Finally Over The Brink(er)?

Law360, New York (April 12, 2012, 4:51 PM ET) -- Some eight years after the underlying lawsuit was filed, on April 12, 2012, the California Supreme Court finally released its opinion in Brinker International Inc. v. Superior Court (Honhbaum). Contrary to the predominant expectation in the legal community following oral argument in the court of a "split" decision on the main issues, the court's unanimous decision was an upset win for employers on both of the central issues — the standard to be used to determine meal break violations, and timing requirements for meal breaks.

In addition, the court sided with employers on several additional issues, providing significant guidance to trial and appellate courts in the process regarding rest break and "off the clock" claims — as well as on the thorny issue of whether and how much trial courts should consider the merits of claims at the certification stage. For obvious reasons, the decision is a clear win for the defendant Brinker International, but the wider California employer community will undoubtedly be delighted as well.

What did the court hold in Brinker, what does it mean, and why will it be important?

The case presented two primary issues on appeal. First, could employers insulate themselves from liability for meal break penalties simply by maintaining policies that allow such breaks to be taken consistent with applicable law if they do not also police implementation of their policies to ensure that employees are actually taking their authorized breaks?

Second, are meal breaks required on a "rolling" basis or, alternatively is their number determined based simply on the total number of hours worked? In other words, if an employee takes a meal break during the first hour of work on an eight-hour shift, is another break required once five more hours have passed, or, alternatively, does it suffice to simply provide that number of meal breaks equal to the greatest whole number arrived at by dividing the total number of hours worked by five?

A clear split had developed on the "provide" versus "ensure" standard in rulings by different panels of the California Court of Appeal following an earlier and first significant foray into the controversy by then-Chief Judge Vaughn Walker of the U.S. District Court for the Northern District of California in White v. Starbucks.

During the Nov. 8, 2011, oral arguments in Brinker, the justices betrayed concern about the practical ramifications of adopting a standard whereby employers could be liable unless they also "ensured" employees were taking the breaks to which they might be entitled. Justice Goodwin Liu, for example, asked — rather pointedly — whether such a rule would be inconsistent with the "hallmark" of a meal period — that the employer is supposed to suspend control over the employee.

On the other hand, on the issue of meal break timing, the justices seemed more sympathetic to the "rolling" five interpretation of the meal break requirement set forth in the Labor Code, and focused more on the literal language of the statute and wage orders. Here, for example and in contrast, Justice Liu's questioning focused on whether an interpretation of the statute disfavoring the "rolling" five interpretation would impermissibly render the clause "except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived" in the statute surplusage, and seemed skeptical of claims that the California

Industrial Welfare Commission interpretation of the statute set forth in its regulations "conflicted" with the statute — as opposed to simply filling a gap in a manner more protective of employees.

As it turned out, the oral arguments were only a partially accurate predictor of what the court actually would decide.

On the "provide" versus "ensure" controversy — the court found that the plaintiffs' position was unsupported by the language of the statute. "The difficulty with the view that an employer must ensure no work is done — i.e., prohibit work — is that it lacks any textual basis in the wage order or statute," reasoned the court. "While at one time the IWC's wage orders contained language clearly imposing on employers a duty to prevent their employees from working during meal periods," it continued, "we have found no order in the last half-century continuing that obligation."

Echoing Justice Liu's questions during oral argument, the court further observed: "Indeed, the obligation to ensure employees do no work may in some instances be inconsistent with the fundamental employer obligations associated with a meal break: to relieve the employee of all duty and relinquish any employer control over the employee and how he or she spends the time."

The court summarized its holding on the "ensure" versus "provide" issue thus:

An employer's duty with respect to meal breaks under both section 512, subdivision (a) and Wage Order No. 5 is an obligation to provide a meal period to its employees. The employer satisfies this obligation if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so. What will suffice may vary from industry to industry, and we cannot in the context of this class certification proceeding delineate the full range of approaches that in each instance might be sufficient to satisfy the law. On the other hand, the employer is not obligated to police meal breaks and ensure no work thereafter is performed. Bona fide relief from duty and the relinquishing of control satisfies the employer's obligations, and work by a relieved employee during a meal break does not thereby place the employer in violation of its obligations and create liability for premium pay under Wage Order No. 5, subdivision 11(B) and Labor Code section 226.7, subdivision (b).

As to the "rolling five" controversy, on other hand, the court's decision was more surprising — particularly given observations earlier in the same opinion that IWC orders are (or should be) afforded the same judicial deference normally afforded the statutory provisions of the Labor Code.

Here, the court found no support in the statute for the plaintiff's "rolling" five theory: The plaintiff, it observed "contends section 512 should be read as requiring as well a second meal period no later than five hours after the end of a first meal period if a shift is to continue." "The text," however, the court found, "does not permit such a reading. It requires a second meal after no more than 10 hours of work; it does not add the caveat 'or less, if the first meal period occurs earlier than the end of five hours of work.' Because the statutory text is conclusive, we need not consider extrinsic sources on this point."

As to the language of the IWC orders that seemed to support a "rolling" five interpretation, the court found the wage order provision "ambiguous" — and moreover — that the 2001 wage orders were intended to "embrace" Labor Code section 512's provisions rather than "impose

different" ones. Hence, the court concluded: "absent waiver, section 512 requires a first meal period no later than the end of an employee's fifth hour of work, and a second meal period no later than the end of an employee's 10th hour of work ... Wage Order No. 5 does not impose additional timing requirements."

What will be the significance of the court's decision?

With the newly clarified "provide" standard, meal break class actions should definitely become more difficult to certify as liability determinations will now necessarily require more individualized and fact specific inquiries regarding why each particular employee, despite an employer's policy, did not take a particular break. These questions will be less susceptible to — albeit not entirely immune from — proof based on "representative" or "sampled" evidence.

Indeed, in a separate concurrence, Justices Kathryn Werdegar and Liu took pains to point out that the court's decision should not be read to necessarily preclude certification of meal breaks claims in all cases — and to observe that an employer's assertion of waiver would remain an affirmative defense on which it would bear the burden of proof. This concurrence notwithstanding, it seems fair to say that class certification motions will become more difficult to prevail on — and the value and frequency of meal break class claims should presumably decrease.

On the rolling five issue, absent some kind of legislative intervention — which is not entirely out of the question but should affect rights only prospectively — California employers who have been facing such meal break "timing" claims should now be able to breathe a significant sigh of relief — or two.

The court's decision is also notable in that it rejects the California Department of Labor Standards Enforcement's stricter views on the issue of paid rest break timing as well, finding significantly more flexibility in governing law than the DLSE had (at least historically) opined existed: "The only constraint on timing," for rest breaks, the court found, is that they "must fall in the middle of work periods 'insofar as practicable.' Employers are thus subject to a duty to make a good faith effort to authorize and permit rest breaks in the middle of each work period, but may deviate from that preferred course where practical considerations render it infeasible."

Given this "good faith effort" standard, class-based claims based on the timing of rest breaks may effectively have been relegated to the dustbin of history. Providing even further compliance guidance for employers, however, the court also clarified just how many paid rest breaks are required under the operative language of the wage orders: "Employees are entitled to 10 minutes' 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 of more than 10 hours up to 14 hours, and so on."

All these rulings should make it easier for employers to adopt and observe clearly compliant rest break policies — and better avoid class-based claims.

As if all this good news were not enough for both Brinker and California employers generally, however, the court did not stop there. Topping off its "substantive" rulings, the court also endorsed the Court of Appeal's view that the plaintiff's "off the clock" claim entailed too many individualized factual determinations to be properly certified as a class action. "On a record such as this," the court observed, "where no substantial evidence points to a uniform, companywide policy, proof of off-the-clock liability would have had to continue in an employee-by-employee

fashion, demonstrating who worked off the clock, how long they worked, and whether Brinker knew or should have known of their work. Accordingly, the Court of Appeal properly vacated certification of this subclass."

Finally, the court also provided guidance regarding when subordinate courts are required to determine legal issues prior to ruling on the issue of certification: "[I]f the presence of an element necessary to certification, such as predominance, cannot be determined without resolving a particular legal issue, the trial court must resolve that issue at the certification stage."

In sum, at least for employers, the Brinker decision seems to have been well worth the wait. No doubt due to widespread anxiety among California employers and massive costs for the judiciary engendered by the tidal wave of class-based wage and hour litigation in the last 10 years, it appears the California Supreme Court desired in Brinker to render a comprehensive decision answering many open questions in rest and meal break litigation in one fell swoop.

Given that the answers have generally favored the employer community — and given both Democratic control of the Legislature and governor's mansion — it does not seem unreasonable to expect that there will at least be an attempt by the plaintiffs bar to secure legislative overrides of those parts of the decision viewed as most unfavorable. In other words — stay tuned for coming attractions. While we are finally over with Brinker, there will undoubtedly be more chapters in this ongoing saga.

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