

# The *Brinker* Decision: Analysis and Guidance

By CalChamber Employment Law Counsel

In April 2012, the California Supreme Court finally released its long awaited decision in *Brinker Restaurant Corp. v. Superior Court*. This white paper provides a summary of the key decision.

The most critical part of the decision is that **employers do not have to ensure employees take their meal breaks**. The state Supreme Court also provided some additional flexibility to employers regarding timing issues.

The unanimous ruling is largely a win for California employers, but is not without potential pitfalls. Employers with vague policies may expose themselves to increased liability, and the case makes clear that meal and rest break cases are still subject to class action lawsuits.

The *Brinker* decision leaves some meal and rest break questions unresolved. Below is our initial analysis; HRCalifornia will continue to be updated with the latest information.

## Employers will need to examine their meal and rest policies and strengthen their timekeeping practices ...

### Meal Periods

Employees of Brinker International, Inc. (Brinker), the parent company of Chili's restaurants and other restaurant chains, filed this lawsuit eight years ago. The heart of the lawsuit is that Brinker failed to provide its employees with their legally mandated breaks. The case was certified as a class action and involved nearly 60,000 employees.

#### No Obligation to Police Meal Breaks

The state Supreme Court ruled in favor of Brinker on the critical issue in this case — the employer's obligation to provide a meal break. The court concluded that "an employer must relieve the employee of all duty for the designated period, but need not ensure that the employee does no work."

When an employee works for five hours, the employer has a choice: "it must (1) afford an off duty meal period; (2) consent to a mutually agreed upon waiver if one hour or less will end the shift; or (3) obtain written agreement to an on duty meal period if circumstances permit."

## **“Provide” a Meal Break**

What does “provide” a meal period mean? According to the court, the employer satisfies its legal obligation to provide an off duty meal period to its employees if it:

- Relieves its employees of all duty
- Relinquishes control over their activities
- Permits them a reasonable opportunity to take an uninterrupted 30-minute break
- Does not impede or discourage them from doing so

The duty to provide a meal break is an affirmative duty on the part of the employer that must meet the above requirements; it is more than simply making the meal break available. How these requirements are satisfied may “vary from industry to industry.”

## **Employers have an obligation to provide a meal break ...**

Yet, the court emphasized that, once the employer has satisfied the above test, “the employer is not obligated to police meal breaks and ensure no work thereafter is performed.” The employer is to relinquish control over the employee’s time, including whether the employee chooses to work during the meal period.

Importantly, if an employee continues to work after the employer satisfied its obligation of providing a duty-free meal period, the employer is not liable for premium pay. This is good news for employers.

The court held that, at most, the employer will be liable for straight pay and then “only when it ‘knew or reasonably should have known’” that the worker was working through the meal period. (Overtime pay is also possible if the work caused the employer to incur an overtime obligation.)

Post-*Brinker*, the employer’s responsibility to have specific meal and rest break policies and to document that the meal break was provided is even more important.

## **Timing of the Meal Break and No Rolling Five Hour Rule**

The timing for meal periods was set forth by the court in *Brinker*:

- The first meal break must be provided “no later than the end of the employee’s fifth hour of work.”
  - » There is some debate as to whether this means that the break needs to be provided no later than 4:59 minutes into the employee’s shift or at the exact 5:00 mark. The most prudent approach is to err on the side of caution and provide the meal break no later than 4 hours and 59 minutes into the employee’s shift, instead of at the very last minute or second, in order to give the employee the ability to clock out in time.
- The second meal break must be provided “no later than the end of an employee’s 10th hour of work.”

Under *Brinker*, “late lunches” after the end of the employee’s fifth hour are still not permitted. The meal period must be given no later than the end of the employee’s fifth hour of work, as described above.

Thankfully, the court rejected the plaintiff’s argument that meal periods had to be provided on a “rolling” five-hour basis, meaning that an employee would receive a second meal break if more than five hours occurred after the time he/she took the first meal break. Instead the court held that the second meal break must only be provided if an employee works more than 10 hours in a day.

Though the court reiterated the employer’s obligation to provide these meal breaks and offered some clarity over the timing of them, several rules still remain the same:

- Employees who work no more than five hours in one shift are not entitled to a meal break.
- Employees who work more than five hours, but no more than six hours, get a meal period unless they consent to a mutually agreed upon waiver.
- On-duty meal periods: are permitted only when the nature of the work prevents an employee from being relieved of all duty; must be agreed to in writing by you and the employee; must be paid; and can be revoked at any time in writing by the employee. (This is in contrast to the off-duty meal period question that *Brinker* was resolving.) This is a difficult exception to meet and applies in very limited circumstances.

## **Employers are cautioned to know the Wage Order that governs their business ...**

As the court points out, different meal period provisions apply to different industries or occupations, such as Wage Order 12 for the film industry.

### **Off-the-Clock Work**

The court refused to allow the employees to pursue a class action claim against *Brinker* for off-the-clock work. The employees claimed they were required to perform work while clocked out during their meal period.

The court noted that *Brinker* had a specific policy prohibiting off-the-clock work and requiring an employee to notify a manager immediately if time records were not accurately recorded.

In helpful language for employers, the unanimous court held that when employees are clocked out, this creates the presumption that they are doing no work. The court held that anecdotal evidence of individual instances is not sufficient to allow class certification.

## Rest Periods

The court also gave employers welcome guidance as to their exact rest period obligations.

### How Many Rest Breaks Must Be Provided?

Under the pertinent Wage Order, “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.” The court held that a “major fraction” of a four-hour work period is any amount of time over two hours.

The Wage Order also provides that employees working shifts of less than three and one-half hours need not be given a rest break. According to the court, the combined effect of these rules is:

- Employees are “entitled to 10 minutes of 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 for more than 10 hours up to 14 hours, and so on.”

Though the court totaled up the minutes that need to be provided during the course of a shift, the exact requirement is to provide a ten minute rest break for each four hour work period or major fraction thereof.

### Timing of the Rest Break

The state Supreme Court also provided guidance as to the timing of the rest period. The court ruled that 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.”

## In general, rest breaks should fall on either side of the meal period ...

But, the court sided with Brinker and held that there is no absolute obligation to permit a rest period before a meal period. The court stated that “in the context of an eight hour shift, [a]s a general matter,’ one rest break should fall on either side of the meal break ... Shorter or longer shifts and other factors that render such scheduling impracticable may alter this general rule.”

For example, it is not unlawful, per se, to have a meal break at the two hour mark and a rest break at the four hour mark. Employers are given some latitude as they may “deviate from that preferred course where practical considerations render it infeasible.”

However, the court did not explicitly define what “practical considerations” may be legally sufficient to justify an employer’s departure from the general rule.

Thus, employers should still be cautious about departing from the general rule to provide rest breaks in the middle of each work period and should consult with counsel if practical considerations unique to their industry seem to warrant a departure from the general rule.

## Best Practices

This decision does not resolve all issues. Meal and rest breaks will continue to be the topic of much discussion here in California.

The first step for any employer is to draft specific meal and rest break policies for your operation. Though *Brinker* provides employers some flexibility, it is important that your meal and rest break policies clearly specify your chosen legally compliant approach. Vague policies that are subject to interpretation by the employee increase your risk of liability.

Include a discussion of the timing of those breaks and consider whether formally scheduling breaks works for your organization. Periodically remind employees of your policy.

The following are some additional general guidelines:

- Comply with the timing requirements for meal and rest breaks issued by the court.
- Meet your obligation to provide an uninterrupted, 30-minute meal break where the employee is relieved of all duty. Record that you have done so.
- Require employees to accurately record time in, meals, and time out.
- Regularly audit your timecard records to determine whether employees are accurately reporting time and/or if there is a pattern of employees working through meal breaks.
- Educate managers about their obligations relating to meal and rest periods and discipline managers who do not follow policy.
- Inform employees that they should notify management if they have been denied the opportunity to take a meal or rest break.
- Consult with legal counsel regarding the approach that is best for your industry.

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