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LABOR & EMPLOYMENT ALERT

SEPTEMBER 2008

A "RESTING" DEVELOPMENT: CALIFORNIA COURT GIVES EMPLOYERS A BREAK ON MEAL AND REST PERIODS

By Jennifer Vanse and Tony Amendola

In *Brinker Restaurant Corporation, et al. v. Superior Court* (7/22/2008), a California Court of Appeal favorably decided a number of issues regarding the state's meal and rest period requirements. On the day the decision was handed down, Governor Schwarzenegger issued a press release commending the Court for "squarely addressing many of the central issues in dispute" and providing clarity in the face of "confusing and conflicting interpretations of the meal and rest period requirements." A few days later, Angela Bradstreet, the Governor's appointed Labor Commissioner issued a memorandum to the staff of the Division of Labor Standards Enforcement ("DLSE"), stating:

> *"All staff must follow the rulings in the* Brinker *decision effective immediately and the decision shall be applied to pending matters. Please ensure that any wage claim filed with DLSE that has a meal or rest period issue is reviewed by your Senior Deputy prior to making any final determination on its merits."*

Meal and Rest Break Requirements

Pursuant to the California Labor Code and wage orders, an employer may not employ someone for a work period of more than five hours per day (six in the motion picture industry) without providing the employee with an unpaid meal period of not less than thirty minutes. (A second meal period may also be required if the employee works more than ten hours per day.) Additionally, a California employer must "authorize and permit" its non-exempt employees to take a ten-minute rest break for each four-hour work period "or major fraction thereof." If an employer fails to provide an employee with a required meal or rest period, the employer is required to pay that employee one additional hour of pay, at the employee's regular rate, for each workday that a required break is not provided. Particularly in light of the onslaught of class action lawsuits alleging meal and rest period violations, in recent years, California employers have struggled to comply with these break time requirements. Of particular concern has been the timing of these breaks and what to do when meal and rest periods were provided but not taken by employees.

The Court's Rulings

In *Brinker*, the Court of Appeal overturned a lower court order certifying a class of over 59,000 current and former restaurant employees alleging various claims, including meal and rest period violations. Brinker, the owner of Chili's and other restaurant chains, had specific policies in place expressly

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INDEPENDENT CONTRACTOR OR NOT?

MS&K IS PLEASED TO OFFER "INDEPENDENT CONTRACTOR OR NOT? GETTING IT WRONG CAN REALLY HURT." JOIN MEMBERS OF OUR LABOR, INTELLECTUAL PROPERTY AND TAX DEPARTMENTS IN A DISCUSSION OF THE SIGNIFICANT EMPLOYMENT LAW, INTELLECTUAL PROPERTY AND TAX RAMIFICATIONS OF CLASSIFYING AND MISCLASSIFYING WORKERS AS INDEPENDENT CONTRACTORS.

WHEN: TUESDAY, OCTOBER 7, 2008
REGISTRATION 8:30 - 9:00 A.M.
PROGRAM 9:00 - 11:00 A.M.

WHERE: MS&K, 11377 W. OLYMPIC BOULEVARD, LOS ANGELES, CA 90064

RSVP: MARY MARSHALL, MQM@MSK.COM OR (310) 914-7981 BY SEPTEMBER 29

THERE IS NO CHARGE TO ATTEND.

A MSK

Q: SHOULD MY COMPANY ADOPT A WRITTEN MEAL AND REST PERIOD POLICY?

A: ABSOLUTELY. THE POLICY IN *BRINKER* IS WHAT HELPED ESTABLISH THAT BREAK PERIODS WERE PROVIDED. BY DRAFTING A POLICY TO INFORM EMPLOYEES OF THEIR ENTITLEMENT TO MEAL AND REST PERIODS AND ENCOURAGING EMPLOYEES TO TAKE THEM, EMPLOYERS CAN PRESENT STRONG EVIDENCE OF THEIR COMPLIANCE

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informing employees of their entitlement to meal and rest breaks, but the plaintiffs alleged that employees did not always take their breaks or did not take them at the appropriate time.

For the first time, a California Court of Appeal held that, while employers *may not impede, discourage or dissuade* employees from taking meal periods, "they need only provide them and not *ensure* they are taken." This is an extremely significant development as it has been the DLSE's position that employers are obligated to ensure that meal breaks are taken. Additionally, with respect to the timing of meal breaks, the Court further held that "employers *are not* required to provide a meal period for every five consecutive hours worked." In *Brinker*, in order to have sufficient staff available during peak customer service hours, some employees were required to take their meal periods soon after starting their shifts. In such cases, employees might work more than five hours after completing their meal breaks. The plaintiffs argued that, in such cases, a violation occurred because the employer did not provide a meal break for every five hours *on the job*. The Court said that "rolling" five-hour meal breaks were not required and that employers need only provide a meal break *at some time* during the entire shift *if the employee worked at least five hours in the day*. Indeed, the Court acknowledged that there would be instances when both employers and employees would desire to schedule meal periods early or late in a shift, in order to permit employees to work during peak customer hours, when tips would be greatest.

The *Brinker* court reached similar conclusions regarding rest periods. Specifically, it held that, while employers may not "*impede, discourage or dissuade* employees from taking rest periods, they need only provide, not ensure, rest periods are taken." Further, while encouraging employers to *strive* to schedule 10-minute rest breaks in the middle of each four-hour work period, "they need not, where impracticable, be in the middle of each work period."

Brinker is an extremely significant victory for employers, not only because it provides clear guidance on a disputed area of law, but also because it eliminates from the arsenal of the plaintiffs' bar some of the most frequently alleged claims in employment class action lawsuits.

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WITH THE LABOR CODE AND WAGE ORDERS.

Q: SHOULD I STILL SCHEDULE MEAL AND REST PERIODS FOR MY NONEXEMPT EMPLOYEES?

A: YES. EMPLOYERS STILL HAVE A DUTY TO *PROVIDE* MEAL AND REST PERIODS, AND IF AN EMPLOYEE MISSES A BREAK, HE MAY STILL CONTEND THAT THE COMPANY "IMPEDES, DISCOURAGES OR DISSUADES" EMPLOYEES FROM TAKING THEM. BY SCHEDULING BREAKS, EMPLOYERS CAN ELIMINATE DISPUTES OVER THE REASON BREAKS HAVE NOT BEEN TAKEN. MOREOVER, IT IS POSSIBLE THAT *BRINKER* WILL BE APPEALED, LEADING THE DLSE TO CHANGE ITS POSITION IN THE FUTURE.

Q: MY EMPLOYEE WOULD PREFER NOT TO CLOCK OUT AND WANTS TO EAT LUNCH AT HER DESK WHILE WORKING. MAY I FORCE HER TO CLOCK OUT AND TAKE A LUNCH BREAK?

A: YES, AN EMPLOYER MAY REQUIRE ITS EMPLOYEES TO TAKE MEAL AND REST BREAKS. WHILE *BRINKER* MAKES CLEAR THAT NO PENALTY WILL BE INCURRED IF THE DECISION TO SKIP A MEAL IS TRULY VOLUNTARY, EMPLOYERS SHOULD STILL BE CAUTIOUS ABOUT ALLOWING EMPLOYEES TO MISS THEIR MEAL OR REST BREAKS. IN ADDITION TO POSSIBLE CLAIMS THAT THE DECISION TO SKIP THE BREAK WAS *NOT* VOLUNTARY, EMPLOYERS MAY END UP PAYING AN EMPLOYEE FOR COMPLETELY NONPRODUCTIVE TIME THAT IS NOT OTHERWISE LEGALLY COMPENSABLE.