Commissioner that the term "major fraction thereof" means an employer must provide its employees with a 10-minute rest period when the employees work any time over the midpoint of each four hour block of time. The court ruled that the rest periods must be given if an employee works between three and one-half hours and four hours, but if four or more hours are worked, it **need be given only every four hours**, not every three and one-half hours."

(3) The Court also ruled that the applicable Wage Order rest period provisions do **not** require employers to authorize and permit a first rest period before the first scheduled meal period. Rather, the applicable language of the Wage Order states only that rest periods "**insofar as practicable** shall be in the middle of each work period." Accordingly, the Court concluded, "as long as employers make rest periods available to employees, and strive, where practicable, to schedule them in the middle of the first four-hour work period, employers are in compliance with that portion of the applicable wage order."

c. The Off-The-Clock Standards

The DLSE did not cover the Court's discussion of **off-the-clock work** in its memorandum. The Court nevertheless enunciated an important standard. It stated that employers can only be held liable for employees working off the clock if they knew or should have known they were doing so. Employers cannot coerce, require or compel employees to work off the clock.

2. Class Certification Standards

Employers should learn everything they can from the portions of the Brinker decision that review compliance standards. Compliance with the law is absolutely imperative. The significance of the decision, however, is not limited to those standards. In the minds of many, the features of the case that severely limit the

circumstances where meal period, rest period and off-the-clock work claims are appropriate for class adjudication are just as important. This aspect of the case did not address the merits of such claims. Instead, the Court engaged in an extensive analysis of the **procedural issues** associated with class action lawsuits, considering when and if class adjudication makes sense. Based on the facts of the case, the Court held that the claims were not amenable to class treatment.

a. The Plaintiff Bears The Burden Of Proving Class Treatment Is Appropriate

As a general matter, the plaintiff in a lawsuit bears the burden of demonstrating that the case should be litigated a as class action rather than a lawsuit involving only the named parties. The author of the ALERT was previously quoted as stating that some judges would certify a ham sandwich as a class action without engaging in the full-blown analysis that is warranted by such serious cases. The Brinker Court made it unmistakably clear that a careful analysis should be made.

Among the elements that a plaintiff must establish are that a case is suitable for class adjudication because (1) common issues of law or fact predominate over individual issues (sometimes called the "predominance test") and (2) a class action is a superior means to adjudicate the dispute. Recently, several courts have concluded that meal and rest period claims are inherently unsuitable for class-wide adjudication because individual issues predominate that would necessitate hundreds or thousands of mini-trials just to determine if liability exists, let alone the amount of damages.

b. The Need For An Individualized Assessment Of The Reasons For Missed Meal Or Rest Periods Barred Class Treatment

Brinker agreed with several recent cases which found that individualized issues predominated in connection with the meal period, rest period, and off-the-clock work claims. Given the Court's conclusion that employers need only make meal and rest periods available and need not ensure that they are taken, the Court found that meal and rest period claims typically require an individualized fact-intensive analysis, even where meal period records exist and, in some instances, do not show that proper meal periods were taken. Indeed, the time sheets in the case did not provide a viable method of proving the meal period claims on a class-wide basis as they did not provide "the **reason** for the missed meal breaks." In short, time cards "cannot show **why**" meal breaks were missed. Similarly, because the Court found that employers need not ensure that employees take rest breaks and employees "may waive their rest breaks," individualized proof is necessary to show a violation of the law even if there were a showing that employees missed or took shortened rest breaks. For example, it must be determined on a class-wide basis whether employees missed breaks as a result of a supervisor's coercion or the employee's uncoerced choice to waive such breaks and continue working.

c. The Absence Of Written Waivers

The Court also observed that the **absence of written waivers** did not signal management coercion given the fact that Labor Code Section 512 does not require that "mutual consent" necessary to a waiver must be in writing. In fact, the affirmative defense of waiver may itself defeat class certification where the defense would raise issues specific to each potential class member.

d. Off-The-Clock Work Claims

The plaintiffs argued that the employer "shaved" time records to eliminate work time and that employees worked off the clock. The Court concluded that the off-the-clock work claims were also not amenable to class treatment. It noted that individual issues predominated on the issue of whether the employer forced employees to work off the clock, whether it changed time records, and whether it knew or should have known employees were working off the clock.

The Court cited an amicus brief submitted by Sheppard, Mullin with approval in reaching its favorable conclusions regarding the duty to provide breaks. It also cited the Wage and Hour Manual for California Employers by Attorney Richard J. Simmons of Sheppard Mullin's Los Angeles office.