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LITIGATION

There's more at stake in *Brinker*: How the decision can impact class action litigation

By Curtis Graham

By February 2012, the state Supreme Court will publish its decision in *Brinker Restaurant Corp. v. Superior Court*, 165 Cal. App. 4th 25 (2008). Brinker is the first of eight opinions before the Court in which a common-sense approach to an employee's entitlement to a meal period has generally prevailed. It is likely that the Court will blaze a new trail in accordance with its overriding concern with curbing litigation abuse, while preserving and promoting the class-wide adjudication of claims.

The discourse over *Brinker* has always been its analysis of the meal period dichotomy: May an employer merely "provide" employee meal periods, or must an employer "ensure" employees actually take them? But, there is more to *Brinker* than this.

Brinker 's procedural baggage, however, could become quite distracting for the Supreme Court. Most prominent is the 4th District Court of Appeal's reversal, directing the trial court to deny with prejudice class certification of the meal period, rest period, and off-the-clock subclasses. This directive violates a core objective of the Court, which is to preserve the sanctity of a trial judge's discretion regarding class certification (*Sav-On Drug Stores Inc. v. Superior Court* (2004) 34 Cal. 4th 319, 328; *Washington Mutual Bank, FA v. Superior Court* (2001) 24 Cal.4th 906, 913; *Linder v. Thrifty Oil Co.* (2000) 23 Cal. 4th 429, 435).

If focused on this issue, the Supreme Court may lose interest in articulating a thorough analysis of meal period obligations. It will not take long, though, for this issue to come before the justices again. Five of the meal period cases in line behind *Brinker* arise out of the affirmation of a trial judge's decision concerning class certification. Thus, the Court will have ample opportunity within the next few months to address the state's meal period law.

The Supreme Court may also center its analysis on the class certification process. It did so recently with the June 2011 class certification opinion in *Wal-Mart Stores Inc. v. Dukes* (2011) 131 S. Ct. 2541, and the justices may wish to articulate and underscore California procedure. Interestingly, in another case, the same two courts are currently engaged in a volley involving the enforceable scope of an employment-based arbitration agreement (*Sonic-Calabasas A Inc. v. Moreno*, 2011 U.S. LEXIS 7728 (Oct. 31, 2011)).

One class-related issue for which further guidance is warranted is whether survey and statistical evidence may be used to establish class-wide meal or rest period liability or wage liability for off-the-clock work. With *Brinker*, the Supreme Court will be reviewing the 4th District's rejection of the statistical evidence as irrelevant based on its belief that the practices displayed did not answer the question of why employees engaged in those practices.

When the Supreme Court elects to tackle the meal period issue, whether with *Brinker* or one of the seven in line behind it, the Court will have to marry its own competing policy objectives. In doing so, the Court will likely preserve and support the use of the class action procedure for the adjudication of employee claims, while fashioning a rule to minimize employee abuse.

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Driving the Supreme Court to rule in favor of an "ensure" standard is its belief that public policy "encourages the use of the class action device" and construes wage laws for the benefit of workers (*Sav-On Drug Stores Inc. v. Superior Court* (2004) 34 Cal. 4th 319, 340). Requiring employers to "ensure" that employees take their meal periods places the focus on the employer, thereby lending itself to class-wide adjudication. Adopting a "provide" standard compels the opposite result.

The Supreme Court also generally believes that employers should not be permitted to deflect responsibility for legal compliance with a practice or policy that is not anchored to actual employee experiences. For example, in *Ramirez v. Yosemite Water Co.* (1999) 20 Cal. 4th 785, 802, the Court emphasized that an employer could not avail itself of the outside salesperson exemption "solely by fashioning an idealized job description that had little basis in reality." A policy that meal periods need only be "provided" by an employer creates the opportunity for employers to claim compliance on paper while ignoring or undermining it in practice.

However, the Supreme Court is concerned about abuse caused by employees. Although not a class action, the *Ramirez* decision may provide the best example of the Court's ability to implement a rule that is equally painful for employers and employees. There, it removed the incentive each side had to "cheat" concerning the application of the outside salesperson exemption. The Court constructed a standard with a fact-based inquiry "into the realistic requirements of the job," including how the employee actually spent his or her time, whether the employer had realistic expectations, and what efforts the employer made to express displeasure regarding the employee's tasks (*Ramirez*, 20 Cal. 4th at 802).

I suspect that the Supreme Court will adopt a similar type of split-the-baby standard concerning meal periods, utilizing a "reality of the workplace" test. The test would examine whether an employer in a given business really can or does uniformly "provide" an opportunity for meal periods on a company-wide basis. Factors relevant to the analysis would include whether employees actually take meal periods, whether supervisors initiate a dialogue with employees who do not take meal periods about their reasons for not doing so, and whether employers pay meal period premiums to employees who identify meal periods they were unable to take due to the employer's demands.

The Supreme Court could achieve this result by implementing a burden-shifting analysis. The initial burden would lie with the employee to establish that the employer failed to "provide" meal periods. The employer would then be required to establish that it uniformly makes meal periods realistically available in light of working conditions, based on its interactive dialogue with employees concerning meal periods. Thereafter, the employee would have to prove that the employer's efforts were insufficient.

Although this ultimately creates a fact-sensitive test for liability purposes, the focus on the employer's policy and uniform enforcement efforts potentially allows for a predominance of common issues over individual issues sufficient for class action litigation. Such a test also minimizes the opportunity for abuse by either side. Employers will be motivated to climb over the taller hurdle of "ensuring" employees take meal periods to minimize the risk of litigation, while employees will be guided away from a strict liability standard and will be forced to explain why their meal periods were not taken.

The employment law bar is eagerly awaiting a decision in Brinker to solve the meal period riddle. But the meal period issue is not the only issue in California about to receive a makeover. The Supreme Court's decision in Brinker and its related cases will directly impact the viability of class action litigation for several types of claims. While the Court will undoubtedly protect the use of class action litigation, it is likely the Court will do so in a manner that minimizes the rampant abuse of the meal period law that the ambiguity has been creating.

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