

**California Court of Appeal Restricts Employee Rights to Recover
for Meal and Rest Break and Off-the-Clock Violations**

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In a case that may have far-reaching and positive implications for both California employers and employees, the California Court of Appeal for the Fourth Appellate District held that (1) employers need not ensure that their employees actually take meal and rest breaks as long as they authorize and permit breaks and do not impede, discourage, or dissuade employees from taking breaks; (2) employers cannot be held liable for their employees working off the clock unless they know or should have known they were doing so; and (3) rest and meal break and off-the-clock claims may not be amenable to class treatment where evidence of individualized practices exists. The decision in *Brinker Restaurant Corp. v. San Diego Superior Court* held that rest, meal break, and off-the-clock claims typically turn on individualized practices and are not amenable to class treatment. This decision will be final in the absence of an appeal by plaintiffs within 40 days.

Brinker operates 137 restaurants in California, including Chili's Grill & Bar, Romano's Macaroni Grill, and Maggiano's Little Italy. Brinker requires its employees to sign a written policy stating that employees are entitled to a 30-minute meal period when they work a shift that is more than five hours long and to a 10-minute rest break for every four hours of work. The policy further provides that an employee's failure to follow the policy may result in disciplinary action up to and including termination. Furthermore, Brinker's Hourly Employee Handbook states that its employees are responsible for clocking in and out for every shift, that they may not begin working until they have clocked in, and that working off the clock for any reason is considered a violation of company policy.

Plaintiffs alleged that Brinker willfully violated Labor Code section 226.7, 512 and Wage Order Nos. 5-2000 and 5-2001 by failing to provide rest periods in the middle of each four-hour work period, failing to provide meal periods for each five-hour block of working time, requiring employees to take their meal breaks within the first hour of work, and requiring employees to work off the clock during meal periods.

At the trial court level, plaintiffs moved to certify a class of "all present and former employees of Brinker who worked at a Brinker-owned restaurant in California, holding a non-exempt position from and after August 16, 2000" and alternatively defined the class as "all hourly employees of restaurants owned by Brinker in California who have not been provided with meal and rest breaks in accordance with California law and who have not been compensated for those missed meal and rest breaks," including "off the clock" work.

Plaintiffs submitted evidence that Brinker's corporate policies of early lunching (within the first hour of work), time shaving, and failing to provide meal and rest periods were centralized and common to the class. Plaintiffs argued that the class action was a superior vehicle to try the case because Brinker maintained relevant data in a searchable format, and they could prove the effects of these alleged companywide policies with this statistical evidence. Citing *Cicairos v. Summit Logistics, Inc.*, 133 Cal. App. 4th 949, 962–63 (2005), plaintiffs asserted that employers have an affirmative duty to ensure that their employees actually receive meal periods.

Brinker submitted more than 600 declarations from hourly workers claiming they were provided meal and rest breaks, and almost 30 declarations from managers who stated they permitted their employees to take meal and rest breaks and that the company's practice for providing meal breaks differed depending on the position, the shift, the manager, and the restaurant.

The trial court issued an order granting plaintiffs' motion for class certification, finding that common issues predominated over individual issues, despite acknowledging that individualized discovery would be required if the law did not require Brinker to force its employees to take breaks. Brinker filed a petition for writ of mandate with the Court of Appeal.

The Fourth Appellate District granted the petition and ordered the trial court to vacate its order granting class certification and to enter a new order denying certification of plaintiffs' proposed class. The Court of Appeal reached several legal conclusions applicable to plaintiffs' claims and criticized the trial court for not deciding these issues prior to making its class certification decision.

As to plaintiffs' rest break claims, the Court of Appeal first concluded that employees need only be afforded one 10-minute rest period every four hours of work, requiring individualized proof as to whether employees received a full 10-minute rest period. The decision also clarifies that the "major fraction thereof" language of the rest period regulation does not mean anything more than two hours, but rather means anything more than three and one-half hours. Consequently, under the court's rationale, only employees who work shifts longer than seven and one-half hours are entitled to a second rest period. Second, the court confirmed that rest breaks need only be afforded in the middle of a four-hour period when "practicable," and that the "practicability" issue could not be resolved on a classwide basis. Third, the court found that because Brinker was not obligated to ensure that its employees took rest breaks, whether plaintiffs waived their rest breaks could not be determined without individualized proof.

The court reached similar conclusions regarding plaintiffs' meal break claims. The court rejected plaintiffs' contention that a meal break must be provided for each five-hour block of consecutive working time. Instead, the court concluded that the statute imposed only an obligation to provide a meal for each work day that exceeds five hours. In the court's view, the law does not mandate when the employee must take the meal. The court also held that employers need not "ensure" meal periods are taken and only need to make meal periods available to their employees. In doing so, the court relied on analogous federal decisions in *White v. Starbucks Corp.*, 497 F. Supp. 2d 1080 (N.D. Cal. 2007), and *Brown v. Federal Express Corp.*, 2008 WL 906517 (C.D. Cal. Feb. 26, 2008). The court also rejected plaintiffs' argument that a meal period could only be waived in writing. The court determined that individualized adjudication of whether an employee declined to take a meal break was required.

Finally, the court determined that plaintiffs' off-the-clock claims were not amenable to class treatment because they required individualized inquiries into the following: (a) whether the employee actually worked off the clock, (b) whether managers had actual or constructive knowledge of such work, (c) and whether managers coerced or encouraged such work. Relying on *Morillion v. Royal Packing Co.*, 22

