LOS ANGELES
Daily Journal
www.dailyjournal.com
THURSDAY, MAY 10, 2012

LITIGATION

# *Brinker*'s unique impact on the health care industry

By Daniel J. McQueen

Much has been written about the Supreme Court's recent holding in *Brinker Restaurant Corp. v. Superior Court* and its impact on meal and rest period rules. Somewhat hidden away in the opinion, however, are several important holdings from the Court about the unique meal period regulations that apply to the state's hospitals.

According to the Hospital Association of Southern California (HASC), there are currently 367 acute-care hospitals operating in the state. In just the six counties represented by HASC (Los Angeles, Orange, San Bernardino, Riverside, Santa Barbara and Ventura), hospitals collectively employ more than 500,000 individuals and generate about $33 billion in annual revenue. Thus, any Supreme Court authority relating to hospital employees is significant.

*Brinker*, of course, established a generally applicable rule that meal period requirements are "satisfied if the employee (1) has at least 30 minutes uninterrupted, (2) is free to leave the premises, and (3) is relieved of all duty for the entire period." Concerning the timing of meal periods, the Court determined that employers must typically provide a first meal period "no later than the start of an employee's sixth hour of work" and a second meal period no later than "the start of the 11th hour of work." The Court further noted that an employee may normally agree to waive the second meal period so long as the total shift length is no more than 12 hours and the first meal period was not already waived.

However, for hospitals, these generally applicable rules are not the end of the story. As *Brinker* made plain, the Industrial Welfare Commission (IWC) has broad statutory authority to issue wage orders that regulate wage and hour matters. Wage orders are entitled to "extraordinary deference" and "are to be accorded the same dignity as statutes." Moreover, the IWC may lawfully "adopt requirements beyond those codified in statute ... ; that is, the Legislature did not intend to occupy the field of meal period regulation." Thus, through its wage orders, the IWC may implement industry-specific rules which differ from the generally applicable ones analyzed by *Brinker*. For hospitals, *Brinker* confirmed that this is precisely what the IWC has done.

Hospitals are governed by Wage Orders 4-2001 and 5-2001. As *Brinker* pointed out, these wage orders contain unique provisions concerning meal period waivers that apply only to health care employees and that are not present in any other wage order. Under the general rule, employees cannot waive a second meal period in any shift longer than 12 hours. However, as confirmed by *Brinker*, a health care employee working in a hospital may waive a meal period "even on shifts in excess of 12 hours."

This ruling directly impacts numerous wage and hour class actions pending against hospitals. Many hospital employees work 12-hour shifts where they agree to waive one of the their two meal periods. This makes sense. If a 12-hour employee takes two, 30-minute meal periods in the day, the employee is effectively at work for 13 hours. In contrast, if only a single 30-minute meal period is taken, the employee leaves after just 12-and-a-half hours.

Of course, many 12-hour employees sometimes work over 12 hours in the day to finish up with a patient or to cover for a late coworker. In this situation, many plaintiffs have argued that the employee's meal period waiver is automatically nullified because the shift lasted more than 12 hours. Thus, for each day the employee worked over 12 hours and only took a single meal period, these plaintiffs contended that a meal period premium was owed.

By acknowledging that the IWC has the authority to issue industry-specific requirements, the Court heightened the need for practitioners in the area to consider any unique rules that apply.

In defense, the hospitals pointed to the specific health care provisions of Wage Orders 4-2001 and 5-2001, arguing that hospital employees are uniquely able to waive daily meal periods even on shifts over 12 hours. Prior to *Brinker*, there had been no clear guidance about which position was correct. *Brinker* resolves the issue, firmly establishing that health care employees governed by the Wage Orders 4-2001 and 5-2001 may waive meal periods even where they work more than 12 hours.

Because the Court reaffirmed the ability of the IWC to establish special rules for the hospital industry, the decision also adds clarity to other frequently litigated issues. For example, Wage Orders 4-2001 and 5-2001 uniquely allow health care employees who work shifts in excess of eight hours to "voluntarily waive their right to one of their two meal periods." In contrast, under the generally applicable rule, employees may only waive their second daily meal period if they did not waive the first. As *Brinker* explains, employees must typically be provided a first meal period by the start of the sixth hour and a second meal period by the start of the 11th hour. However, since health care employees with longer shifts can waive "one of their two" meal periods, they may lawfully waive the first of their two meal periods and need not be provided a meal period until the start of the 11th hour. Since many 12-hour health care employees prefer to take their meal periods somewhere in the middle of the shift, and not in the first five hours, the unique "one of two" waiver provision allows them the flexibility to do so.

As another example, some hospitals require certain employees to remain on the premises during meal breaks. Such a rule would seem to conflict with *Brinker*'s general holding that employees must be free to leave the worksite during a meal break. However, Wage Orders 4-2001 and 5-2001 provide that "hours worked" in the health care industry are to be "interpreted in accordance with the provisions of the Fair Labor Standards Act." Under the FLSA, hours worked do not include time that an employee is required to remain on the premises during a duty-free meal break.

Accordingly, the state's Division of Labor Standards Enforcement (DLSE) has long concluded that health care employees need not be paid for duty-free meal periods even if they are required to remain at the worksite. The DLSE's position in this regard was made clear in its July 12, 1996, opinion letter and cited with approval in *Brinker*, which explains that such letters "constitute a body of experience" that courts may rely upon for guidance. Notably, this opinion letter also stated that hospitals can require employees to wear and respond to pagers during their meal periods and are entitled to be paid only if they are actually interrupted. Thus, in the health care arena, it clearly appears that employees need not be permitted to leave the premises for meal periods.

*Brinker* certainly added significant clarity to meal and rest period rules. However, by acknowledging that the IWC has the authority to issue industry-specific requirements, the Court heightened the need for practitioners in the area to consider any unique rules that apply.

**Daniel McQueen** *is a partner in the Labor and Employment Practice Group at Sheppard Mullin Richter & Hampton LLP. He can be reached at (213) 617-4183 or DMcQueen@sheppardmullin.com.*