

California Employers Need Not Police Meal Breaks

By Hope Eastman

On April 12, 2012, the California Supreme Court issued a long-awaited ruling in the class action case of *Brinker Restaurant Corp. v. Superior Court*. *Brinker*, which had been pending since 2008 and triggered more than twenty six amicus briefs from interested organizations on both sides, centered on a number of issues relating to California state requirements for non-exempt employee meal and rest breaks.

Although the class actions on meal and rest periods may yet continued, in a unanimous decision somewhat favorable to employers, the California Supreme Court rejected several more restrictive rules proposed by the plaintiffs and concluded that:

- employers must relieve non-exempt employees of all duties for the duration of the meal break proscribed by state law, but need not police meal breaks and ensure no work thereafter is performed. Employee must have an uninterrupted 30 minutes during which he or she, is free to leave the premises;
- meal breaks need to be offered no later than the completion of five and then ten hours from the time an employee commences work, as opposed to one every five hours;
- rest breaks need to be permitted in the middle of each four-hour work stretch; and
- employees are entitled to a ten minute rest period in shifts from three and a half to six hours, 20 minutes for shifts between six and ten hours and 30 minutes for shifts of more than 10 hours up to fourteen hours, as opposed to one break every four hours.

Policies that comply with these rules will not trigger California's premium pay requirement for violations of state meal break and rest period statutes and wage orders. However, some questions remain unanswered. If an employer offers a lunch break beginning at the end of the fifth hour, is the employee free to decide, with the employer's concurrence, to vary the start time? And, as discussed below, does "no monitoring" really mean that?

The meal break portion of *Brinker* does not really free the employer from all monitoring. The court made it clear that employers cannot offer the lunch period and then informally force employees to work through it. The employer may not undermine a formal policy of providing meal breaks by pressuring employees to perform their duties in ways that omit breaks. According to the court, the California laws "do not countenance an employer's exerting coercion against the taking of, creating incentives to forego, or otherwise encouraging the skipping of legally protected breaks."

This brings California's interpretation of its laws in line with the federal Fair Labor Standards Act. Although the FLSA does not require rest or meal breaks, it has a long standing prohibition of knowingly permitting employees to work off the clock without compensation and treats meal breaks the same way. The employee must be completely relieved from duty for the purposes of eating regular meals. The employee is not relieved if he or she is required to perform any duties, whether active or inactive, while eating. 29 C.F.R. § 785.19.

"Unauthorized" or "unapproved" work is work and must be counted (provided that the employer knows or should know it is being done and permits the employee to do it). If an employer does not wish an employee to perform work, it must prohibit the employee from doing so if it does not wish to include that work time in the required FLSA pay computations. An employer may not accept the benefit(s) of work performed by its nonexempt employees without counting the time in computing pay due under the FLSA. Important FLSA regulations on these points are at 29 CFR §§785.11, 785.12, and 785.13.

Some jurisdictions, including Maryland, have adopted statutes similar to the California statute under consideration in *Brinker* that set certain requirements for employee breaks and meals. Others, including Virginia and Washington, DC, have remained silent on the issue. In Maryland, employers that are retail establishments (other than restaurants) must provide a nonworking shift break of at least 30 minutes to every employee who works more than 6 consecutive hours. Employees who work 4-6 hours must get a 15

minute break unless they get the 30 minute break. Employees who work 8 consecutive hours in a single shift get an additional nonworking shift break of at least 15 minutes for every additional 4 consecutive hours. This law is enforced by civil penalties in the discretion of the Commissioner and, in certain circumstances, by a private right of action. Maryland Code, Labor and Employment §3-710