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PROBLEM PREVENTION BULLETIN ~ JULY 31, 2008 ~ REVISED

The *Brinker* Decision: Good News for Everyone Regarding Missed Rest and Meal Period Law

The text of this article will soon be available at the WAAG AND CO. *website at WaagandCo.com (click on "News", then click on "Bulletins").*

☐ **Applies to:** All Employers in California (Nonexempt Employees Only)

☐ **Effective:** Immediately

☐ **Synopsis:** Finally, there has been some good news for employers regarding California's Rest and Meal Period requirements — and good news for employees who have not enjoyed the State's very rigid interpretation of the rules. As a bonus, the case also issued a ruling about an employer's responsibility for an employee's off-the-clock work. While it is possible that the Courts or the Legislature might take away this new flexibility, the State enforcement agency will be following *Brinker* and this case is currently the law of the land. *Employers should discuss the impact of this ruling with qualified employment counsel.*

☐ **A Quick Summary of the *Brinker* Ruling:**

☐ **1.** Employers must provide meal periods by making them available, but need ***NOT*** ensure that they are taken.

☐ **2.** Meal periods may be taken ***ANY TIME*** during the workday; the so-called "rolling five-hour" rule has been rejected.

☐ **3.** Employers need only authorize and permit rest breaks every four hours or major fraction thereof; rest breaks do ***NOT*** need to be in the middle of each work period, when doing so would be impracticable.

☐ **4.** While employers cannot coerce, require or compel employees to work off-the-clock, they are only required to pay employees if they knew or should have known they were doing so.

Action Notes:

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Route to:

☐ HR Dept: ____________

☐ Accounting Dept: ____________

☐ Benefits Admin: ____________

☐ Managers:

☐ ***Rest and Meal Period Background*:** Since October 2000, California has required employees to get 10-minute rest periods for every 4 hours worked and a minimum 30-minute off-duty meal period for any shift in excess of five hours. If the employee missed any of these breaks, the employer had to pay the employee a "premium payment" equal to an additional one hour of pay for each day on which any rest periods were missed, and an additional one hour of pay for each day on which a meal period was missed ("Premium Payment"). There has been much confusion and debate about these provisions. WAAG AND CO. has frequently reported on these issues.

☐ ***Brinker* Ruling Details:** On July 22, 2008, the California Court of Appeal issued a decision that squarely addressed many of the central issues concerning the most confusing (and confounding!) aspects of rest and meal periods.

The decision came in the case of *Brinker Restaurant Corp. v. Superior Court of San Diego County.* That case involved a potential class action suit against the Brinker Restaurant Group for alleged violation of California's rest and meal period rules. Among other things, the plaintiffs complained that employees working 8-hour shifts were forced to take their meal period so early in their shift, that they would then work more than five additional hours without another meal period.

This bulletin is a general overview of the subject matter, and is not meant to provide professional opinions regarding any specific case, matter, or set of facts, or to substitute for the professional advice of WAAG AND CO. *Instead, please contact* SUSAN S. WAAG, ESQ. *for additional information.*

They alleged that this violated the rule that nobody may work more than five consecutive hours without stopping for a meal period — which was the rule applied by the State's enforcement agency, the Division of Labor Standards Enforcement ("DLSE"). There was also a debate over whether the employer was required to force employees to take a meal period (also a rule being applied by the DLSE), or just make the opportunity to take a meal period *available* to employees.

☐ **Break Availability Only:** The *Brinker* Court held in favor of flexibility for employers. The Court held that the law regarding meal periods requires employers to "provide" meal periods by making them available, ***not*** ensure that they are taken.

☐ **No More "Forced" Breaks:** Employers, however, cannot impede, discourage or dissuade employees from taking meal periods. That means if an employer prevents an employee from getting a meal period, the employer will need to pay the statutory Premium Payment (an additional one hour of pay) to the employee for the missed meal period. But if the break was available to the employee and the employee simply did not take advantage of the opportunity to take it, then no Premium Payment is due. *Employers no longer have to police meal periods and force unwilling employees to take them.*

A logical corollary to the "make it available" rule is that an employee who ***chooses*** to return from the meal break before the full 30-minute minimum is not due the Premium Payment for a missed meal period. Prior to *Brinker*, the DLSE's enforcement position has been to treat a 29-minute lunch break as failing to meet the legally-required minimum break, regardless of why the "full" 30 minutes was not accomplished. After the *Brinker* ruling, since an employee can decide to entirely skip a meal period without a premium payment being due, then the employee can also decide to shorten a meal period without triggering a premium payment.

As the *Brinker* Court noted, to find otherwise would mean that "employees would be able to manipulate the process and manufacture claims by skipping breaks or taking breaks of fewer than 30 minutes, entitling them to compensation of one hour of pay for each violation. This *cannot* have been the intent of the California Legislature, and the court declines to find a rule that would create such perverse and incoherent incentives." As a result, employers no longer need worry about the employee who takes a shortened meal period (unless the employer caused the meal period to be cut short).

☐ **Rolling Five-Hour Rule Rejected:** Another big problem for many employers and employees has been the DLSE's position that no employee may work more than five consecutive hours without stopping for a meal period. This position had been applied very rigidly, such that an employee who stopped for lunch after five hours and one minute would still be entitled to a premium payment for the "missed" meal period.

Additionally, if an employee took the meal period early (as in the *Brinker* case), leading the employee to work more than five hours after that meal period, the DLSE's position was that a second meal period had to be given. The *Brinker* Court held that employers are not required to provide a meal period for every five consecutive hours worked. Instead, the entitlement to a meal period is based on the total number of hours worked per day. Accordingly, the law requires that an employee working more than five hours and less than 10 in a workday must be provided the opportunity to take a single 30-minute meal period at some point during the day — not at some precise time.

☐ **First Meal Period of the Day:** Specifically, the Court held that an employer must make a first 30-minute meal period available to an 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.

☐ **Second Meal Period:** The court also held that the statute plainly provided 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."

☐ **Off-the-Clock Ruling:** Another significant issue was addressed in *Brinker*, but is overshadowed by the landmark meal period portions of the case. The plaintiffs in *Brinker* alleged that employees would clock out for lunch, but still perform some work tasks while clocked out. They asked the court to certify a class-action claim for unpaid wages for such "off-the-clock" work. The Court held that the employer could

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only be liable for such "off-the-clock" wages if the employer knew or should have known the employee had worked "off-the-clock." Certainly, no employer should permit employees to work "off-the-clock," but this ruling will make it harder for employees who secretly do so to later claim unpaid wages.

☐ **The Future of *Brinker* Ruling:** A Court ruling will be binding on future cases only if it is "published." There was a previous ruling by the Court of Appeal in the *Brinker* case that resolved the break and off-the-clock issues the same way; however, it was not a published decision, and accordingly was disregarded by the DLSE. That decision, however, was raised to the California Supreme Court, which transferred it back to the Court of Appeals for further briefing on certain issues. That yielded the current published ruling of the *Brinker* case.

As this ruling was issued, there have been concerns about whether the appellate-level *Brinker* decision would stand, given that the issues are likely to be appealed to the State Supreme Court. Within just three days, it appeared that the *Brinker* decision was getting wide support.

Indeed, on July 25, 2008, the DLSE staff received a memo from the Labor Commissioner confirming that *Brinker* constitutes a "binding court ruling" that will be followed in all enforcement actions regarding rest and meal periods, including currently-pending matters. There has been some concern that this memo was premature, but as of right now, that is the DLSE's official enforcement position. Be aware, however, that political opposition to *Brinker* has started to dramatically heat-up.

☐ **The Politicians Jump In:** Just hours after the *Brinker* decision was issued, Governor Schwarzenegger issued a press release praising the decision for putting an end to confusion over requirements that "harmed both employees and employers."

This sends a clear signal to the Legislature that the Governor would be very likely to veto any legislation seeking to overturn the *Brinker* decision. Additionally, there have been at least four federal court rulings consistent with the *Brinker* ruling. Although those federal rulings are not binding on California courts, the logic of these cases has been prevailing.

However, there has now been word that the Speaker of the State Assembly is jumping into the fray and will be taking an active role in supporting the appeal to the Supreme Court in an attempt to overturn the ruling. Additionally, on July 30, 2008, the California Labor Federation (AFL-CIO) petitioned the Labor Commissioner to withdraw its new enforcement position.

☐ **Conclusion and Recommendations:** While all of this is exceptionally good news for employers, ***CAUTION IS ADVISED.*** The California Supreme Court has not yet issued a ruling on these issues. However, the DLSE has made clear that its official enforcement position is to follow the *Brinker* ruling. If the Supreme Court takes the appeal, then the *Brinker* ruling will not be available as binding authority. That does not mean the DLSE will need to change its enforcement position while that is pending, but with the political pressure being exerted by the Unions, even the DLSE position is at risk.

Until the Supreme Court rules, whether in *Brinker* or some future decision, there will always be a risk in adopting anything but the most rigid policy. If an employer were to change its policies and practices in reliance on the DLSE's now-current enforcement position, then the employer should also be prepared for the possibility that such position might change again. As with anything, there are costs associated with going in either direction, so a careful discussion with qualified employment counsel is advised before taking any action.

Regardless of what happens, even if *Brinker* is upheld by the Supreme Court, some rules still apply. It is important to remember that employees must still be paid the missed-break Premium Payment if the reason they miss their break is because the employer in any way impeded, discouraged or dissuaded the employee from taking a rest or meal period.

Having a system for reporting missed break periods when the employee believes work prevented the break is imperative. For further information regarding the *Brinker* decision or how it will impact your business, please contact WAAG AND CO. or other qualified employment counsel.

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