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California Supreme Court Issues Long-awaited Decision Regarding Rest and Meal Breaks

By Michael Mishlove, Esq.

On April 12, 2012, the California Supreme Court handed down a long-awaited decision in *Brinker Restaurant Corp., et al. v. Superior Court of San Diego County*, No. DOO49331 (April 12, 2012). The decision has already received much press because it concerns an employer's obligations under California law regarding how and when to provide rest and meal breaks to employees. A less-publicized, but no less important, aspect of the case concerns class certifications in employment litigation.

Employer Obligations Regarding Rest and Meal Breaks

Brinker Restaurant Corporation owns and operates restaurants throughout California, including such familiar eateries as Chili's Grill & Bar and Maggiano's Little Italy. The named plaintiffs in this litigation are all current or former hourly, non-exempt employees at one or more of Brinker's restaurants. The plaintiffs' complaint alleges, among other things, that Brinker failed to provide employees rest breaks and meal breaks, or premium wages in lieu thereof, due them under

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California law. With respect to the obligations of employers to provide meal and rest breaks, the California Supreme Court looked at three issues: (1) when rest periods must be provided; (2) when meal breaks must be provided; and (3) whether an employer must ensure employees perform no work during a meal period, or rather just make sure that a meal period is made available to employees.

In regards to rest periods, California law states, "Every employer shall authorize and permit all [non-exempt, hourly] employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 ½) hours." IWC Wage Order No. 5, subdivision 12.

At issue was the timing of the rest periods. The state Court of Appeal interpreted this language to mean that employees are entitled to 10 minutes' rest for shifts of three and one-half hours or more, to 20 minutes' rest for shifts of seven and one-half hours or more, and so on. The California Supreme Court rejected this interpretation and held that an employer's requirement under California law is as follows:

- 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; and
- 30 minutes for shifts of more than 10 hours up to 14 hours, and so on.

With regard to meal periods, subdivision 11(A) of Wage Order 5 provides, "No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes," absent a mutual waiver in limited circumstances. Subdivision 11(A) further provides, "[u]nless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an 'on duty' meal period and counted as time worked." In addition to Wage Order No. 5, section 512 of the California Labor Code establishes a statutory (as well as a wage order) obligation: an employer must "provide the employee with a meal period of not than less than 30 minutes" for workdays lasting more than five hours and provide two meal periods for workdays in excess of 10 hours, subject to waiver in limited circumstances.

The plaintiffs argued that this language required employers to not only provide meal breaks but also to ensure that no work is performed by employees during meal breaks. The California Supreme Court rejected that interpretation and held that employers only must "relieve[] its employees of all duty, relinquish[] control over their activities and permit[] them a reasonable opportunity to take an uninterrupted 30-minute break" without impeding or discouraging the employee from doing so. Further, employers have no obligation to police meal breaks to ensure no work is being performed, and an employee working during a meal break will not automatically place an

employer in violation of the law and subject the employer to liability for premium pay.

With respect to the timing of meal periods, the California Supreme Court concluded that "absent waiver . . . a first meal period [is required] no later than the end of an employee's fifth hour of work, and a second meal period no later than the end of an employee's 10th hour of work." *Id*. at 37. In so holding, the Court rejected the plaintiff employees' contention that California law required a second meal period no later than five hours after the end of the first meal period if a shift is to continue.

Implications for Class Action Employment Litigation

In addition to the much-publicized meal and rest period issues, the *Brinker* case also decided important class certification questions that will affect employers defending against class action lawsuits in California. In *Brinker*,the plaintiffs sought to bring their claims on behalf of themselves and a class of all current and former non-exempt Brinker employees who worked at a Brinker-owned restaurant in California from August 16, 2000, to the present - approximately 60,000 employees. The trial court certified the plaintiffs' proposed classes and subclasses without first resolving certain threshold factual and legal disputes pertaining to the scope of Brinker's duties to provide meal and rest periods, which are discussed above. The California Court of Appeal reversed the trial court, finding it erred by not first resolving those threshold factual and legal disputes.

As to this procedural aspect of the case, the California Supreme Court disagreed with the Court of Appeal, holding that it is not error *per se* for a trial court to forego addressing and resolving disputed questions of fact or law prior to certifying a class. To the contrary, very often it will be entirely proper for a trial court to rule on the class certification issue without any consideration whatsoever of threshold factual or legal issues that are in dispute. However, if the propriety of a class certification depends upon the disputed threshold legal and factual questions, then indeed the trial court must consider and resolve those questions. Otherwise, a trial court should generally avoid considering and resolving such disputes when deciding whether to certify a class of plaintiffs.

This decision is important for employers because defendant employers often resist class certification by raising all manner of threshold disputes going to the elements necessary for class certification. To the extent the *Brinker* decision stands as authority upon which a trial court can rely to avoid addressing such disputes, the opinion may be regarded as somewhat plaintiff-friendly. However, such a perspective is somewhat myopic insofar as sometimes resolution of a dispute through class-action litigation truly is in the best long-term interests of defendants (notwithstanding the short-term cost and inconvenience) because of the added measure of finality and claim preclusion achieved through class litigation.

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D.C. Circuit Enjoins NLRB Notice-Posting Rule

By Vincent T. Norwillo, Esq.

Yesterday, the United States Court of Appeals for the District of Columbia enjoined the National Labor Relations Board (NLRB) from enforcing its Employee Rights Notice-Posting Rule. *Nat'l Ass'n of Mfrs. v. NLRB*, (D.C. Cir., No. 12-5068, *injunction pending appeal*, April 17, 2012). The injunction was issued just days after a federal judge in South Carolina ruled that the NLRB lacked statutory authority to promulgate the rule. *Chamber of Commerce v. NLRB,* (D.S.C. No.11-cv-2516, April 13, 2012).

The injunction has two significant results: 1) the Notice-Posting Rule will *not* go into effect on April 30, 2012 as previously scheduled; and 2) the Rule will remain suspended while the Court of Appeals resolves the legal challenges that have been filed in an attempt to rescind the Rule altogether. Accordingly, employers should not post the Notice of Employee Rights required by the Rule, pending further instruction from the Court. Since the Court of Appeals is not even scheduled to hear oral arguments on the legal challenges to the Rule until September, it is unlikely that this issue will be resolved until after November's presidential election. Of course, GSH will continue to provide updates on any further significant developments on this matter.