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Brinker v. Superior Court:

California Supreme Court Clarifies Meal and Rest Break Rules, but Compliance Challenges and Class Action Risks Remain

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Twelve years and hundreds of meal and rest break class actions after California employees were given the right to seek monetary relief for these claims, California's highest court issued a sermon from the mount that will impact not only employers who conduct business in California, but all employers who are at risk of employment class actions. Unlike many high court rulings, the California Supreme Court in *Brinker Restaurant Corp., et al. v. Superior Court*, chose not to "stay within the lines," but rather addressed issues that have bedeviled California employers and lower courts alike in an attempt to lift the fog. In addition, the *Brinker* Court waded waist deep into the pool of class action jurisprudence, and in doing so, paid homage to a core principle of *Wal-Mart Stores, Inc. v. Dukes*, while assiduously steering clear of other precepts from the US Supreme Court's groundbreaking opinion of last year.

For those of you who like to keep scorecards, the Court's ruling breaks down essentially as follows:

Meal Periods

- An employer's duty with respect to meal periods is an obligation merely to provide a meal period to its employees (and not to ensure that they take it), which is satisfied if the employer relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break (which includes the freedom to attend to any personal business, including leaving the premises), and does not impede or discourage employees from doing so.
- If work continues during an off-duty meal period, the employer will not be liable for premium pay but, at most, will be liable for straight pay, and then only when it "knew or reasonably should have known that the worker was working through the authorized meal period."[1]
- An employer's obligation is to provide a first meal period after no more than five hours of work and a second meal period after no more than ten hours of work.
- The Court vacated the trial court's certification of a meal period subclass, but only because the class definition was overbroad in that it included individuals whose only injury, if any, would have been because of a violation of certain meal period timing requirements, which the Court had rejected. In light of the Court's substantive meal period rulings, the Court remanded the question of meal period subclass certification for reconsideration.

Rest Periods

- Employees are entitled to a ten minute rest break for shifts from three and one-half to six hours in length, 20 minutes for shifts of more than six hours up to ten hours, 30 minutes for shifts of more than ten hours up to 14 hours, and so on.
- 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.
- Employers do not have a legal duty to permit their employees to take a rest break before any meal break.
- With respect to the plaintiffs' rest period subclass, the Court reversed the Court of Appeal's decision, and thus reinstated this subclass, holding, in part in reliance on the existence of Brinker's uniform rest break policy, that the fact that rest periods can be waived does not necessarily preclude treatment of rest period claims on a class basis.

Off-the-Clock Claims

- The Court found that no substantial evidence supported the trial court's conclusion that common issues predominated with respect to the plaintiffs' off-the-clock claims, and therefore upheld the Court of Appeal's decision vacating certification of this subclass.
- The fact that employees have clocked out for meal breaks creates a presumption that they are doing no work, which the employees have the burden of rebutting in order to establish their off-the-clock claims.

Determining Predominance at the Class Certification Stage

- In determining whether common issues predominate at the class certification stage, a trial court need only resolve those threshold factual and legal issues that are *necessary* to the resolution of the class certification issue, and should go no further.

However, as is typically the case, the box scores will only tell you so much, and much of the significance of the *Brinker* decision can be found only in the rich text of the 54-page opinion.

Meal Period Claims

An employer must relieve the employee of all duty for the designated period, but need not ensure that the employee does no work

The issue of whether employers must "provide" or "ensure" meal periods has been at the heart of many class actions since employees were given a private right of action for monetary relief in 2000. In *Brinker*, the Court held that "[a]n employer's duty with respect to meal breaks . . . is an obligation to provide a meal period to its employees. The employer satisfies this obligation if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so."[2] Moreover, the Court, in a footnote of which employers should take particular note, clearly states that if the employee who is properly provided a meal period nevertheless continues to work, "the employer will not be liable for premium pay."[3] At most, employers will be liable for straight time pay, and then only if they "knew or reasonably should have known that the worker was working through the authorized meal period."[4]

In this regard, the Court's ruling dealt a lethal blow to that particular basis for meal period class action lawsuits. However, for years, class action plaintiffs have been seeking certification of meal period classes under the alternate theories of "ensuring" and "permitting," so the impact of the Court's ruling will be to simply eliminate that particular weapon from their arsenal, while permitting them to press for certification under the latter.

One practical consequence for employers is that they are no longer required to strictly monitor, for meal period compliance purposes, the activities of their employees during properly provided meal periods. However, California employers will still need to police how their non-exempt employees utilize their meal periods. As stated by the Court, an employer's duty is to relieve its employees of all duty,

relinquish control over their activities and permit them a reasonable opportunity to take an uninterrupted 30-minute break (which includes the freedom to attend to any personal business, including leaving the premises), and not to engage in conduct that impedes or discourages employees from doing so. The Court expressly stopped short of defining what may be sufficient in different industries, thus leaving the contours of the rule to be defined through litigation.

Meal Period Timing

The plaintiffs in *Brinker* had argued that California law requires employers to provide a second meal period no later than five hours after the end of a first meal period, if the shift were to continue. That position had been unsupported by either the statutory law, controlling legal authority, or the recent pronouncements of California's Division of Labor Standards Enforcement ("DLSE"), but remained an unsettled area of California law. Referred to as the "rolling five hour" rule, the Court showed particular interest in this issue during the briefing stage and at oral argument, and many prognosticators had forecast a victory for employees on this issue. They were wrong. The Court, engaging in a painstaking historical analysis of the California Labor Code and Wage Orders, concluded that those two sources were congruent on the requirements, and that an employer's obligation is to provide a first meal period after no more than five hours of work (i.e., no later than the beginning of the sixth hour) and a second meal period after no more than ten hours of work (i.e., no later than the beginning of the eleventh hour).

This ruling too will make it more difficult for employees to have meal period timing classes certified. Somewhat surprisingly, however, the Court did set in concrete the outer boundaries regarding the timing of meal breaks, and (unlike with respect to rest breaks) expressed indifference to the practical challenges employers may encounter in scheduling these breaks to comply with the newly delineated requirements. For example, an employer whose workforce is subject to unpredictable changes that impact shift schedules, such as those in the airline industry, or those whose employees are peripatetic by nature or otherwise perform their jobs outside the workplace, may have difficulty satisfying these meal timing requirements. In addition, with respect to second meal breaks, employers will need to be diligent in ensuring that their written waiver policies (for shifts between ten and twelve hours) incorporate *Brinker*'s timing requirement so that employees can make an informed decision regarding whether to waive their second break.

Leaving the Premises

One area of the Court's decision that is likely to be a fertile source for more litigation and judicial interpretation is *Brinker*'s holding that an employer's obligation to satisfy its duty to provide a meal period to its employees includes the duty to permit employees the freedom to leave the premises. The Court addressed this issue in the context of its ruling on the "ensure versus provide" question, but this issue can be viewed as a distinct claim under California law. The *Brinker* Court discussed at great length what it means to provide an "off-duty" meal period under California law. Specifically, it held that an "off-duty" meal period means "an uninterrupted 30-minute period during which the employee is relieved of all duty," meaning that the employee must be free to attend to any personal business, and must be free to leave the premises.[5] Failure to provide an off-duty meal period (or obtain a written agreement to an on-duty meal period, if circumstances permit) renders the employer liable for premium pay.

Claims based on an employer's failure to permit employees to "leave the premises," have been percolating through the California courts in the years leading up to the *Brinker* decision, and may gain momentum in the wake of this ruling. Employers with work facilities that are geographically isolated or otherwise offer few areas in which to roam, are particularly vulnerable to these types of claims, and they need to be aware that even the appearance that their employees are captive may expose them to these types of claims.

Court Strikes the Meal Period Subclass

After addressing employers' substantive obligations with respect to meal breaks, the *Brinker* Court agreed with the Court of Appeal's reversal of the trial court's order certifying a meal break class, but, significantly, on far narrower grounds than the intermediate appellate court had done. The latter had vacated the certification of all the subclasses because, among other reasons, the trial court had failed to resolve the threshold elements of the plaintiffs' claims before determining predominance. However, the California Supreme Court rejected the meal break subclass and remanded it to the trial court for further determination, solely on the grounds that the trial court had reached an erroneous legal conclusion on the "rolling five hour" issue and therefore the subclass had been tainted by the inclusion of those who might have had a claim under that theory.

Plaintiffs' attorneys will undoubtedly seek to cabin this reversal of the trial court's class certification order to its unique facts, and will seek sustenance from Justice Werdegar's concurrence which said, in part, that the rumors of the demise of class certification for missed meal breaks are greatly exaggerated. In fact, Justice Werdegar, who authored the Court's main opinion, went out of her way to state that "the opinion of the court does not endorse Brinker's argument, accepted by the Court of Appeal, that the question why a meal period was missed renders meal period claims *categorically* unenforceable. Nor could it, for such a per se bar would be inconsistent with the law governing reporting obligations and our historic endorsement of a variety of methods that render collective actions judicially manageable."[6] However, *Brinker*'s rulings provide ample grist for employers to refute such arguments, including its conclusion that "[p]roof an employer had knowledge of employees working through meal periods will not alone subject the employer to liability for premium pay; employees cannot manipulate the flexibility granted them by employers to use their breaks as they see fit to generate liability."[7]

Rest Period Claims

The number and timing of rest periods

On the issue of rest breaks, the Court got even more granular than with respect to meal breaks, holding that "[e]mployees 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."[8] Significantly, the Court rejected the plaintiffs' argument that employers had an absolute obligation to permit a rest break before a meal break, holding that an employer's obligation was merely to make a good faith effort to authorize and permit rest breaks in the middle of each four-hour work period, "but may deviate from that preferred course where practical considerations render it infeasible."[9] The Court concluded that, in the context of an eight-hour shift, one rest break should fall on either side of the meal break, but that "[s]horter or longer shifts and other factors that render such scheduling impracticable may alter this general rule."[10] The trigger for the entitlement to a rest period, for those employees who work more than three and one-half hours, is having worked a "major fraction" – or just greater than half – of each four-hour work period.

Certification of the Rest Period Subclass

Brinker's rest break policy was included on a form to be signed by all its employees. The form provided: "If I work over 3.5 hours during my shift, I understand that I am eligible for one ten-minute rest break for each four hours that I work."[11] There was apparently no dispute that this policy was uniformly applied to all employees and, according to the plaintiffs, Brinker executives testified that the company's policy did not authorize and permit a rest period until after an employee had worked a full four hours, instead of "four hours or major fraction thereof," as set forth under the California regulations. On this basis, the trial court certified the rest period subclass. The certification was reversed by the Court of

Appeal, which adopted a less generous interpretation of the rule regarding the number of rest periods to be provided, and further went on to hold that because rest periods can be waived, determining whether Brinker violated California law as to those employees who missed or took shortened rest periods would require predominantly individualized inquiries into the reasons why those breaks were missed or shortened.

Unlike its ruling with respect to the meal period subclass, the Court reversed the Court of Appeal and reinstated the trial court's class certification decision for two reasons. First, the Court disagreed with the Court of Appeal's interpretation of the number of rest periods to be provided. As noted above, the trigger for entitlement to a rest period is having worked a "major fraction" (i.e., just more than half) of a four-hour work period, not having worked the *full* four-hour work period. Second, the Court held that class certification of the rest period subclass was appropriate because resolution of those claims did not depend on the sufficiency of any individual employee's waiver of the right to take a rest break. Rather, class wide liability could be established through common proof if the plaintiffs were able to demonstrate that, for example, "Brinker under [its] uniform policy refused to authorize and permit a second rest break for employees working shifts longer than six, but shorter than eight, hours."[12]

Ironically, notwithstanding its favorable rest break class determination for the plaintiffs, the Court observed that such a result would actually benefit employers because, by avoiding early threshold determinations on the merits, the courts, in certifying a class, would allow employers to obtain the preclusive benefits from a later victory on the merits as to an entire class, and not just the named plaintiffs.

As a practical matter, given the Court's failure to provide any concrete guidance in its opinion with respect to the certifiability of meal period classes, plaintiffs may apply the Court's rest break certification analysis to meal break claims. For employers, the best advice is to shore up your written policies to ensure full compliance with California law, and communicate and implement those policies fully. The problem for the employer in *Brinker* was that the Court found evidence of a common rest break policy applied uniformly in violation of law. Before or after *Brinker*, there is a good chance a claim presenting these circumstances would be certified.

Court Strikes the Certification of the Off-the-Clock Subclass

Regarding the plaintiffs' off-the-clock subclass, the Court held that no substantial evidence existed to support the trial court's certification of that subclass. This subclass was essentially derivative of the plaintiffs' meal period claims, in that the plaintiffs claimed that Brinker required them to work while clocked out for their meal periods. Unlike the plaintiffs' rest period claims – which the Court held were supported by evidence of a common policy – Brinker's written policies disavowed off-the-clock work, and the plaintiffs had not provided substantial evidence that the company systematically pressured employees to work off the clock. In language that is sure to be cited by employers in defending off-the-clock and meal break claims, the Court concluded: "that employees are clocked out creates a presumption they are doing no work, a presumption [plaintiffs] and the putative class members have the burden to rebut."[13]

Brinker's Class Action Analysis

Within the first two paragraphs of its opinion, the *Brinker* Court left no doubt of its intent to cast a long shadow on class action jurisprudence – "We granted review to consider issues of significance to class actions generally . . . ."[14] and then spent eight pages discussing those issues. Of particular significance in discussing the element of predominance, the Court drew liberally from both California and federal cases (including several from outside of the Ninth Circuit). It also paid homage to *Wal-Mart Stores, Inc. v. Dukes*, the seminal US Supreme Court case from

last year, which has had powerful reverberations on class cases of all stripes during the past ten months. The *Brinker* Court's reliance on federal, as well as California state cases, stems from the similarities between the elements of a class action under California law and Rule 23 of the Federal Rules of Civil Procedure.

Wal-Mart v. Dukes concluded, in part, that determinations of commonality under Rule 23 often "entail some overlap with the merits of the plaintiff's underlying claims."[15] Here, the *Brinker* Court acknowledged that principle in the context of discussing the predominance element, but cautioned against taking that principle too far: "A class certification motion is not a license for a free-floating inquiry into the validity of the complaint's allegations; rather, resolution of disputes over the merits of a case generally must be postponed until after class certification has been decided."[16] In seeking to draw the boundaries for determinations at the class certification stage, the *Brinker* Court instructed the trial courts as follows:

> Presented with a class certification motion, a trial court must examine the plaintiff's theory of recovery, assess the nature of the legal and factual disputes likely to be presented, and decide whether individual or common issues predominate. To the extent the propriety of certification depends upon disputed threshold legal or factual questions, a court may, and indeed must, resolve them. Out of respect for the problems arising from one-way intervention, however, a court generally should eschew resolution of such issues unless necessary. Consequently, a trial court does not abuse its discretion if it certifies (or denies certification of) a class without deciding one or more issues affecting the nature of a given element if resolution of such issues would not affect the ultimate certification decision.[17]

In sum, in determining whether to certify a class, trial courts may only resolve those threshold factual and legal issues that are "*necessary*" to resolution of the class determination (emphasis in original).[18]

Both plaintiffs and defendants may draw heavily from this holding, depending upon the particular facts and circumstances of the class case. Moreover, it may be cited by defendants as a basis to limit the scope of pre-certification discovery, by contending that discovery must be limited solely to those facts and legal issues that are essential to determining the certifiability of the class.

Use of Survey and Statistical Evidence

One issue that was highlighted by the plaintiffs in their appeal concerned the proper use of statistical, survey and representative evidence at the class certification stage. The plaintiffs viewed the Court of Appeal's decision as having established a complete bar to the use of such evidence to establish that a class should be certified, and specifically asked the Court to reverse that aspect of the Court of Appeal's decision. The Court, however, ducked the issue, leaving it to the lower courts to determine the weight, if any, to be afforded such evidence at the class certification stage. Justice Scalia, in the *Dukes* decision, cast a jaundiced eye at the use of such evidence to determine commonality under Rule 23, concluding, for example, that even a statistical study seemingly showing disparities between men and women vis-a-vis promotions was not enough to support certification of a class. Defendants have relied upon the *Dukes* majority's skeptical view of such data in opposing class certification, and in the absence of the *Brinker* Court's discussion on the subject, will continue to do so. Plaintiffs in class cases, however, will undoubtedly cite to Justice Werdegar's language in her concurrence (which was joined by another Justice) that "[r]epresentative testimony, surveys, and statistical analysis all are available as tools to render manageable determinations of the extent of liability"[19] to support their use of such evidence to certify a class. However, the absence of any such references to this type of evidence in the Court's main opinion suggests that the majority of the Court wanted to let the lower courts figure it out.

Conclusion

For employers who were looking for clarity with respect to certain practical aspects of meal and rest break law in California,

the *Brinker* Court did not disappoint. However, there are still challenges to compliance with the rules in the wake of the decision, including the timing of meal periods and the provision of compliant "off duty" meal periods as defined by the majority. While the decision inflicts sizeable wounds on the plaintiffs' class action bar vis-a-vis meal and rest break cases, it does not foreclose such actions in the future, and may even have opened windows into other areas.

1 Slip op. at 35 n.19.

2 Slip op. at 36.

3 Slip op. at 35 n.19.

4 *Id.*

5 Slip op. at 28, 30.

6 Slip op., Werdegar, J., concurring at 1 (emphasis in original).

7 Slip op. at 36.

8 Slip op. at 20.

9 Slip op. at 22.

10 Slip op. at 23.

11 Slip op. at 25.

12 *Id.*

13 Slip op. at 52.

14 Slip op. at 2.

15 *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. --- (2011), slip op. at 10.

16 Slip op. at 11.

17 Slip op. at 13-14 (citations omitted).

18 Slip op. at 10 (emphasis in original).

19 Slip op., Werdegar, J., concurring at 4.

If you would like more information about the *Brinker* decision or Weil's employment law practice, please speak to your regular contact at Weil, or to:

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