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California Supreme Court to Review Brinker Case; Liability for Missed Meal Periods Hangs in the Balance

October 29, 2008 – Last week, the California Supreme Court granted review in *Brinker Restaurant Corp. v. Superior Court*, a wage and hour case of great consequence to California employers. The appeal challenges the decision of the California Court of Appeal, which ruled in July that an employer cannot be liable for the one-hour per day premium under California law for missed meal periods so long as it made the meal break available to employees and did not do anything to prevent them from taking it. Under the appellate court’s interpretation, employers need only “provide, not ensure,” that such periods are taken. The Court of Appeal also ruled that cases seeking the recovery of premiums for missed meal periods should rarely be certified as class actions.

The pendency of the case before the state Supreme Court means that the appellate court opinion can no longer be relied upon as legal precedent. However, in a memorandum issued by the state Department of Labor Standards Enforcement on October 23, 2008, that enforcement agency indicated that it will continue to take the position that “employers must provide meal periods to employees but do not have an additional obligation to ensure that they are taken.” The DLSE memorandum further states that:

- An employer does not satisfy its obligations under the law if its policies or practices prevent or discourage employees from taking their meal breaks
- An employer’s obligation to provide employees with an adequate meal period is not satisfied by merely assuming that the meal periods were taken
- Unless expressly permitted by an applicable Wage Order, the first meal period provided by the employer must commence prior to the fifth hour of work
- Employers have a duty to record their employees’ meal periods, unless they are provided during a time that the employer’s operations “cease”

Complying with the state law requirements of providing meal periods to employees is proving troublesome to California employers due to the shifting legal pronouncements of the courts and government agencies. Indeed, just yesterday, another Court of Appeal held in the case of *Brinkley v Public Storage* that employers need only make meal periods available to their employees, not ensure that they are taken. If you have any questions about how to enforce your meal break policies in light of these developments, please contact your attorney at Hill, Farrer & Burrill, LLP.

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