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## State Supreme Court to review key meal period decision

By **DOUG SHERWIN**, The Daily Transcript

The California Supreme Court on Wednesday agreed to review the appellate court's decision in *Brinker Restaurant v. San Diego Superior Court*, a touchstone case for meal- and rest-period claims.

In July, the Fourth District Court of Appeals ruled that employers are not required to force their employees to take state mandated meal breaks, they only need to provide the 30-minute breaks.

The panel also said employees are allowed to take their meal breaks at any time during an eight-hour shift and not necessarily in the middle.

The ruling was celebrated by businesses statewide, especially restaurant owners who had been susceptible to costly and increasingly numerous class-action lawsuits.

Now that the state's high court has agreed to hear the case, the appellate court holdings are no longer valid -- at least for now.

"We knew that the plaintiff was going to appeal, and the Supreme Court was going to take the case up on review," said San Diego employment attorney Lonny Zilberman, a partner with **Wilson Petty Kosmo & Turner LLP**. "Unfortunately the court of appeals decision is not citable.

"We're in a limbo period, so I would be advising all of my clients and employers they need to remain vigilant and diligent in requiring that employees take 30-minute meal periods in the middle of their shift, and they need to ensure that meal periods are taken."

The state Supreme Court is likely to take at least a year before issuing a decision in the case and it could stretch into 2010.

"It's huge in terms of affecting California employers," Zilberman said. "I think that if the federal district courts are any bellwether, a number of federal district courts rendered decisions similar to *Brinker*, based on the same reasoning."

The number of class-action lawsuits involving meal- and rest-period claims has risen dramatically in recent years.

According to Zilberman, between October 2007 and March 2008, 544 employment class actions were filed in California; of those, 57 percent related to meal- and rest-break issues.

Zilberman also said between two and 10 class actions are filed every day on wage- and-hour issues in California, approximately half of which include meal- and rest-break claims.

Riverside attorney Bill Floyd, a senior partner in Best Best & Krieger's labor relations and employment law practice group, said he's been telling clients to hold off on following the appellate court decision given the likelihood it would the Supreme Court take it up.

“It’s very important to employers and employees how the case turns out,” Floyd said. “If the Supreme Court says that employers are required to ensure employees take a meal break, then it’s going to mean a lot more administrative effort on the part of employers.”

The flexibility of when meal breaks can be taken has been a contentious issue in the restaurant industry, and not necessarily among employers.

“It’s waiters and servers who don’t want to take their meal period during lunch,” Wilson Petty’s Zilberman said. “They’d prefer to punch in at 9 a.m., punch out at 9:30 and punch back in at 10 and work through the height of lunch hour.”

The appellate court also decertified the class in *Brinker*, ruling that meal periods are an individual matter.

If the Supreme Court affirms the appellate court decision, it “could basically stop this wave of class actions,” Zilberman said.

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