

## *Wage & Hour*

# California *Brinker* Decision Casts Uncertainty Over Employer Rest and Meal Break Policies

By [Ray Lane](#)

Employers nationwide may need to be more mindful of their rest and meal break policies following a decision last month by the California Supreme Court, experts told BNA.

In (*Brinker Rest. Corp. v. Super. Ct. Cal.*, No. S166350, 4/12/12), the state court April 12 [held](#) that under California wage and hour laws, an employer must relieve an employee of all duty for a designated meal period but does not need to ensure that the employee does no work (30 HRR 400, 4/16/12).

The decision addressed a long-simmering dispute between a class of present and former wait staff in California against Brinker Restaurant Corp., the parent company of the Chili's Grill & Bar and Maggiano's Little Italy restaurant chains.

The Brinker employees filed a class action claim in 2000 alleging the employer violated state laws dating back to 1998 on rest and meal breaks mandated under California law, alleging “off-the-clock” work for about 59,000 workers.

### **Issue Overlapped Several Industries.**

More broadly, *Brinker* addressed crucial wage and hour questions that have spawned numerous class action lawsuits across California not only in the restaurant industry, but in transportation, retail, manufacturing, medical, and other service industries.

Kenneth D. Sulzer, a partner in the Labor & Employment Law Department of Proskauer Rose LLP in New York City, and co-head of its national Class/Collective Action Group, told BNA April 25, “The court settled to two big questions for California employers: Do employers simply have to provide a meal break to employees, or must employers ensure that they actually take their breaks? And, when during the workday must meal and rest breaks be taken, and how much time must be provided?”

According to Sulzer, whose firm had no involvement in *Brinker* but has handled as many as 100 meal and rest break class actions cases in California in the past decade, the court said that “if grown adults are truly given the break but work instead, ... then there's no violation of state laws.”

On the issue of rest breaks, *Brinker* stipulates that employers must provide a 10-minute rest period for each four hours of work, or major fraction thereof.

“They finally spelled out for employers very clear standards to comply with,” Sulzer said.

## **Employers Must Relinquish Control.**

But the California Supreme Court also said there is an affirmative obligation on employers, said Michael D. Singer, a partner in Cohelan, Khoury and Singer in San Diego, whose firm represented the plaintiffs in lower court proceedings. The key California takeaway is whether employer policies in fact relinquish employees of all duties during meal and rest periods, he said.

“Employers can't just give lip service, but need a written policy and practice, in some kinetic, real way relieving workers of their duties,” Singer told BNA April 26. “They have to relinquish control over the employees so that employees know they are not working now, and are free, able to leave work if they want to, and take that 30 minute lunch break.”

“I think the decision is a good one,” observed Kevin Lilley of Littler Mendelson PC in Los Angeles. “Some employers may not agree, but in setting clear standards . . . it clarifies the law both with respect to the technical meal and rest break requirements which was very much in need of cleaning up, but more importantly, in adopting clearer standards for class certification it brings state practice much closer to the Supreme Court's *Dukes* decision,” he said, referring to (*Wal-Mart Stores Inc. v. Dukes* U.S. No. 10-277 6/20/11; 29 HRR 677, 6/27/11).

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He called the ruling “a plus for employers.”

“You have to keep in mind that *Brinker* doesn't solve every problem for every employer,” Lilley continued. “What relieves employees of all duties may be different in different industries, such as in trucking and other transportation industries. Guys on the road have a lot of flexibility to pull over for a rest, more than, say, a production line worker, or guard or retail worker when the store is jammed with customers.”

“We'll see more litigation on that I'm sure,” he said.

Sulzer noted that California is big economy, and an active area of litigation and precedent-setting case law. “In the mid-to-late '90s it was misclassification, then salary versus overtime, and now it's shifted slowly to meal and rest periods,” he observed

“*Brinker* says it's more difficult to certify a class, which is a plus, but I don't see the issue fading away,” Sulzer said. “Not in California, anyway.”

## **Concentrated Industry Invites Litigation.**

For Angelo Amador, an attorney and vice president of labor and workforce policy at the National Restaurant Association in Washington, D.C., the concern is about “that unfinished aspect of *Brinker*.”

He explained that as the industry is evolving into fewer but larger employers, the collateral effect is to create fewer but large employee pools.

For the first time in history, 50 percent of all U.S. restaurants are mult-unit chains and franchises, he told BNA April 26. “As we are moving in that direction, with bigger and bigger percentage of the market concentrated in restaurant chains,” he said, “the plaintiff’s bar may look at the nation’s 13 million or so hospitality workers as an attractive class action target.”

“And something always seems to be starting in California,” he continued.

“Once the bar sees that opportunity opening in one state, we’ll see it move to other states, where the bigger you grow the class, the more expensive the burden is for business, and the great economic incentive exists for plaintiff’s attorneys,” he said.

“We’re watching the fallout from *Brinker* closely,” he offered.

### **The California Factor.**

“California, though, is critical,” Amador offered. “For employers, the easiest path sometimes is to change employment policies to comply with California rules, rather than have different work rules all around the country.”

“We watch California because we have to,” he added.

“The thing about *Brinker* is where it’s taking place,” echoed Chris Tilly, director of the Institute for Research on Labor and Employment at the University of California/Los Angeles. “California is so big, with a labor market so large, issues like this tend to be in front of the rest of the nation.”

“What’s troubling about *Brinker* isn’t that it settles issues, but opens new and more troubling areas within the employment sector that could spread nationally,” he said.

“Essentially, the Supreme Court said there is no obligation on the employer to make certain workers have their breaks,” Tilly said. “And by restricting class action possibilities, a chilling effect might be felt in the plaintiff’s bar.”

“The employer can do things that do not appear to reach the level of pressure, but nonetheless convey to workers they really ought to be skipping their breaks,” Tilly continued.

“Scholars call it ‘low road competition,’ keeping costs low, getting that extra 15 minutes of free work out of employees,” he said.

What many employers may take away nationwide from *Brinker* is not guidance on best practices, Tilly said. “The opposite may be the lesson learned--how to game the system.”

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