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Calif. High Court To Hear Long-Awaited Meal Break Case

By **Ben James**

Law360, New York (November 04, 2011, 4:12 PM ET) -- The California Supreme Court will hear oral arguments Tuesday in a long-running dispute over whether employers in the Golden State must merely make meal breaks available or ensure that employees take them, setting the stage for a ruling lawyers say could lower the bar for class certification and raise the stakes for employers.

Attorneys for Brinker International Inc. and a proposed class covering an estimated 59,000 current and former employees will square off before the state's high court more than three years after the court decided to review the case. An opinion is expected to be issued within 90 days of the argument.

If the court rules in favor of the plaintiffs and reverses the July 2008 decision of California's Fourth Appellate District — which struck down the worker class and ruled that employers are not obligated to ensure employees take legally required meal breaks — the decision could cost employers a bundle and have major implications for wage and hour class actions against all companies with workers in the state, attorneys said.

“California is a huge part of the U.S. economy and companies that do business in California and have employees who work in California are bound by California employment law, so it will have an impact on companies throughout the country in that respect,” said Barnes & Thornburg LLP's Scott Witlin.

Such a decision would “cement California's place as an outlier jurisdiction in wage and hour law,” added Daniel Chammas of Venable LLP.

To Make Sure or Make Available?

Foley & Lardner LLP's John Douglas said that if the state Supreme Court were to adopt the “ensure” rather than “make available” standard for meal periods, employers would face soaring compliance costs, with the decision forcing companies to devote resources to policing employees and checking that required breaks are taken.

In addition, companies would have to institute policies that punish employees for not taking the required breaks, as well as managers who allow workers to skip them, according to Winston & Strawn LLP's Joan Fife.

Such a ruling would also make meal period wage claims in lawsuits more valuable, and push up settlement values, according to Douglas, who noted that California had seen a “tidal wave” of meal period and rest break class actions in recent years.

“If there are not adequate records to demonstrate that a meal break was actually taken, the plaintiffs bar presumably will require payment of 100 percent of that liability, versus that potential liability being negotiated,” said Fife.

And if the state Supreme Court finds that employers have to ensure that employees stop work and take their meal periods rather than just make them available, employers would be on the hook for missed meal breaks going back four years, said Michael Singer of Cohelan Khoury & Singer, an attorney for the Brinker plaintiffs.

The statute of limitations for alleged meal period violations is three years, but California's unfair competition law, which is often invoked by plaintiffs in wage and hour cases, has a four-year statute of limitations, he said. The California Supreme Court held in 2000 that cases for unpaid wages could be pursued under the UCL, which forbids any “unlawful, unfair or fraudulent business act or practice.”

If employers are required to mandate meal breaks they also risk damaging employee morale, Littler Mendelson PC's Stacey James said.

Making companies require workers to take meal breaks on a set schedule basically amounts to “telling employers that they need to treat their employees like kindergartners,” she said.

Dallas-based Brinker owns restaurant chains Chili's Bar & Grill and Maggiano's Little Italy. The company said it owns or franchises more than 1,500 restaurants in 32 countries. Subsidiary Brinker Restaurant Corp. operates restaurants in California.

The employee plaintiffs sued in August 2004, claiming Brinker had violated California wage and hour law as well as the state's unfair competition law, and accused the company of failing to provide meal and rest breaks or compensation in lieu thereof, and making them work off the clock during meal periods.

If the state high court sides with Brinker and affirms the intermediate trial court's ruling that employers need only make meal breaks available, meal break claims will be far less attractive from the plaintiffs perspective, said Douglas.

Plaintiffs have been bringing meal break cases in the hopes that the Brinker decision goes in their favor, despite the fact that more than 20 federal court cases have found for the employer on this issue, according to Chammas.

Those 20 cases include Washington v. Joe's Crab Shack, in which a federal judge denied class certification in Dec. 2010 and wrote that “employers are required to make meal breaks available, but need not compel employees to take meal breaks if they are unwilling to do so”.

"If the Supreme Court rules in favor of employers, then these lawsuits will certainly slow down substantially and be reserved for the truly exceptional cases where an employer has a policy of depriving employees of breaks," said Chammas.

To Certify or Not to Certify?

Along with the clarification of which standard applies to employers' obligations to provide meal breaks, the Brinker ruling gives the state high court a chance to provide guidance on class certification issues that could have significance for a broad range of wage and hour cases, not just meal break cases.

The question for the court is “whether class certification is proper for these kinds of cases,” James said.

If the onus is on companies to make sure that meal periods are taken, then the reason for meal breaks being missed doesn't matter, and the employer is liable as long as the plaintiffs can prove that the breaks were not taken. An “ensure” standard, therefore, would dramatically lower the bar for plaintiffs seeking class certification on meal break claims, Chammas said.

On the other hand, if employers need only make meal breaks available and can be let off the hook when workers decide on their own not to avail themselves of those breaks, then, in order to prove liability, a court will need to do an individualized analysis of why the breaks were missed, which makes winning class certification much tougher, he added.

The intermediate appeals court held that the Brinker plaintiffs' meal break claim was not amenable to class treatment because figuring out why employees declined to take meal breaks would require individualized analysis. The court said that while time cards could show when meal breaks where taken and when they were not, they could not show why.

It's possible the state Supreme Court might endorse the “make available” standard, but at the same time, lay out guidelines for when suits like the Brinker case are appropriate for class certification, according to James.

“Every time the court of appeals has said certification is not proper, the California Supreme Court has scooped that case up,” James said, referring to the six related “grant and hold” cases that the court has put on the back burner while mulling over the Brinker case.

Those six grant and hold cases include Brinkley v. Public Storage, in which an appeals court rejected the plaintiffs assertion that employers had to ensure meal breaks were taken.

If the Brinker decision lays out circumstances under which a meal break case is proper for class certification, that may give guidance on what type of common proof is sufficient to certify classes in a much broader range of suits, Fife said.

“It's very possible the Supreme Court could further indicate what standards have to be met for class certification,” said Fife.

Altschuler Berzon LLP's Michael Rubin and Kimberly Kralowec of Schubert Jonckheer Kolbe & Kralowec LLP will argue for the plaintiffs on Tuesday, Singer said.

The plaintiffs are represented by Michael Rubin of Altschuler Berzon LLP, Kimberly Kralowec of Schubert Jonckheer Kolbe & Kralowec LLP, Timothey Cohelan and Michael Singer of Cohelan Khoury & Singer, and William Turley of the Turley Law Firm APLC.

The defendants are represented by Rex Heinke of Akin Gump Strauss Hauer & Feld LLP, Michael Brett Burns, Susan Sandidge and Laura Marie Franze of Hunton & Williams LLP, and Karen Kubin of Morrison Foerster LLP.

The case is Brinker International Inc. et al. v. Superior Court, case number S166350, in the California Supreme Court.

--Editing by John Quinn.