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Class Litigation of Meal and Rest Period Claims

May Meal and Rest Period Claims Be Certified in a Post-*Brinker *World?

By Matt C. Bailey

In *Brinker Restaurant Corp. v. Superior Court*, 80 Cal. Rptr. 3d 781, 800 (2008), *review granted and opinion superseded* in 85 Cal. Rptr. 3d 688 (Oct. 22, 2008), California's Fourth District Court of Appeal substantively altered the wage and hour landscape through its conclusion that California meal and rest period regulations only impose a passive obligation on employers to make breaks available. This legal finding, according to the *Brinker* court, renders meal and rest period claims hopelessly uncertifiable as a class action, as the employee's option to waive a meal or rest period requires a case-by-case inquiry into the reason each individual break was not taken. While the *Brinker* decision is currently pending review by the California Supreme Court, *Brinker's* analysis is not the be-all end-all when it comes to class adjudication of meal and rest period claims. Regardless of the outcome in *Brinker*, numerous meal and rest break theories will continue to be suitable for class adjudication.

Claims Involving Uniform Barriers to Breaks

Perhaps one of the most effective theories permitting class adjudication of meal and rest period claims involves an employer's imposition of a common policy and/or practice that uniformly prevents employees from accessing meal and rest periods. Such violations predicated upon a common barrier are antithetical of *Brinker*, as such violations involve: 1) a common policy ideal for classwide adjudication; 2) a lack of employee choice that effectively negates the "individualized" waiver defense; and 3) the potential for employer liability, notwithstanding the existence of a facially lawful meal and/or rest period policy. *See e.g., Bufil v. Dollar Financial Group, Inc.*, 162 Cal. App. 4th 1193, 1206 (2008) ("no one disputes that the wage order was posted or that there were designated areas to take a break — these matter naught if a single-shift sole employee or sole employee working with a trainee is not able to take an off-duty break.").

continued on page 2

Managing the Compensable Workday in a New Electronic World

By Christopher A. Parlo and Michael J. Puma

The Fair Labor Standards Act (FLSA) requires employers to pay their employees a minimum wage for all hours worked in a workweek and to pay overtime to those nonexempt (*i.e.*, hourly) employees in any workweek that exceeds 40 hours. All time from an employee's first principal activity of the day until the last principal activity, excluding meal periods, is compensable.

History

When Congress passed the FLSA in 1938, measuring (and controlling) the length of an employee's workday was relatively easy. An employee showed up to work, punched a time-clock (or signed a log sheet, or followed some similar method), recorded his or her departure from the worksite in the same manner as used on arrival, and was paid for the intervening time period, excluding only the generally preset lunch period. The routine seemed simple enough.

Since that time, however, the confines of both the workday and the workplace have changed. Under the FLSA, employees are entitled to be paid beginning only with their first "principal activity," that is, the first activity that the employee is hired to perform, and to be paid only through their last principal

continued on page 5

In This Issue

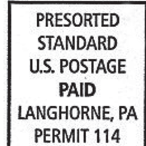
Brinker and Meal and Rest Breaks. 1

What Is a Compensable Workday? 1

Guns in the Workplace. 3

Movers & Shakers . . . 8

Verdicts 8



Right to Bear Arms

continued from page 4

employer's place of business, unless there is reason to believe that the employer might present an immediate threat to the health, life, or safety of others. The employee must consent to the search, which may defeat the purpose. Also, if there is consent, then query whether the exception is needed. Further, if an employee is subject to disciplinary action, employers may revoke the right to bring concealed weapons on the property. This provision does not seem effective, as an employee subject to discipline may well be a person likely to commit violence in the workplace. Finally, company-owned vehicles are exempt.

Alaska

In Alaska, employers are prohibited from establishing policies banning employees from bringing weapons to company parking lots.

Tri-State Decision

A 2005 Fifth Circuit decision, which covers Texas, Louisiana, and Mississippi, held that workplace shootings were a workers' compensation matter. *See Tanks v. Lockheed Martin Corp., et al.*, 417 F.3d 456 (5th Cir. 2005). The decision stemmed from a 2003 shooting rampage at a Lockheed Martin plant in Meridian, MS, in which an employee left a mandatory diversity training class at his work site, returned with a 12-gauge shotgun and semiautomatic rifle, and shot 14 people before killing himself. The Fifth Circuit's holding meant that employees and family members who sued the employer for liability were limited to awards of $150,000 each. The ruling stated that "[t]he only viable conclusion is that … [the employee's] act of shooting cannot be separated from the employment status of his victims." Critics of the decision argue that it could lead large corporations to believe there is no need to curtail workplace violence because of their potentially limited liability.

Conclusion

Litigation between state's rights advocates, the National Rifle Association, employers, and employees will certainly seek answers to the questions created by the courts' decisions and various state laws regarding firearms in the workplace. Notwithstanding the enactment of the state laws, employers still must provide a safe workplace for employees, and intervene where appropriate. If necessary, as a response to violent behavior by a worker, an employer may need to secure a court order prohibiting the employee from carrying guns to work. In states with pro-gun laws, employers may need to re-write employee handbooks to include firearms policies specifically created to reflect the reality that guns could be present in the parking lot. Employee training should take place to explain exactly what is, or is not, allowed by the employer within the confines of the law. In states that have not enacted such laws, employers should review this issue with employment counsel and develop policies and procedures with respect to firearms at work.

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Compensable Workday

continued from page 1

activity. However, those concepts do not necessarily include everything an employee might do to get ready for work at the beginning of the day, or that they may do after the traditional or scheduled workday has ended. Time can be spent turning on, booting up, and opening certain computer programs needed to perform an employee's duties. Employees may have to print out and read certain reports. They may have to check in with security or go through other screening processes just to be able to get to a work station to perform their jobs. At or after the end of the scheduled workday, an employee may need time to log off from a computer or may choose to check e-mails.

Christopher A. Parlo is a partner in Morgan Lewis's Labor and Employment Practice. He represents and counsels management clients in a broad spectrum of industries and in all aspects of labor and employment law. **Michael J. Puma** is a partner in the firm's Employment Practice. His practice includes the full spectrum of labor and employment law matters.

What Is 'Work'?

Recognizing these realities, employees have sought clarification in the courts as to what it means to "work" — arguing that beyond the things their employers had hired them to perform from the beginning to the end of the workday, there were certain additional tasks they had to complete in order to perform these principal activities and that they should be paid as well for the time spent doing them. Their efforts have led to a major expansion of the concept of "work," to encompass not only the principal activities themselves, but also activities that are "integral" and "indispensable" to the principal activities.

When Does the Day Begin And End?

To this day, however, the boundaries of this additional "work" remain murky, and efforts to define them in the courts have met with limited success. The important point, however, is that if an employee can persuade a court to call, for example, a particular morning task "integral" and "indispensable," that activity can become the first principal activity of the day. For compensation purposes, the employee then is on the clock — and is required to be paid — for all of his or her work time from that moment forward. The same dynamic occurs from the end of the traditional workday until the completion of any alleged last principal activity.

Thus, a meat cutter in a slaughterhouse was originally thought to be entitled to payment only beginning with the time he or she reached the butcher table, poised to begin carving the first side of beef, until courts decided that the job could not be done with a dull knife. In a blink, sharpening knives became the first principal activity of the day and the meat cutter was entitled to be paid not only for the time spent with the sharpening stone, but also for

continued on page 6

Compensable Workday

continued from page 5

all of the intervening time from the grinding room to the refrigerator to the butcher table, including interim walking time where the butcher was not performing duties precisely defined as "butchering," but walking from place to place.

Needless to say, this created a problem for employers, but a reasonably containable one. Although considerable uncertainty existed (and continues to exist today) over what activities qualify as "integral" and "indispensable," at least all of the activities occurred in the workplace, so employers could conceivably observe and monitor what their employees did and how long it took.

Technology Expands the Workday

What happens, however, when the workplace itself is no longer contained within the four walls of an office or plant? What happens to the compensable workday in what we'll call the "BlackBerry Age"? For many years now, employees have been permitted — and in some cases required — to work without being physically present in their places of employment. Technology has driven this expansion of the workplace to include homes, cars, hotel rooms, airplanes — virtually any place that is cell phone– laptop– or BlackBerry–accessible. This has been both a convenience and a productivity enhancement for employers and employees. But these technological advances have profound implications for what constitutes the compensable workday.

Take, for example, an employee who brings his or her laptop home, and there performs some extra work. That employee may be entitled to be paid not only for the few minutes actually spent editing a document or reading e-mails at night before he or she sits down to dinner or goes to bed, but also for all of the intervening time from the minute the employee left the office until he or she reaches home, turns on the computer there and finishes checking her document or e-mails. The employee could argue an entitlement for this time even if his or her employer did not ask that any extra outside work be done. Remember, the compensable workday runs from the first principal activity of the day to the last principal activity. It does not start and stop to account for intervening downtime, such as commuting.

Take, for another example, an employee who pulls out his or her BlackBerry first thing in the morning to read and respond to e-mails. At first blush, this might sound like only a good thing for an employer, blessed to have such a diligent and fastidious employee. But wait! That employee may also be found to be performing an "integral" and "indispensable" part of his or her job by checking messages, which effectively starts his or her day for compensation purposes, long before he or she even reaches the office. The employer also now has an electronic record of all the time that is spent, beginning with the employer's electronic record of the BlackBerry login. So, this diligence comes at a high price.

Controlling Exposure

Because changes in technology have made it easy for employees to extend their workdays well beyond the hours indicated by the time clock at the plant or the office — and thus more difficult for employers to monitor and control — employers now have to manage the use of technology carefully to avoid potentially crushing exposure to overtime claims for hours worked outside of the traditional compensable workday, and outside of the traditional workplace. There are steps an employer can take to control and limit this exposure.

First, employers should establish a policy to limit the distribution of technology. Remote work devices (BlackBerrys, cell phones, laptops) could be issued only to exempt personnel, who are not entitled to overtime pay, and only as needed. If nonexempt personnel need short-term access to company technology off-site, a company can require that they acknowledge, preferably in writing via an acknowledgement form, that these tools may not be used outside scheduled work hours (except at the direction of a supervisor), that they must record and report all time spent performing off-site business activities, and that they will be required to return their electronic devices when the work is complete.

Second, employers should encourage nonexempt employees to adopt practices that keep work at the workplace. Encourage employees to go home and rest, not work. Establish limits for time that can be spent checking emails and voicemails during non-work hours. Consider refusing remote access to e-mail for nonexempt employees altogether. The policy's goal is to make sure that only those nonexempt employees who have to work off-site are given access to work-related technology and that they use it no more than is necessary.

Third, employers need to monitor compliance with any company policies limiting the use of remote work devices. Consider requiring nonexempt employees who use remote devices to sign an annual acknowledgement form signifying their understanding of the policy. Employers can also audit or sample e-mail and voicemail logins and other records of employee time spent using remote electronic devices and compare these records to pay records to ensure that all compensable time is being paid. Employers should also make sure that managers have a firm grasp of all of the policies as well. Require managers to confirm in writing that they have no knowledge of uncompensated off-site work performed by nonexempt employees, train them not to encourage and not to ignore such work, and discipline those managers who permit it.

Conclusion

Perhaps the most important thing an employer can do to avoid exposure to overtime claims is not to assume it can accept the benefits of work performed off-site, even if it was done without permission and/or in violation of company policy. If a nonexempt employee works out of the office, pay him or her. Then enforce any rules against such work with disciplinary measures.