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LABOR & EMPLOYMENT DEPARTMENT

ALERT

COURT OF APPEALS HANDS EMPLOYERS SIGNIFICANT VICTORY IN WAGE & HOUR CASE

Wage and hour class actions have been a nightmare for many employers with operations in California. The consequences for even minor infractions of the state's arcane wage and hour laws can be completely disproportionate to the alleged harm. But on July 22, 2008, a state Court of Appeal handed employers a significant victory and clarified employers' obligations regarding meal and rest periods.

California law generally requires employers to provide a 30-minute, unpaid meal period to non-exempt employees who work more than five hours in a day, and a second 30-minute meal period to those who work more than 10 hours. In addition, employers must permit non-exempt employees a 10-minute paid rest break during every four hours worked, "which insofar as practicable shall be in the middle of each work period." During these breaks, employees must be relieved of all responsibilities. Employers who fail to provide these breaks are liable to aggrieved employees for one-hour's pay for each day there was a violation.

The question of what it means to "provide" these breaks, however, was unresolved. Was it enough for employers to have policies requiring employees to take these breaks? Or did they need to monitor employees to ensure that they took breaks of the specified duration at the proper times?

Brinker Restaurant Corp. v. Superior Court involved a challenge to an order certifying a class action. The class consisted of employees from Brinker's 137 California restaurants who claimed they were denied meal and rest periods and were required to work off the clock. The trial court that certified the class held that "common questions regarding the meal and rest period breaks are sufficiently pervasive to permit adjudication in this one class action."

The Court of Appeal disagreed. It first concluded that employers need not ensure that the breaks are actually taken, but need only make them available. And if employers only needed to offer the breaks, then the determination as to why specific employees had not taken them necessarily involved individualized inquiries that were ill-suited to class-wide treatment. In essence, the Court of Appeal articulated a standard that is easier for employers to meet and is harder for plaintiffs to challenge on a class-wide basis.

This is unlikely to be the final word on the topic. The *Brinker* decision had already gone from the trial court, to the appellate court, to the state supreme court, and back to the appellate court. A return trip to the California Supreme Court, which has not been friendly to employers, seems certain. But it is encouraging for California employers to have a

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published state court of appeal decision recognizing that a standard requiring them "to police their employees and force them to take…breaks" would be unworkable.

Even with this "win," California employers still have exposure to these types of claims, and other issues remain unsettled. Fox Rothschild can guide employers on what policies and postings can be used to reduce that exposure. If you have questions or concerns about this specific issue or would like a more general review of your wage and hour practices in California, please contact David F. Faustman at 415.364.5550 or dfaustman@foxrothschild.com, or Jeffrey D. Polsky at 415.364.5563 or jpolsky@foxrothschild.com, or Lynne M. Hook at 310.556.8786 or lhook@foxrothschild.com, or any other member of our Labor & Employment Practice.

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