



More on the *Brinker* Decision

A number of clients have asked for additional information or clarification of the *Brinker* decision (see Employer's Legal Advisory Spring 2012). For the benefit of all, please note the following:

1. Is an employee's meal period **waiver** still valid?

In *Brinker* the court specifically upheld the validity of meal period waivers that are in conformance with the applicable IWC Order. Thus, an employee and employer can mutually consent to a waiver of the meal period if the total hours worked in the day are six (6) hours or less. Additionally, most of the IWC Orders also contain language that allow waiver of the second meal period by mutual consent in those instances in which the total hours worked in the day are more than ten (10) but not more than twelve (12). Notably, IWC Order 4 does not include this second meal period waiver, but employees in the health care industry who work more than eight (8) hours in a shift can waive one of their meal periods. Also, IWC Order 14 (covering agricultural occupations) has specific language by which the employer must "authorize and permit" the employees to take a meal period which was not changed by the decision in *Brinker*.

The requirements for an "on duty" meal period also remain the same.

2. Should there be a **written document** confirming that an employee has voluntarily elected not to take a meal period?

If an employee regularly does not take a meal period (even if it is confirmed in writing that this was done voluntarily) this may indicate that the employer is not "providing" the meal period as required by the Labor Code and the IWC Orders, and confirmed by the court in *Brinker*. Thus, it is recommended that the employer discourage an employee from regularly foregoing a meal period. Of course, if an employee elects not to take a "provided" meal period the employer may want to document this (even though a written document is not required) to avoid a later claim that the meal period was not properly provided. Although there may be some guidance forthcoming from the Labor Commissioner on this issue, currently each employer will need to decide whether to obtain such documentation. For assistance with language on the employee's voluntary election not to take a meal period please contact Employer's Legal Advisor to discuss language appropriate for your operations.

If you have any questions or require additional assistance please contact Jeanne Flaherty at 805-499-2918 or jflaherty@eladvisor.com.