



State of California
DIVISION OF LABOR STANDARDS ENFORCEMENT - HQ
MEMORANDUM

TO: DLSE Staff

FROM: Angela Bradstreet, Labor Commissioner
Denise Padres, Deputy Chief
Robert Roginson, Chief Counsel

DATE: October 23, 2008

SUBJECT: Court Rulings on Meal Periods

On October 22, 2008, the California Supreme Court granted review of the California Court of Appeal decision in *Brinker Restaurant Corp. v. Superior Court of San Diego County (Hohnbaum)*. The Supreme Court's grant of review supersedes the Court of Appeal's decision, and the Court of Appeal decision may not be cited or relied on by a court or a party in any other action. (California Rules of Court 8.1105(e) and 8.1115(a)).

Accordingly, the memo issued July 22, 2008, by Angela Bradstreet, Denise Padres, and Robert Roginson is hereby withdrawn. Effective immediately, neither the Court of Appeal decision nor the memo may be relied upon by any DLSE staff in deciding pending or future matters.

In its review of the *Brinker* matter, the California Supreme Court is expected to clarify and confirm, among other things, the extent of an employer's obligation under Labor Code § 512(a) and the wage orders. Specifically, the Court is expected to confirm whether these statutory and regulatory sections impose upon employers an affirmative duty to ensure that employees actually take the meal period or rather, that the employer's obligations do not go that far and the employer must make that meal period available to the employee and afford the employee the opportunity to take the meal period. Despite claims from all sides on this issue, neither the statutory nor regulatory language, nor the legislative and regulatory history of the California Legislature and Industrial Welfare Commission, respectively, directly and definitively answers this fundamental question. Similarly, until *Brinker* was decided, no California court had directly decided this issue.

Until such time that the Supreme Court provides guidance on this fundamental question, the Division will rely upon the language of the statute and wage order as well as existing

California Supreme Court and Court of Appeal decisions and other recent, persuasive federal court decisions in interpreting Labor Code section 512 and the meal period provisions set forth in the applicable wage orders. Taken together, 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. As the federal court in *Brown v. Federal Express Corporation* explained:

It is an employer's obligation to ensure that its employees are free from its control for thirty minutes, not to ensure that the employees do any particular thing during that time.

(249 F.R.D. 580, 585 (C.D.Cal. 2008)). In addition, numerous, other federal courts in California have similarly held that employers are not obligated to ensure that their employees take meal periods. They include *White v. Starbucks* (N.D.Cal. 2007) 497 F.Supp.2d 1080; *Perez v. Safety-Kleen Systems, Inc.* (N.D.Cal. July 28, 2008) 2008 WL 2949268; *Kenny v. Supercuts* (N.D.Cal. June 2, 2008) 2008 WL 2265194, *Salazar v. Avis Budget Group* (S.D.Cal, July 2, 2008) 251 F.R.D. 529; *Kimoto v. McDonald's Corp.* (C.D.Cal. August 28, 2008) 2008 WL 4069611; and *Gabriella v. Wells Fargo Financial, Inc.* (N.D.Cal August 4, 2008) 2008 WL 3200190.

In *Cicairos v. Summit Logistics, Inc.*, the California Court of Appeal stated that employers have "an affirmative obligation to ensure that workers are actually relieved of all duty." (*Cicairos v Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949, 962). It has been contended that this means that employers have an affirmative obligation to force employees to take their meal periods and that employees cannot refrain or refuse to take their meal periods.

For several reasons, this interpretation of California's meal period requirements is not compelling. First, as noted above, the question of whether employers have an affirmative obligation to ensure that employees take their meal period is now squarely before the California Supreme Court in the *Brinker* case, and definitive guidance on this issue is expected from the Court. Second, there is recent, substantial, and persuasive authority from many federal trial courts which have interpreted *Cicairos* that the appellate court in that case did not hold as a matter of binding law that employers have a statutory or regulatory obligation to ensure that employees actually take their meal periods. These cases include *Perez, supra*, 2008 WL 2949268 ["*Cicairos* is not authority for the proposition that an employer violates its duty to "provide" meal breaks

any time an employee misses a meal break, regardless of the employee's reason for missing the break or the employer's policies regarding breaks.”] (*Id.*, at p. 5), *White, supra*, 497 F.Supp.2d 1080 [Court rejected the argument that *Cicairos* imposes a strict duty on employers to enforce meal break requirements, finding that “the employee must show that he was forced to forego his meal breaks as opposed to merely showing that he did not take them regardless of the reason.”] (*Id.*, at p. 1089); *Brown, supra*, 249 F.R.D. 580 [Court held that the language in *Cicairos* that “employers have ‘an affirmative obligation to ensure that workers are actually relieved of all duty’” is “consistent with an obligation to make breaks available, rather than to force employees to take breaks.”] (*Id.*, at p. 586) and *Kenny, supra*, 2008 WL 2265194 [“*Cicairos* is not persuasive authority for the proposition that employers must ensure that their employees take meal breaks...”] (*Id.*, at p. 5). Third, this interpretation is consistent with the characterization by the California Supreme Court in *Murphy v. Kenneth Cole Productions, Inc.* of circumstances when an employee is entitled to the additional hour of pay for a meal period violation. (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094) Describing Labor Code section 226.7, the court explained “an employee is entitled to the additional hour of pay immediately upon being forced to miss a rest or meal period.” (*Id.*, at p. 1104). Lastly, as was demonstrated in meal period forums held by Labor Commissioner Bradstreet in Summer, 2007 and in subsequent written submissions, the lack of clarity in this area is resulting in harm to workers because employees are being disciplined and even terminated for choosing not to take their full 30 minute meal periods.

Meal periods are minimum labor standards which are critical to the health and welfare of employees, and it is required under California law that employers provide them. Set forth below are principles drawn from the Labor Code, the wage orders, and these cases which provide some guidance on how California’s meal period requirements are to be enforced by the Division.

- California’s meal period requirements are governed by Labor Code section 512¹ and Section 11 of most of the Industrial Welfare Commission wage orders.² Labor Code section 512(a) provides:

¹ Labor Code § 512 does not apply to any person employed in an agricultural occupation, as defined in Wage Order 14. (Labor Code § 554.)

² Under Wage Order 16, the meal period requirements are set forth in Section 10. The meal period requirements in Wage Order 16 make specific reference to Labor Code section 512. Under Wage Order 17, the meal period requirements are set forth in Section 9.

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.

- Section 11 of Wage Order 1-2001³ provides, as follows:

(A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and employee. In the case of employees covered by a valid collective bargaining agreement, the parties to the collective bargaining agreement may agree to a meal period that commences after no more than six (6) hours of work.

(B) An employer may not employ an employee for a work period of more than ten (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.

- Employers may not require employees to work through their meal periods. "No employer shall require any employee to work during any meal... period mandated by an applicable order of the Industrial Welfare Commission." (Labor Code § 226.7(a))

³ The meal period provisions in the other wages are substantially similar, except Wage Order 14. Also, Wage Orders 4 and 5 do not expressly require a second meal period for a work period of more than ten hours per day. A second meal period, however, is still required for employees covered under these orders under Labor Code § 512(a).

- An employer does not satisfy its obligations under Labor Code § 512 and the applicable wage order if its policies or practices prevent or discourage employees from taking their meal periods. (*Cicairos v. Summit Logistics, Inc. supra*, at p. 962; *Perez v. Safety-Kleen Systems, Inc., supra*, at p. 7))
- The facts in each case must be carefully analyzed. An employer's "obligation to provide [employees] with an adequate meal period is not satisfied merely by assuming that the meal periods were taken." (*Cicairos, supra*, at p. 962.)
- The first meal period provided by an employer must commence prior to the end of the fifth hour of work, unless otherwise expressly permitted by the applicable wage order. For example, see Wage Order 1, Section 11(A). (Labor Code §§ 512(a) and (b) and Section 11(A) of the wage orders)⁴
- An employer must provide a second meal period for any employee employed for a work period of more than ten (10) hours per day, 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. (Labor Code § 512(a) and Section 11(B) of the wage orders.)⁵
- Except as required in Labor Code § 512(a) and Section 11(B) of those wage orders requiring a second meal period, there is no obligation for employers to provide additional meal periods during the course of the workday, including instances in which employees work for a period of more than five hours of work between meal periods. (Labor Code § 512(a) and Section 11(B) of the wage orders.)⁶ While the Division has varied in its interpretation of this so-called "rolling five" hour rule in the past, there is no controlling legal authority interpreting California's meal period regulations to require employers to provide meal periods every five hours. Until such authority exists interpreting the wage orders and Labor Code § 512 to require employers to provide meal periods every five hours, the Division will not interpret California's meal period provisions in that fashion.

⁴ Section 10 of Wage Order 16 and Section 9 of Wage Order 17.

⁵ Section 10 of Wage Order 16 and Section 9 of Wage Order 17.

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- Employers have a duty to record their employees' meal periods. The wage orders require: "Every employer shall keep accurate information with respect to each employee including the following: Meal periods, split shift intervals and total daily hours worked shall also be recorded. Meal periods during which operations cease... need not be recorded." (Section 7 of Wage Order 1).
- No employer shall require any employee to work during any meal period mandated by an applicable order of the Industrial Welfare Commission. If an employer fails to provide an employee a meal period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal period was not provided. (Labor Code § 226.7)

Please ensure that any wage claim filed with DLSE that has a meal period issue is reviewed by your Senior Deputy prior to making any final determination on its merits.



State of California
DIVISION OF LABOR STANDARDS ENFORCEMENT - HQ
MEMORANDUM

TO: DLSE Staff

FROM: Angela Bradstreet, Labor Commissioner
Denise Padres, Deputy Chief
Robert Roginson, Chief Counsel

DATE: July 25, 2008

SUBJECT: Binding Court Ruling on Meal and Rest Period Requirements

On July 22, 2008, the California Court of Appeal issued its decision in *Brinker Restaurant Corp. v. Superior Court of San Diego County (Hohnbaum)*, (2008) ___ Cal.App.4th ___, 2008 WL 2806613. The court in *Brinker* decided several significant issues regarding the interpretation of California's meal and rest period requirements. The decision is a published decision, and its rulings are therefore binding upon the Division of Labor Standards Enforcement (DLSE).

The decision in *Brinker* included the following rulings regarding the interpretation of California's meal and rest period requirements:

Meal Periods

- The court held that Labor Code § 512 and the meal period requirements set forth in the applicable wage order mean that employers must provide meal periods by making them available, but need not ensure that they are taken. Employers, however, cannot impede, discourage or dissuade employees from taking meal periods.¹
- The court rejected the so-called "rolling five-hour" requirement as being inconsistent with the plain meaning of Labor Code § 512 and the applicable wage order.² An employer must make a first 30-minute meal period available to an

¹ Slip Op. at pp. 4, 34 and 41-47.

² Slip Op. at pp. 4 and 34-41.

hourly employee who is permitted to work more than five hours *per day*, unless (1) the employee is permitted to work a “total work period per day” that is six hours or less, and (2) both the employee and the employer agree by “mutual consent” to waive the meal period.³ The court also found section 512 to plainly provide that an employer must make a second 30-minute meal period available to an hourly employee who has a “work period of more than 10 hours *per day*” unless (1) the “total hours” the employee is permitted to work per day is 12 hours or less, (2) both the employee and the employer agree by “mutual consent” to waive the second meal period, and (3) the first meal period “was not waived.”⁴

Employers are not required to provide a meal period for every five consecutive hours worked.⁵ The court held that the employer’s practice of providing employees with an “early lunch” within the first few hours of an employee’s arrival at work did not violate California law, even though that would mean that the employee might then work in excess of five hours without an additional meal period.⁶

Rest Periods

- The court held that the rest period requirements set forth in the applicable wage order mean that employers must provide rest periods, but need not ensure that they are taken. Employers, however, cannot impede, discourage or dissuade employees from taking rest periods.⁷
- The court held that 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.⁸ The court interpreted the phrase “major fraction thereof” to mean the time period between three and one-half hours and four hours and not to mean that a rest period must be given every three and one-half hours.⁹ In so doing, the court rejected as incorrect a 1999 interpretation by the Labor Commissioner that the term “major fraction thereof” means an employer must provide its employees with a 10-minute rest period when the employees work any

³ Slip Op. at p. 36.

⁴ Slip Op. at p. 37.

⁵ Slip Op. at p. 4.

⁶ Slip Op. at pp. 34-41.

⁷ Slip Op. at pp. 4 and 31.

⁸ Slip Op. at pp. 4 and 28-29.

⁹ Slip Op. at p. 24.

time over the midpoint of each four hour block of time.¹⁰ The court ruled that the rest periods must be given if an employee works between three and one-half hour and four hours, but if four or more hours are worked, it need be given only every four hours, not every three and one-half hours.¹¹

The court also ruled that the applicable wage order rest period provisions do not require employers to authorize and permit a first rest period before the first scheduled meal period. Rather, the applicable language of the wage order states only that rest periods “insofar as practicable shall be in the middle of each work period.” Accordingly, the court concluded, as long as employers make rest periods available to employees, and strive, where practicable, to schedule them in the middle of the first four-hour work period, employers are in compliance with that portion of the applicable wage order.¹²

The court relied upon the plain meaning of the Labor Code and applicable wage order provisions in making its determinations. The court found persuasive the reasoning in the federal district court decisions in *White v. Starbucks* (ND Cal. July 2, 2007) 497 F.Supp.2d 1080 and *Brown v. Federal Express Corp.* (CD Cal. Feb. 26, 2008) 2008 WL 906517, and concluded that employers need not ensure meal periods are actually taken, but need only make them available.¹³ The court distinguished the decision in *Cicairos v. Summit Logistics, Inc.* (2006) 133 Cal.App.4th 949, concluding that the facts in *Cicairos* established that the employer failed to make meal periods available to employees and that the court there only decided meal periods must be provided, not ensured.¹⁴

All staff must follow the rulings in the *Brinker* decision effective immediately and the decision shall be applied to pending matters. Please ensure that any wage claim filed with DLSE that has a meal or rest period issue is reviewed by your Senior Deputy prior to making any final determination on its merits.

¹⁰ Slip Op. at p. 25.

¹¹ Slip Op. at pp. 27-28.

¹² Slip Op. at pp. 28-29.

¹³ Slip Op. at p. 44.

¹⁴ Slip Op. at pp. 44-47.