

Fenwick Employment Alert

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EMPLOYERS MUST MAKE MEAL AND REST BREAKS AVAILABLE TO NON-EXEMPT WORKERS; NEED NOT ENSURE BREAKS ARE TAKEN OR FORCE EMPLOYEES TO COMPLY

In a victory for California employers, a California appellate court ruled that an employer's duty to "provide" rest and meal breaks to employees means that the employer need only make such breaks available to employees, and not that it ensure that employees actually take such breaks. In *Brinker v. Superior Court*, hourly employees of several Brinker restaurant chains filed a class action against the chains' owner for failing to provide rest and meal breaks and forcing employees to work off the clock. The trial court certified a class of nearly 60,000 workers, finding that the issues were common to all class members and could be litigated collectively. The court of appeal reversed, established a clear definition of what it means to provide a meal or rest break, and concluded that class treatment was inappropriate.

California law requires that employers provide meal and rest breaks to hourly, non-exempt workers who work in excess of a certain number of hours in a day. Through its ruling, the court resolved a hotly contested issue: whether "provide" means an employer must ensure that non-exempt employees take rest and meal breaks, or whether it must simply make such breaks available. As to both rest and meal breaks, the court held that an employer must make them available to employees, but that it need not force employees to take them, or otherwise "ensure that employees take advantage of what is made available to them." Indeed, the court expressly recognized that to do otherwise would create an impossible task for large employers and create perverse incentives for employees to manipulate the system by intentionally missing breaks.

The *Brinker* court offered other important wage and hour compliance guidance and rejected various interpretations advanced by labor groups and the plaintiffs' bar:

- Rest periods need not be scheduled in the middle of the work period if not practical to do so.
- Meal periods do not need to be provided on a rolling five-hour basis. Therefore, the second meal is not required five hours after the first meal; rather, it must be provided on work days of more than ten hours.
- Meal periods are not required to be scheduled in the middle of shifts.
- Employers are liable for off-the-clock work only if management knew or should have known about the unrecorded work.

In addition to clarifying some murky areas of wage and hour law, the ruling will serve as a significant barrier to class certification in most rest and meal break cases. Specifically, resolution of these issues – whether and why an employee missed a rest or meal break – will typically require an individualized, employee-by-employee inquiry, such that courts will be less likely to certify large classes.

Plaintiffs will likely seek review by the California Supreme Court and request this ruling be depublished. Unless and until such a request is granted, employers can rely on this decision in managing their rest and meal break compliance.

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