CALIFORNIA HOSPITALITY ALERT
LEGAL-EASE FOR THE HOSPITALITY INDUSTRY

EMPLOYERS GRANTED GREATER FLEXIBILITY ON MEAL AND REST PERIODS IN HOTEL AND LODGING INDUSTRY

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Class action litigation over meal and rest break laws has been on the rise. Rest and meal breaks can happen very easily in the hospitality industry. The front desk gets busy, the restaurant gets flooded with customers, a customer has a complaint, and before you know it, an employee has worked through their meal or rest period. And, too often, frazzled and untrained managers may ask employees to work through a meal or rest period, or to delay their meal and rest period. These practices can lead to meal and rest break lawsuits, and often not by one or two employees, but rather by all of the employees in the form of a class action. However, in the past two years, California has started to cut employers a break regarding meal and rest periods.

Recent case developments coupled with a strong meal and rest period policy could help prevent you from being the next victim of a class action litigation.

California Rules an Employer Need Not Police Breaks

On July 22, 2008, the Fourth District Court of Appeal published its decision in *Brinker Restaurant Corporation v. Superior Court of San Diego (Hohnbaum)*. The court reached several conclusions favorable to employers, particularly those in the restaurant and hotel industries, on the issue of meal periods and rest breaks. The court held that employers have some flexibility in scheduling meal periods and rest breaks, and that while employers must provide meal periods, they are not necessarily liable if the employees do not actually take them. For reasons that are particularly beneficial to employers of multiple work-site establishments, the court denied class certification.

Brinker operates 137 restaurants in California, including Chili's Grill and Bar, Romano's Macaroni Grill, and Maggiano's Little Italy. In 2006, Brinker was sued by a purported class of employees for failing to provide meal periods and rest breaks under California Labor Code section 227.6.

Plaintiffs claimed that Brinker used an improper system of "early lunching," requiring employees to take their first meal period shortly after their shifts began, then requiring employees to work an additional five to nine hours without a second meal break. Plaintiffs also claimed they were required to work while off the clock during meal periods, and that Brinker management "shaved" or altered employee time cards. Plaintiffs further argued that employers have an affirmative duty to ensure that employees receive meal periods, and that Brinker could not meet this obligation simply by making meal periods available.

Brinker argued that if an employee worked more than five hours but less than ten, Brinker was only required to give that employee one meal period at some time during the shift, and that Brinker was not required to give employees one meal period every five hours, as Plaintiffs were suggesting.

Labor Code Section 512(a)

Labor Code section 512(a) plainly provides that a California employer has a duty to make a first 30-minute meal period available to an hourly employee who is permitted to work more than 5 hours per day unless, (1) the total work period per day is 6 hours or less and (2) both the employer and the employee agree by mutual consent that the employee waives the meal period. Section 512(a) also states that an employer must make a second 30-minute meal period available to an hourly employee who worked more than 10 hours per day, unless (1) the total hours worked per day is 12 or less, and (2) the first meal period was not waived.

Plaintiffs contended that, where hourly employees take their first meal period approximately one hour into their shift, they are entitled to a second meal period five hours after they returned to work from the first meal period. The court disagreed, and found that employees are entitled to a first meal period for every work period of more than five hours per day, not a meal period for every five hours worked. Further, the wage order contains no restriction on the timing of meal periods, so Brinker was not violating the law by requiring "early lunching" by some of its employees.

Following IWC Wage Order 5-2001, which applies to the public housekeeping industry, and the applicable Regulation 11050(12)(A), the court found that the plain language of the wage order, which requires an employer to permit a 10-minute rest period "per four hours of time worked or major fraction thereof," does not mean that a rest period must be given every 3.5 hours. Plaintiffs asserted that a rest break was required when employees work any time over the midpoint of each 4-hour block of time. The *Brinker* court rejected this interpretation. The appropriate number of breaks is based on total hours worked daily. It is only when an employee is scheduled for a shift longer than 3.5 hours, but less than 4 hours, that he or she is entitled to take a rest break before the 4-hour mark.

The *Brinker* court also found that Regulation 11050(12)(A) does not require employers to authorize and permit a first rest break before the first scheduled meal period. The regulation is silent as to the timing of the first rest break vis-à-vis the first scheduled meal period. The regulation only states that rest breaks, "in so far as is practicable, shall be in the middle of each work period." The court noted that in the case of a restaurant server whose busiest time is likely at mid-shift - it is not "practicable" to have a break at that point.

Best Practices

Have a meal and rest break policy that managers actually enforce. Remember that it is almost always the employer's burden to prove that it complied with the wage and hour laws.

If employees do miss their breaks, have a policy in place that compensates them for missed meal periods. This ensures that if an employee makes a claim, the employer can demonstrate that when it is put on notice of the missed meal period, it appropriately compensates. Further, employees should be required to review and sign off on their time cards certifying that the hours shown (which should include meal and rest periods) are accurate.

In California, employees who miss a meal break are entitled to an extra hour of pay. For example, if an employee working an 8-hour shift who took his meal break would be entitled to 7.5 hours of pay; however, if that same employee did not take his meal break, he would be entitled to 9 hours of pay, i.e. 8 hours of work plus one hour of extra pay. For small employers this may be an option to handle those situations when there is no other employee there to relieve an employee for a meal period.

California has 17 Wage Orders covering a cross-section of industries. Therefore, it is always recommended that you consult with legal counsel before taking any employment action to ensure that your practice is in accordance with State and Federal Law.

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Christine H. Long, a partner at Berliner Cohen, represents and counsels hospitality clients on all matters related to their operation. She provides advice and counsel on employment matters and represents clients in litigation in matters relating to employment, contracts, partnerships, and real estate.