Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

On The Brink Of Deciding Brinker

Law360, New York (November 14, 2011, 2:43 PM ET) -- There is no question that the most anticipated oral argument in many years in the California wage-and-hour arena occurred recently, on Nov. 8, 2001, in Brinker Restaurant Corp. v. Superior Court (Hohnbaum), S166350. Brinker, as it is popularly referred to, has become synonymous with the controversy now long-raging in California over the proper legal standards for liability for missed rest and meal breaks as well as their timing.

By this time, almost every large employer in the state of California has been hit with a "rest and meal break" class action, generally looking to recover for as long as four years under California's unfair competition law. At stake has been literally tens — if not hundreds — of millions of dollars in potential exposure. May we have a drum roll please?

What do the tea leaves show following the argument? For those who either attended in person or watched the (apparently only occasionally) streaming feed over the Internet, it seemed that the court is fairly clearly headed toward rendering a split decision.

On the big issue of whether employers must ensure — rather than merely authorize — their employees' taking statutorily mandated breaks, the tenor of the court's questioning betrayed skepticism toward the plaintiffs' claims.

Ironically, it was the newest justice, Goodwin Liu — whose nomination for a U.S. Ninth Circuit Court of Appeals seat was recently scotched by the U.S. Senate due to his perceived too-liberal credentials — whose questioning of plaintiffs' counsel on the subject was most pointed.

How, Justice Liu wondered, could the argument that employers have to force employees to take breaks at specific intervals for health and safety reasons be squared with the core idea of a "break" — that the employer gives up control over the employee during that same time?

Justices Marvin Baxter, Carol Corrigan and Joyce Kennard likewise all questioned the practical ramifications of an employer's having to insure that employees take their breaks, and, if necessary, on pain of progressive discipline up to and including termination.

The bottom line on the "big" issue — Brinker should win the round.

On the less prominent, but still very important, issue of the timing of breaks, in contrast, the questions being asked suggested that here Brinker may not be so lucky.

The controversy is whether meal periods must be provided every five consecutive hours worked, or need only be provided based on the total number of hours worked over the entire day.

If the former, an employee working less than 10 hours can still be entitled to a second meal break if more than five hours has passed since the first concluded. If, on the other hand, employees can take their meal break at any point during a shift, so long as the shift is less than 10 hours in total length, one break will suffice.

Here, the questioning by Justice Liu and Justice Kathryn Werdergar in particular suggested that the court favored the plaintiffs' interpretation of the statute, one shared by the California Department of Labor Standards Enforcement.

While a decision in the plaintiffs' favor on the rolling five-hour meal issue may significantly affect employers like Brinker that operate restaurants and often have or prefer to schedule meal periods at or around the beginning of shifts, employers in other industries that already schedule meal breaks toward the middle of shifts may not view an adverse outcome on this issue as being particularly onerous.

There are other issues raised in Brinker that the plaintiffs also appear to be headed toward a win on.

For example, plaintiffs' counsel argued persuasively — and with little interruption from the court — that even if the appellate court properly denied class certification on some issues, it had been improper for it to deny class certification of every issue in the case.

On the issue of rest breaks, for example, one of the attorneys for the class argued strongly that the legality of Brinker's claimed policy of not allowing employees to pick up tips left during an otherwise authorized rest break — presumably when a colleague has to cover for him or her — was an issue that could properly be certified for class proof and treatment, and none of the justices appeared to disagree strongly, if at all.

In short, after two years waiting, it now appears that the California Supreme Court will soon render a split decision on the issues raised in the Brinker case, offering a little something for everyone.

What remains to be seen is whether, after this two-year wait, the opinion that comes down in the next 90 days will raise as many new questions for the plaintiff and defense wage-and-hour bar as it resolves old ones.

--By John H. Douglas, Foley & Lardner LLP

John Douglas is a partner in the San Francisco office of Foley & Lardner and practices management side labor and employment. He and his clients have been eagerly awaiting the outcome of the Brinker litigation for several years now.