

PROBLEM PREVENTION BULLETIN ~ JANUARY 2012

Yet Another Update of the *Brinker* Case

California employers have been waiting more than 3 years for the California Supreme Court to issue a ruling about meal and rest periods in the case of *Brinker v. Superior Court*. Just when we thought the long wait for a decision was about to end, the Supreme Court ordered more briefing. Yet another delay!

With the completion of oral arguments on November 8, 2011, the case was officially “submitted.” By law, this meant the Court had 90 days to issue a ruling. However, on December 2, 2011, the California Employment Law Council filed a brief raising a very significant issue that it did not want the Court to overlook. By mid-December, the Court decided the issue was important enough to order all parties to file briefs on the subject. So, it vacated the case’s status as “submitted” and ordered more briefs to be filed by January 13, 2012. The case will be deemed “resubmitted” at that time, giving the Court until April 12, 2012 to issue its decision. That is, unless something else comes up to delay this important decision even further.

So what was this important issue? One of the controversies regarding meal breaks is the Wage Order requirement that “no employer shall employ any person for a work period of more than five (5) hours without a meal break of not less than 30 minutes...” Put aside, for now, the exception that allows an employee to waive a meal break if he / she performs not more than 6 hours of work for the day. Most employers, experts and lower court rulings have interpreted this rule to mean that employees who work more than 5 hours in a day get a meal period and employees who work more than 10 hours in a day get a second meal period.

The Rolling 5: But an issue arose at the oral argument in *Brinker* about whether an employee can ever be required to work more than five consecutive hours without a meal period. This involves what has been referred to as the “Rolling 5” interpretation; i.e., a rolling five-hour work period. Specifically, the “Rolling 5” issue asks: What happens if an employee works from 8:30 a.m. to 5:00 p.m. with a 30-minute lunch that

starts at 11:15 a.m.? The employee returns to work at 11:45 a.m. and works until 5:00 p.m. – a period of 5.25 hours. Or, similarly, what happens if the employee goes to lunch on time (11:30), but then works until 5:15 p.m. (with overtime pay, of course)? The plaintiffs in *Brinker* contend that such an employee has worked a “period of more than 5 hours” and, therefore, was entitled to a second meal break – or extra pay if one was not taken.

Retroactive Nightmare: Amazingly, the meal and rest period law has been on the books since October, 2000 without a clear cut definition of how employers are supposed to comply with it. Since the Court is interpreting an *existing* law, there is a real concern that a ruling in favor of the “Rolling 5” interpretation would be applied *retroactively*; i.e., to all current and potential claims going back as far as the statute of limitations allows. This could be devastating for employers, since the overwhelming majority have not adopted the “Rolling 5” approach. The briefing ordered by the Court concerns the extent to which its ultimate decision should apply retroactively.

Beyond the disappointment of the delay, the fact that the Court has reopened briefing on this point is very troubling. It suggests that the Court may be intending not only to overrule the pro-employer decision from the lower court, but also that the Court may be contemplating a new and detailed quasi-legislative standard for determining whether an employer has successfully provided timely meal breaks to its employees. In other words, a current law that has long been complicated and unduly burdensome would become even more so.

Conclusion: Whatever the Court decides, whenever it decides it, the decision will impact every employee in California. Any employer who does not take the time to fully understand and comply with the *Brinker* ruling (if and when it ever comes out) will be risking expensive and time-consuming litigation, with potentially staggering back-pay awards and penalties. WAAG AND CO. will be closely following this issue and providing analysis as information becomes available.

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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.