EMPLOYER'S LEGAL ADVISORY

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The *Brinker* Decision: Rest and Meal Breaks

On April 12, 2012 the California Supreme Court issued its long-awaited decision in *Brinker Restaurant v. Superior Court*. Although the case was primarily brought to determine whether class certification was appropriate for the various causes of action, the court specifically answered threshold questions raised in the case on meal and rest breaks in California.

The Court first considered how to determine the appropriate number of **rest breaks**. The IWC Order at issue in the case states the following:

Every employer shall authorize and permit all 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 1/2) hours.

The court adopted the literal definition of "major fraction thereof" finding that an employee must be given a ten-minute rest period for every four hour segment of the day plus any additional period of more than two (2) hours. The only exception is, as stated in the Order, when an employee's entire workday is three and a half (3 ½) hours or less. Thus, employees must be given one break for daily work hours of three and a half (3 ½ to six (6); an additional break if the employee works between six (6) and ten (10) hours; a third break for a work day of ten (10) to fourteen (14) hours, etc. The Labor Commissioner has followed this interpretation for some time. However, the only requirement with regard to timing of rest breaks is that the rest period must be "insofar as practicable" in the middle of each work period. Assuming this condition is met, no particular sequence of rest and meal breaks is required by the Orders. Thus, a rest break may, in some cases, be taken before or after a meal break.

With regard to **meal periods** the Supreme 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." Thus the employer's obligation is to provide a meal period which is "off duty" such that the employee need not perform any work for at least thirty (30) uninterrupted minutes during which time the employee is free to leave the work premises. The court did not find any affirmative obligation on the part of the employer to ensure that no work is done during this time. Rather, the focus is on the employer relinquishing control over the employee during this period of time. However, even when the employer has properly provided the meal period (and, therefore, is not liable for the one-hour penalty), if the employee continues to work and the employer knows, or has reason to know the employee is continuing to work, the employee must be paid regular compensation for the time worked.

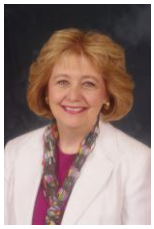
Furthermore, there is no requirement that the employer provide a second meal period if the employee works more than five (5) hours after the end of the first meal period, as long as the employee does not work more than ten (10) hours total in the day. Thus, there is no "rolling" five (5) hour period requirement after the first five (5) hour period of the work day.

For most employers this decision is very welcome news. Supervisors or managers no longer have to "police" when meal periods are taken, as long as the employees are aware that they can take a meal period after no more than five (5) hours worked without repercussions. If employees should decide to continue working (during which time they will be paid) the employer will not be required to pay an additional one-hour penalty. Thus, the employee is now being given greater flexibility with regard to the timing of his/her meal period (assuming the employer wishes to grant this flexibility). Keep in mind that the decision to keep working must be the employee's, not influenced or pressured by the employer. To do so would make the employer liable for the penalty for a meal break that was not provided. It is important to note that the decision did not hold that the employer can provide the meal period at any time during the day as long as there is a meal period for every five (5) hours worked – it must be provided no later than after the first five (5) hours worked.

Notably, even though the employer need not ensure that employees take meal breaks the employer can still require employees to take a meal period (and take it at a particular time) as a matter of its own internal policy, to avoid additional paid time to an employee and/or to make sure that employees are working during times determined by the employer.

Employers have been given additional flexibility in the scheduling of rest breaks (before or after a meal period) if it is not practicable to allow rest breaks in the middle of the work period.

For more information or assistance on implementing appropriate rest and meal breaks contact Jeanne Flaherty.



Jeanne Flaherty is the President and Managing Attorney of Employer's Legal Advisor, Inc., which represents and advises employers on all employment matters. The firm specializes in conducting employment practices compliance reviews and advising employers on day-to-day legal issues in the workplace.

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