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EMPLOYERS NOT REQUIRED TO ENSURE EMPLOYEES TAKE MEAL AND REST BREAKS; SUPREME COURT REVIEW PENDING

One of the hotter, more closely watched issues in California over the last several years has been whether employers must force meal and rest periods on their employees to comply with the California Labor Code. That issue has come to a head recently, with appellate rulings that have teed the matter up for review by the California Supreme Court.

Earlier this year, in *Brinker Restaurant Corp. v. Superior Court*, 165 Cal. App. 4th 25 (Cal. Ct. App. 2008), the court of appeals ruled that California employers do not have an affirmative obligation to ensure that their employees actually take meal and rest breaks, so long as employers make the breaks available. More recently, in *Brinkley v. Public Storage*, 2008 Cal. App. LEXIS 1707 (Cal. Ct. App. Oct. 28, 2008), the court of appeals made a similar ruling. In October, however, the California Supreme Court agreed to review the *Brinker* decision. This review should result in the controlling answer to this legal question.

At issue is the interpretation of California Labor Code § 226.7, which states, “[i]f an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee’s regular rate....” (emphasis added). Similar language is found in other relevant sections of the Code, such as section 512(a), which states “[a]n employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes.” (emphasis added).

The issue then is whether the word “provide” requires employers to ensure that employees actually take their breaks or whether “provide” simply means that employers must make these breaks available.

In both *Brinker* and *Brinkley*, the California Court of Appeal held that employers have no affirmative obligation to ensure that employees take meal or rest breaks. According to the court, as long as employers make these breaks available and do not “impede, discourage or dissuade” employees from taking their breaks, employers satisfy their statutory obligations. The court recognized that a contrary ruling would not only be impractical—as it would require employers to police their employees—but it would also create perverse incentives for employees to violate company break policies to obtain additional compensation.

Although these decisions represent an important victory for California employers, it remains to be seen whether the law in this area will change following the California Supreme Court’s decision. For now, employers must simply wait for the Court’s answer.

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