

Division of Labor Standards Enforcement Changes Policy To Keep Consistent With *Brinker*

Hot on the heels of the momentous *Brinker v. Superior Court* decision we informed you of in our last update, on July 25, 2008, California's Labor Commissioner instructed the Division of Labor Standards Enforcement ("DLSE") (the California agency charged with enforcing the state's wage and hour laws) to strictly follow *Brinker* in its enforcement of California law concerning meal periods and rest breaks. A copy of the Labor Commission's memorandum to the DLSE is enclosed.

In California, the DLSE's role is two-fold: (1) it audits employers for wage and hour violations; and (2) it oversees hearings between employers and employees when employees bring a complaint regarding their wages. For years, in these audits and hearings, the DLSE had taken positions at odds with the holding in *Brinker*. Now, however, the DLSE must follow *Brinker* in its audits and hearings.

As you will recall, among other things, *Brinker* determined that employers need only authorize and permit employees to take meal periods – not force employees to take their meal periods. Meal periods can be taken at the beginning of a shift even if that would mean the employee is working more than 5 consecutive hours without a meal period. Another notable portion of the ruling is that employers need only authorize and permit rest periods every four hours or major fraction thereof. Rest periods, where impracticable, need not be in the middle of each work period.

Despite the DLSE's position, because the Supreme Court still has the opportunity to overrule *Brinker*, we still recommend that employers continue to require employees to take their meal periods. Of course, if you have any questions on how this announcement affects your business, please do not hesitate to contact us.

If you have any questions regarding this client alert, please contact Beth Schroeder at 310.282.9400 or via email at bschroeder@silverfreedman.com.



State of California
DIVISION OF LABOR STANDARDS ENFORCEMENT - HQ
MEMORANDUM

TO: DLSE Staff

FROM: Angela Bradstreet, Labor Commissioner
Denise Padres, Deputy Chief
Robert Roginson, Chief Counsel

DATE: July 25, 2008

SUBJECT: Binding Court Ruling on Meal and Rest Period Requirements

On July 22, 2008, the California Court of Appeal issued its decision in *Brinker Restaurant Corp. v. Superior Court of San Diego County (Hohnbaum)*, (2008) ___ Cal.App.4th ___, 2008 WL 2806613. The court in *Brinker* decided several significant issues regarding the interpretation of California's meal and rest period requirements. The decision is a published decision, and its rulings are therefore binding upon the Division of Labor Standards Enforcement (DLSE).

The decision in *Brinker* included the following rulings regarding the interpretation of California's meal and rest period requirements:

Meal Periods

- The court held that Labor Code § 512 and the meal period requirements set forth in the applicable wage order mean that employers must provide meal periods by making them available, but need not ensure that they are taken. Employers, however, cannot impede, discourage or dissuade employees from taking meal periods.¹
- The court rejected the so-called "rolling five-hour" requirement as being inconsistent with the plain meaning of Labor Code § 512 and the applicable wage order.² An employer must make a first 30-minute meal period available to an

¹ Slip Op. at pp. 4, 34 and 41-47.

² Slip Op. at pp. 4 and 34-41.

hourly employee who is permitted to work more than five hours *per day*, unless (1) the employee is permitted to work a “total work period per day” that is six hours or less, and (2) both the employee and the employer agree by “mutual consent” to waive the meal period.³ The court also found section 512 to plainly provide that an employer must make a second 30-minute meal period available to an hourly employee who has a “work period of more than 10 hours *per day*” unless (1) the “total hours” the employee is permitted to work per day is 12 hours or less, (2) both the employee and the employer agree by “mutual consent” to waive the second meal period, and (3) the first meal period “was not waived.”⁴

Employers are not required to provide a meal period for every five consecutive hours worked.⁵ The court held that the employer’s practice of providing employees with an “early lunch” within the first few hours of an employee’s arrival at work did not violate California law, even though that would mean that the employee might then work in excess of five hours without an additional meal period.⁶

Rest Periods

- The court held that the rest period requirements set forth in the applicable wage order mean that employers must provide rest periods, but need not ensure that they are taken. Employers, however, cannot impede, discourage or dissuade employees from taking rest periods.⁷
- The court held that employers need only authorize and permit rest periods every four hours or major fraction thereof and they need not, where impracticable, be in the middle of each work period.⁸ The court interpreted the phrase “major fraction thereof” to mean the time period between three and one-half hours and four hours and not to mean that a rest period must be given every three and one-half hours.⁹ In so doing, the court rejected as incorrect a 1999 interpretation by the Labor Commissioner that the term “major fraction thereof” means an employer must provide its employees with a 10-minute rest period when the employees work any

³ Slip Op. at p. 36.

⁴ Slip Op. at p. 37.

⁵ Slip Op. at p. 4.

⁶ Slip Op. at pp. 34-41.

⁷ Slip Op. at pp. 4 and 31.

⁸ Slip Op. at pp. 4 and 28-29.

⁹ Slip Op. at p. 24.

time over the midpoint of each four hour block of time.¹⁰ The court ruled that the rest periods must be given if an employee works between three and one-half hour and four hours, but if four or more hours are worked, it need be given only every four hours, not every three and one-half hours.¹¹

The court also ruled that the applicable wage order rest period provisions do not require employers to authorize and permit a first rest period before the first scheduled meal period. Rather, the applicable language of the wage order states only that rest periods “insofar as practicable shall be in the middle of each work period.” Accordingly, the court concluded, as long as employers make rest periods available to employees, and strive, where practicable, to schedule them in the middle of the first four-hour work period, employers are in compliance with that portion of the applicable wage order.¹²

The court relied upon the plain meaning of the Labor Code and applicable wage order provisions in making its determinations. The court found persuasive the reasoning in the federal district court decisions in *White v. Starbucks* (ND Cal. July 2, 2007) 497 F.Supp.2d 1080 and *Brown v. Federal Express Corp.* (CD Cal. Feb. 26, 2008) 2008 WL 906517, and concluded that employers need not ensure meal periods are actually taken, but need only make them available.¹³ The court distinguished the decision in *Cicairos v. Summit Logistics, Inc.* (2006) 133 Cal.App.4th 949, concluding that the facts in *Cicairos* established that the employer failed to make meal periods available to employees and that the court there only decided meal periods must be provided, not ensured.¹⁴

All staff must follow the rulings in the *Brinker* decision effective immediately and the decision shall be applied to pending matters. Please ensure that any wage claim filed with DLSE that has a meal or rest period issue is reviewed by your Senior Deputy prior to making any final determination on its merits.

¹⁰ Slip Op. at p. 25.

¹¹ Slip Op. at pp. 27-28.

¹² Slip Op. at pp. 28-29.

¹³ Slip Op. at p. 44.

¹⁴ Slip Op. at pp. 44-47.