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BRINKER, *BRINKLEY*, AND BEYOND: SURVEYING CALIFORNIA'S WAGE-HOUR FIELD OF BATTLE

The California Supreme Court's October 22, 2008, and January 14, 2009, grants of review (and consequent depublications) of the Court of Appeal decisions in *Brinker Restaurant Corp. v. Superior Court (Hohnbaum)*, 2008 WL 2806613 (Cal. Ct. App., July 22, 2008), and *Brinkley v. Public Storage,* 2008 WL 4716800 (Cal. Ct. App., October 28, 2008), have caused great optimism for some within the plaintiff's bar. They anticipate that the Supreme Court will undo these lower court holdings that (i) an employer's obligation is to authorize meal periods, not ensure that they are taken, and (ii) the individualized nature of that inquiry renders meal and rest period claims not amenable to class treatment.

That optimism may be misplaced. The legal landscape before, during, and after the Supreme Court's grant of review appears at least to level the field for employers on these questions. Various decisions, as well as prior statements from the Supreme Court, potentially counsel in favor of upholding the conclusions reached by the lower courts in *Brinker* and *Brinkley*. Additionally, the procedural history of *Brinker* cautions against taking any inference from the Supreme Court's grant of certiorari. If anything, the unique procedural history of this matter suggests that the Supreme Court had determined to review these issues even before the *Brinker* decision was rendered, regardless of its outcome. In all events, it is likely that defendants' and plaintiffs' wage-hour lawyers will have many issues to argue about in the wake of the Supreme Court's decision.

THE *BRINKER* DECISION

In *Brinker*, the Court of Appeal held in favor of employers on a broad range of issues concerning when an employer's obligation arises to "provide" meal and rest periods to its employees, and what that obligation requires of the employer. Most notably, the court held that an employer's obligation to "provide" employees with a meal period means that the employer must make meal periods "available," not "ensure" they are

taken. The court also suggested that, in all but rare cases, meal and rest period claims are not appropriate for class-wide adjudication because a failure to "provide" must be decided on a "case-by-case basis." Specifically, the court stated that "[i]t would need to be determined as to each employee whether a missed or shortened meal period was the result of an employee's personal choice, a manager's coercion, or, as plaintiffs argue, because the restaurants were so inadequately staffed...." In short, although not a total bar to class certification, the *Brinker* standard renders class certification far more difficult.

PRIOR TO *BRINKER*: CONCURRENCE AMONG THE COURTS

Prior to the *Brinker* decision, a broad consensus had emerged among federal courts that the "provide" standard requires an employer to make meal and rest periods available, not to ensure that they are taken. *See e.g.*, *White v. Starbucks*, 497 F. Supp. 2d 1080, 1086, 1089 (N.D. Cal. 2007) ("[T]he court agrees that the words 'authorize' and 'permit' only require that the employer make rest periods available"; employers are required to "offer meal breaks, without forcing employers actively to ensure that workers are taking those breaks"); *Brown v. Federal Express Corp.*, 2008 WL 906517, *1, 5, 7 (C.D. Cal. Feb. 26, 2008) (determination whether the defendant made meal periods available requires "substantial individualized fact findings"); *Kenny v. Supercuts, Inc.*, 2008 WL 2265194, *1, 6, 7 (N.D. Cal. June 2, 2008) ("whether defendants failed to provide a class member with a meal period on a particular day is an individualized question that can only be resolved with individual trials").

Likewise, those courts to reach the issue after *Brinker*, and before the Supreme Court's decision to review it, continued the drumbeat. *See Perez v. Safety-Kleen Sys., Inc.*, 2008 WL 2949268 (N.D. Cal. July 28, 2008) (adopting *Brinker*-like standard; granting summary judgment in favor of employer where it posted the Industrial Welfare Commission's ("IWC") Wage Order in the branch offices and in the employee handbook despite the fact that it never scheduled meal breaks for plaintiffs); *Kimoto v. McDonald's Corp.*, 2008 WL 4069611, *5 (C.D. Cal. Aug. 28, 2008) (adopting *Brinker*-like standard, granting summary judgment in favor of employer).

TEA LEAVES FROM THE SUPREME COURT

Although some may infer from a grant of review that the Supreme Court is inclined to "correct" an errant decision below, the procedural history of the *Brinker* matter, as well as the Supreme Court's prior statements on this topic, render that inference particularly suspect here.

Typically, a reviewing court does not reach issues that were not reached by the lower court whose decision is being reviewed. Accordingly, when the Court of Appeal in *Brinker* first reviewed the trial court's ruling and issued its original "final" decision, it noted that the trial court had failed to reach the question of the meaning of "provide." It remanded the question for resolution by the trial court in the first instance.

The Court of Appeal then did an about-face and enlisted the assistance of the Supreme Court to permit it to do so. Shortly after issuing its "initial" decision, the Court of Appeal wrote a letter to the California Supreme Court requesting that the Supreme Court grant review of the case and immediately transfer it back to the Court of Appeal for reconsideration. (Letter from Fourth Appellate District, Division One, to Chief Justice George, Oct. 26, 2007, *in* No. DO49331.) The Supreme Court obliged, vacated the first decision, and then instructed the Court of Appeal to "reconsider the matter as it sees fit." (Supreme Court Order, Oct. 31, 2007, *in* No. DO49331.) The Court of Appeal's subsequent decision then reached the issue that the trial court had not reached, and held that the "provide" standard did not require an employer to ensure that a meal period was taken.

Particularly in this context, the fact that the Supreme Court has granted review of this second Court of Appeal opinion should not be read to signal disapproval of the Court of Appeal's *Brinker* standard. It appears that the Supreme Court actively positioned itself to review the question before the trial court or Court of Appeal had articulated a resolution of the issue below. As such, the only inference fairly drawn from the grant of review is a desire by the Supreme Court to settle this area of law, once and for all.

Moreover, the California Supreme Court's prior decision in *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal. 4th 1094, 1104 (Cal. Ct. App. 2007), may reveal its thinking on the issue now squarely before it. In *Murphy*, the California Supreme Court

addressed the question of whether the hour's payment due from an employer to an employee when the employer fails to "provide" a meal or rest period was a "wage" or a "penalty." In resolving that question, a unanimous Supreme Court described the failure to "provide" that prompts payment, as follows: "[a]n employee *forced to forego* his or her meal period similarly loses a benefit to which the law entitles him or her." The Supreme Court's description is consistent with the *Brinker* court's central holding. To "provide" is to make available, not to ensure. Although prior dicta (if that is what this is) of the Supreme Court is not binding on it, it does carry significant weight with the lower courts—*e.g., County of Fresno v. Superior Court*, 82 Cal. App. 3d 191, 194 (1978) ("Dicta may by highly persuasive, particularly where made by the Supreme Court after the court has considered the issues and deliberately made pronouncements thereon intended for guidance of the lower court upon further proceedings")—and may even reveal a prior unanimous conclusion on the subject.

AFTER THE GRANT OF REVIEW: THE BEAT GOES ON

Six days after the Supreme Court granted review and depublished *Brinker*, another district of the Court of Appeal reached the same result in *Brinkley v. Public Storage,* 2008 WL 4716800 (Cal. Ct. App., October 28, 2008). Without citing *Brinker*, the *Brinkley* court concluded that the plain meaning of "provide" is "to supply or make available" and "does not suggest any obligation to ensure that employees take advantage of what is made available to them." Applying that standard, the court granted summary judgment to the employer on plaintiffs' meal and rest break claims on the ground that the employer had informed employees during meetings and in written policies that they were required to take their breaks, and thereby it had discharged its obligation to "provide." As noted above, on January 14, 2009, the California Supreme Court granted review of the *Brinkley* decision, to hold the matter pending its resolution of the issues presented on the *Brinker* review. Given that review was granted in *Brinker*, the Supreme Court's review and hold order concerning the *Brinkley* decision seemed inevitable based on administrative concerns.

Likewise, the day after the Supreme Court granted review, the Division of Labor Standards Enforcement ("DLSE") issued a memorandum that adopts the *Brinker* standard for the interim period during which the Supreme Court considers the matter. The memorandum states that the DLSE is persuaded by the logic of many of the cases cited above, and concludes that, under the language of the statute and existing California Supreme Court and Court of Appeal precedent, "employers must provide meal periods to employees but do not have the additional obligation to ensure that such meal periods are actually taken." Although DLSE opinions have no controlling effect over the Supreme Court, this memorandum is yet another document in support of the *Brinker* standard, and it reinforces the conclusions of *Brinker*, *Brinkley*, and the pre-*Brinker* federal decisions discussed above.

Finally, in *Watson-Smith v. Spherion Pacific Workforce, LLC,* 2008 WL 5221084 (N.D. Cal. December 12, 2008), the District Court reached the same conclusion as the California Courts of Appeal in *Brinker* and *Brinkley*, and held that: "employers have an obligation to *provide* meal breaks, but are not strictly liable for any employee who fails to take a meal break, regardless of the reason." *Id*. at *3.

RECOMMENDATIONS FOR EMPLOYERS

While the future is unknown, courts likely will continue to use a *Brinker* standard for interpreting the obligation to "provide" breaks, at least until the Supreme Court finally decides the issue. An employer must pay a nonexempt employee an hour's pay for failure to provide a meal or rest period in accordance with an applicable order of the IWC. To ensure compliance, employers should consider the following best practices:

- Prominently display signs around the workplace and break rooms stating that employees are authorized to take the meal and rest periods.
- Require each nonexempt California employee to sign a document that (i) advises the employee in writing of his/her right to take meal and rest periods, and (ii) instructs the employee to contemporaneously report via a method that creates a record of same (*e.g.*, written complaint to HR) any conduct witnessed by the employee that prohibits or dissuades any employee from taking a rest or meal period in accordance with the rights set forth in the document. This acknowledgment and obligation—coupled with the

absence of contemporaneous complaints—may provide strong evidence that an employer has satisfied its obligation to "provide" meal and rest periods, as that term is currently defined by the courts.

- Use standardized training materials and handouts in crew and manager training. Standardization of training materials will diminish any claim that mixed signals/confusion vitiated the prior authorizations.
- Periodically review time records of nonexempt employees to determine whether employees are accurately reporting meal periods taken.
- Use caution if you use a "sign-off" form that requires an employee to acknowledge that his/her time records are accurate and that he/she has actually taken authorized meal and rest periods. A recently enacted California statute, AB 2075, effective January 1, 2009, makes it unlawful for an employer to require an employee sign-off on any record of hours worked that the employer knows to be unlawful. Such forms should include a statement that the employee must report only actual hours worked and is not obligated to sign an inaccurate form.
- If a nonexempt employee does not report meal periods, inquire of the employee whether the meal period was actually taken but not recorded.
- Discipline or counsel any supervisors who dissuade or instruct employees to miss meal or rest periods.

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

Mark D. Kemple
1.213.243.2195
mkemple@jonesday.com

Aaron Agenbroad
1.415.875.5808
alagenbroad@jonesday.com

George S. Howard, Jr.
1.858.314.1166
gshoward@jonesday.com

Robert A. Naeve
1.949.553.7507
rnaeve@jonesday.com