Have Your Meal and Time to Eat It, Too!

California Courts and the Law on Meal and Rest Breaks
Jackson Lewis is one of the largest law firms in the country dedicated exclusively to representing management on workplace issues. The Firm has successfully handled cases in every state and is admitted to practice in all Circuit Courts of Appeal and in the United States Supreme Court. With 45 offices and more than 600 attorneys, the Firm has a national perspective and sensitivity to the nuances of regional business environments.

Since 1958 we have represented a wide range of public and private businesses and non-profit institutions in a vast array of industries. When issues arise, we devise optimal solutions that minimize costs and maximize results. Whether we are counseling on legal compliance or litigating a complex case, we assist our clients in achieving their business goals.

In addition, we help employers create policies and procedures promoting positive employee relations. We have built our practice and earned our national reputation over the years by helping companies reduce workplace-related litigation by educating management on legal trends, judicial developments, and statutory and regulatory compliance in the rapidly evolving area of workplace law. Our state-of-the-art preventive law programs utilize the Firm’s expertise and unmatched experience to evaluate employment trends and related litigation, minimizing the risk of exposure in future lawsuits.
Have Your Meal and Time to Eat It, Too – California Courts and the Law on Meal and Rest Breaks

By Robert M. Pattison, Esq.

“No soup for you!” shouts out the advertisements placed on BART commuter trains by a plaintiffs’ employment law firm in Northern California. Decrying employers who make employees work without lunch or rest breaks, this firm has brought dozens of class action lawsuits over alleged failure to comply with California meal and rest period requirements. With their understated reference to a Seinfeld television character, the BART ads, in a not-so understated way, encourage commuting workers who feel they aren’t getting meals or rest to contact the firm.

Meal and rest period claims have dominated California wage-hour litigation for the last several years. Changes in how work is done, in how families organize their work and school and free time, and arguable ambiguities resulting from Labor Code language that differs slightly from the historic language of the Industrial Welfare Commission “wage orders” gave rise to a bonanza of class action litigation over whether employees received proper meal and rest breaks.

What are the real rules about meal periods in California?

Most California employers know they must provide meal periods for non-exempt employees who will work more than five hours. Most understand California law dictates that when a meal period is required, the meal break must be at least 30 uninterrupted minutes long, with the employee relieved of all duty. And most California employers know state law also calls for them to give employees opportunities to rest during the work day.

But just when during the work day should the meal break be given? Is there any flexibility in the timing of the meal period? What if an employee prefers to take her break earlier, or later – or maybe not at all, so she instead can leave work earlier to help at her child’s school or watch his soccer game or go to the dentist or take care of any of a hundred possible errands or other things to do? And must the employer force employees to stop working for meal periods, even where an hourly employee prefers to work through lunch?

California’s Supreme Court is set to address these questions in the pending Brinker Restaurant Corp. case. The court of appeal in that case vacated a trial court order certifying a class of restaurant workers who contended their employer had caused them to take meal periods too early or too late in the work day, misplaced the timing of rest breaks, and made employees work “off the clock” – working time without getting paid for it.

Plaintiffs’ counsel urged the appeals court to rule California law requires a highly structured, inflexible work schedule for non-exempt employees. Their reading of the Labor Code and the wage orders calls for employees working a standard eight-hour day to work about two hours, then take at least a 10-minute break, then work another couple of hours, then take at least a 30-minute lunch break, then work another two hours or so, then take another 10-minute rest break, and then finish out the day with another couple of hours of work.
Moreover, according to Plaintiffs, the employer must be a meal-period police officer, enforcing the law by assuring each individual employee stops work and takes time for lunch regardless of the employee’s wishes in the matter. That interpretation denies employees any flexibility in how they may want to structure their own work days.

The fourth district court of appeal in Brinker Restaurant rejected Plaintiffs’ arguments and vacated the trial court’s order certifying a class because, it found, the trial court had failed “to properly consider the elements of plaintiffs’ claims in determining if they were susceptible to class treatment.” The court neatly summarized its holding early in its decision:

Specifically, we conclude that (1) while employers cannot impede, discourage or dissuade employees from taking rest periods, they need only provide, not ensure, rest periods are taken; (2) employers need only authorize and permit rest periods every four hours or major fraction thereof and they need not, where impracticable, be in the middle of each work period; (3) employers are not required to provide a meal period for every five consecutive hours worked; (4) while employers cannot impede, discourage or dissuade employees from taking meal periods, they need only provide them and not ensure they are taken; and (5) while employers cannot coerce, require or compel employees to work off the clock, they can only be held liable for employees working off the clock if they knew or should have known they were doing so.


The court went on to find that it could not determine on a class basis the when, how and why employees took or did not take meal or rest breaks or worked off the clock because too many individual inquiries had to be made. The court said that

. . . because the rest and meal breaks need only be "made available" and not "ensured," individual issues predominate and, based upon the evidence presented to the trial court, they are not amenable to class treatment. . . . the off-the-clock claims are also not amenable to class treatment as individual issues predominate on the issue of whether Brinker forced employees to work off the clock, whether Brinker changed time records, and whether Brinker knew or should have known employees were working off the clock.

Id.

The California Supreme Court steps in to the fray

Plaintiffs appealed the court of appeal’s ruling to the California Supreme Court, which has consolidated it for hearing with another meal and rest break case, Brinkley v. Public Storage. In Brinkley, the second district court of appeal came to the same conclusions reached by the fourth district court of appeal in Brinker Restaurant Corp., and the plaintiffs in Brinkley also appealed that decision that had granted summary judgment to the employer.

The Supreme Court may have been motivated in part to grant review to address a seeming conflict among the courts of appeal. Some years earlier the third district court of appeal took an arguably different view from Brinker and Brinkley in Cicairos v. Summit Logistics, Inc. (2005) 133 Cal.App.4th 949. The Cicairos court ruled the employer there had not proved it had provided its employees with required
meal periods. The Brinker and Brinkley courts distinguished Cicairos as limited to its peculiar facts, but plaintiffs’ counsel assert Cicairos holds employers must make employees stop working to take meal breaks.

Briefing in the Supreme Court in Brinker Restaurant Corp., closed in October 2009. The parties have submitted at least a half-dozen briefs to the Court. More than 50 employee and employer organizations and individuals have submitted, jointly with others or individually, friend-of-the-court or so-called amicus briefs in the case. Jackson Lewis LLP submitted an amicus brief in the case on behalf of the Southern California, San Diego, Sacramento and San Francisco Bay Area Chapters of the Association of Corporate Counsel (“the California ACC Chapters”) and the Employment and Labor Law Committee of the Association of Corporate Counsel (“ELLC”).

The Court’s justices and their law clerks now are reading all those briefs and the record from the respective courts of appeal. At some point in the coming months, the Court will schedule oral argument and the attorneys will present their clients’ positions. It is not unusual for a case to take more than a year from the close of briefing before the Court hears oral argument. The most certainty that can exist about when the Court will decide the case is that by law, the Court must issue its opinion within 90 days of oral argument.

The fight over the meaning of California law

Labor Code section 226.7 (a) provides: "No employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission." This Commission (the “IWC”) has issued orders in more than a dozen industries or occupations that regulate “wages, hours and working conditions” of California workers. Most of these IWC “wage orders” address rest periods for non-exempt workers with this language:

Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.

California Code of Regulations (“C.C.R.”), title 8, section 11050, subdivision 12(A) [IWC Order 5, §12(A), regulating the public housekeeping industry] [italics supplied].

Taken together with the meal period requirements discussed below, these words mean, “Work, rest, work, lunch, work, rest, work,” plaintiffs’ lawyers contend, urging the regulations require a highly structured work day. But the court of appeal interpreted the wage order language in a manner that allows rest period flexibility:

The phrase "per four (4) hours or major fraction thereof" does not mean that a rest period must be given every three and one-half hours. [Section](12)(A) states that calculation of the appropriate number of rest breaks must "be based on the total hours worked daily." Thus, for example, if one has a work period of seven hours, the employee
is entitled to a rest period after four hours of work because he or she has worked a full four hours, not a "major fraction thereof." It is only when an employee is scheduled for a shift that is more than three and one-half hours, but less than four hours, that he or she is entitled to a rest break before the four hour mark.

Moreover, because the sentence following the "four (4) hours or major fraction thereof" limits required rest breaks to employees who work at least three and one-half hours in one work day, the term "major fraction thereof" can only be interpreted as meaning the time period between three and one-half hours and four hours. Apparently this portion of the wage order was intended to prevent employers from avoiding rest breaks by scheduling work periods slightly less than four hours, but at the same time made three and one-half hours the cut-off period for work periods below which no rest period need be provided.

Id., at 44.

Some Brinker Restaurant employees had their meal periods relatively soon after arriving at work, in a practice referred to as “early lunching.” These restaurant workers might come into work for an hour or less, have a full off-duty meal period, then return to work, sometimes for longer than five hours or for as much as nine hours. Plaintiffs' lawyers argued the law did not permit employees to have a meal break before they had a rest break – such a system did not fit their inflexible vision of how a day’s work must be scheduled. Brinker Restaurant’s practice, they argued, violated Labor Code section 512(a). This statute provides:

An 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, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived. (Italics added by court of appeal, 165 Cal.App.4th at 51.)

But the court of appeal had no problem with Brinker Restaurant’s approach. The court focused on the code’s reference to hours worked per day. Section 512 does not require, as Plaintiffs argued, that employers provide a meal break no later than after five consecutive hours of work, the court ruled. According to the court of appeal, the code means when an hourly employee will work more than five hours in a day, that employee must receive a meal period at some time during that day – unless the day’s work will be done in less than six hours and both employer and employee agree the employee won’t take a meal period.

The California Labor Commissioner tries to adapt

The State Labor Commissioner, who as chief of the Division of Labor Standards Enforcement of the Department of Industrial Relations has responsibility for enforcing California’s wage-hour laws, continues to interpret the timing question of Labor Code section 512(a) in the manner urged by the
Brinker Restaurant Plaintiffs: an employee must take a meal break no later than the end of every five hours of work. For example, under this interpretation, an employee scheduled to work from 8 a.m. to 1 p.m. must take at least a 30-minute meal period no later than 1 p.m. DLSE has followed this interpretation for many years. The Labor Commissioner’s deputies will find an employer owed the employee a missed meal period penalty of an additional one hour’s pay under Labor Code section 226.7(b) if the employee didn’t start a meal break by 1 p.m. Employees’ attorneys have urged the same interpretation in court cases up and down the state.

At the same time, in the wake of the Brinker Restaurant and Brinkley decisions, the Labor Commissioner has abandoned another longstanding enforcement policy: the position that an employer must make sure employees actually take their meal breaks. The Division’s Enforcement Policies and Interpretations Manual long stated that because of differences in the wording of the meal and rest period regulations, employers must ensure employees take their meal periods while they had only to “authorize and permit” employees to take rest periods. The Labor Commissioner emphasized the statutory language that an employer “may not employ an employee for a work period of more than five hours” without a meal period.

Plaintiffs’ counsel in Brinker Restaurant urged the same interpretation, which neglects to consider the phrases “per day” and “without providing” that also appear in the statute. But in an October 2008 memo to Division staff, Labor Commissioner Angela Bradstreet, her deputy chief and her chief counsel told deputy Labor Commissioners “the language of the statute and the regulation, and the cases interpreting them demonstrates compelling support for the position that employers must provide meal periods to employees but do not have an additional obligation to ensure that such meal periods are actually taken.” Memo to DLSE Staff re Court Rulings on Meal Periods, October 23, 2008, page 2 (italics added).

The dictionary could rule the day

Recall Labor Code section 512(a) provides that an 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" (italics added) and, if the employee's work period is less than six hours, "the meal period may be waived" (italics added).

Using the dictionary, the Brinker Restaurant court of appeal looked to “the plain language” of section 512(a):

“"To ascertain the common meaning of a word, "a court typically looks to dictionaries."" (Arocho v. California Fair Plan Ins. Co. (2005) 134 Cal.App.4th 461, 466, fn. omitted.) The term "provide" is defined in Merriam-Webster’s Collegiate Dictionary (11th ed. 2006) at page 1001 as "to supply or make available." (Italics added.) Thus, from the plain language of section 512(a), meal periods need only be made available, not ensured, as plaintiffs claim. Moreover, plaintiffs' interpretation of section 512(a) is inconsistent with the language allowing employees to waive their meal breaks for shifts of less than five hours.

Brinker Restaurant Corp., 165 Cal.App.4th at 55. The court concluded the law does not require employers to play meal period police patrol, observing that such a requirement would be impractical.
and often impossible. In so ruling, the Brinker Restaurant court followed the lead of a couple of California federal district courts, one of which noted:

"[r]equiring enforcement of meal breaks would place an undue burden on employers whose employees are numerous . . . . It would also create perverse incentives, encouraging employees to violate company meal break policy in order to receive extra compensation under California wage and hour laws [because an employee who does not receive a required meal period must be paid an extra hour’s pay under Labor Code §226.7(b)]."


What’s an employer in California to do?

It is doubtful that anyone can accurately predict just what the California Supreme Court will do with these meal and rest period cases. In recent years, many employers and their counsel expressed hope that two other significant wage-hour class actions that went to the California Supreme Court – Sav-On Drug Stores, Inc. v. Superior Court (2004) 34 Cal.4th 319, and Murphy v. Kenneth Cole Productions, Inc. (2007) 40 Cal.4th 1094 – would result in common-sense interpretations of the laws at issue that would limit the proliferation of class actions against California employers. The Supreme Court disappointed them both times, in Sav-On actually encouraging class action claims and in Murphy expanding the limitation periods during which missed meal and rest period penalties may be claimed (they are wages, not a true penalty, the Court said, so the three-year rather than a one-year statute of limitation applied).

The best course for employers in the meantime may be to maintain the status quo and follow the Labor Commissioner’s continuing interpretation: make sure no non-exempt employee works more than five consecutive hours without a meal break. If the Supreme Court adopts the courts of appeal’s more common-sense approach, employers will have new flexibility. If the Supreme Court maintains the approach historically followed by the Labor Commissioner and urged by Plaintiffs’ counsel, employers will be following the law.
For more information, please contact the author, Robert M. Pattison, one of the attorneys listed below, or the attorney with whom you normally consult.

Robert M. Pattison  
Author  
Managing Partner | San Francisco Office  
199 Fremont Street | 10th Floor  
San Francisco, CA 94105  
(415) 394-9400  
pattisonr@jacksonlewis.com

JoAnna L. Brooks  
Partner | San Francisco Office  
199 Fremont Street | 10th Floor  
San Francisco, CA 94105  
(415) 394-9400  
brooksj@jacksonlewis.com

Joel P. Kelly  
Partner | Los Angeles Office  
725 South Figueroa Street | Suite 2500  
Los Angeles, CA 90017  
(213) 689-0404  
kellyj@jacksonlewis.com

Mia Farber  
Partner | Los Angeles Office  
725 South Figueroa Street | Suite 2500  
Los Angeles, CA 90017  
(213) 689-0404  
farberm@jacksonlewis.com

Frank M. Liberatore  
Managing Partner | Orange County Office  
5000 Birch Street | Suite 5000  
Newport Beach, CA 92660  
(949) 885-1360  
liberatf@jacksonlewis.com

Cary G. Palmer  
Partner | Sacramento Office  
801 K Street | Suite 2300  
Sacramento, CA 95814  
(916) 341-0404  
palmerc@jacksonlewis.com

Paul F. Sorrentino  
Managing Partner | San Diego Office  
655 West Broadway | Suite 900  
San Diego, CA 92101  
(619) 573-4900  
sorrentp@jacksonlewis.com