



California Labor Federation

AFL-CIO

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July 30, 2008

Ms. Angela Bradstreet
Labor Commissioner, State of California
455 Golden Gate Avenue, 9th Floor
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FAX - (415) 703-4807

Re: Your July 25, 2008 Memorandum to DLSE Staff, Regarding *Brinker Restaurant Corp. v Superior Court of San Diego County (Hohnbaum)* (2008) __ Cal App. 4th ___, 2008 WL 2806613

Dear Ms. Bradstreet:

We write to express the California Labor Federation's concern about the incorrect interpretation of current California meal and rest break law adopted by DLSE in your July 25, 2008 Memorandum entitled *Binding Court Ruling on Meal and Rest Period Requirements*. The Federation is deeply concerned that your hasty publication of this unbalanced and flawed analysis will undermine California workers' rights to meal and rest breaks. We also object to the fact that you have posted this flawed analysis in Chapter 45 of the on-line DLSE Manual.

The July 25, 2008 Memorandum touts the July 22, 2008 decision of the 4th District Court of Appeal in *Brinker Restaurant Corp. v Superior Court (Brinker)* as a "binding court ruling," but that is simply not accurate. The Memorandum fails to mention that *Brinker* is just one of two California Court of Appeal decisions that interpret key language in the laws and regulations governing meal breaks, that it does not become a final decision of the Court of Appeal until August 21, 2008, and that it is possible, and, according to many observers, likely, that our Supreme Court will grant review and depublish the *Brinker* case within a few months.

Meanwhile, the appellate case that offers a more protective interpretation of meal break law for California workers, *Cicairos v Summit Logistics, Inc.*, (2005) 133 Cal App. 4th 949, remains good law. Unlike *Brinker*, *Cicairos* holds that employers have "an affirmative duty to ensure that workers are actually relieved of all duty" during their prescribed breaks." This standard allows workers a realistic chance of obtaining a remedy for their missed meal breaks. Despite this, the *Cicairos* decision has yet to receive attention or recognition on the DLSE web site or in the DLSE Manual and your Memorandum mentions it only in the context of the 4th District Court of Appeal's clumsy effort to distinguish it.

There is significant conflict between these two appellate decisions, and the First District Court of Appeal in *Cicairos* better protects the statutory right of California workers meal and rest breaks. As the Labor Commissioner you are charged with protecting the welfare of California's working people (Cal Labor Code §50.5) yet your Memorandum all but celebrates a decision that workers and worker advocates consider a severe setback. At the very least DLSE staff should be provided the holdings of all relevant appellate cases and informed when the law is unsettled that until the California Supreme Court acts there will be no absolute binding authority.

A balanced approach would report the split in the appellate courts, acknowledge the fact that the *Brinker* plaintiffs will petition for review, and if the Supreme Court certifies the case, that *Brinker* will be depublished. Is it because this decision will likely be short-lived that you were in such a hurry to declare that the law is now clear? This harkens back to the days of 2005 when the Labor Commissioner tried to effect changes in meal breaks by using emergency regulations, fake video news releases, unlawful abeyances in DLSE investigations and issuing a precedential decision, all of which either the courts or office of administrative law later disapproved.

The DLSE's rush to give binding effect and immediate enforcement to a Court of Appeal opinion that diminishes protection for employee meal and rest breaks is disturbing, particularly when compared to the much lower profile accorded to the California Supreme Court's decision in *Murphy v. Kenneth Cole*, which found in favor of *greater* protection for employee breaks. In contrast to the DLSE's treatment of the *Brinker* decision, the DLSE never sent a memo from the Labor Commissioner instructing all staff to immediately apply the *Murphy* decision to pending matters. There the Labor Commissioner made no pronouncements of "binding authority." Instead, the *Murphy* California Supreme Court decision (the ultimate "binding authority") was simply distributed by a non-lawyer Deputy Chief to "All DLSE Staff" and continues to be available to the public under the simple heading "Meal and Rest Period Statute of Limitations." There is no mention that for California's workers this case was a landmark decision in workplace justice. I attach both Memoranda to this letter for your review. They may also be viewed at <http://www.dir.ca.gov/dlse/dlse.html> under the heading "Alerts/News".

I ask that you remove from your website this inaccurate and biased Memorandum and your directive to all deputy labor commissioners to follow *Brinker* rather than *Cicairos*. If, after the Supreme Court acts on the petition for review of *Brinker*, you decide a Memorandum is appropriate, a more neutral analysis such as the one DLSE published on the occasion of the California's Supreme Court's decision in *Murphy vs. Kenneth Cole* should be published.

I would like to arrange a meeting with a representative group of worker advocates and you at your earliest convenience and I ask that in the meanwhile you rescind the July 25, 2008 Memorandum and remove it from the DLSE's web site and from the DLSE Manual.

Sincerely,



Angie Wei
Legislative Director

AW: sm
OPEIU 3 AFL CIO (31)

Cc: Victoria Bradshaw, Secretary, Labor and Workforce Development Agency
John Duncan, Director, Department of Industrial Relations
Robert Roginson, Counsel, Labor Commissioner's Office



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.

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
LEGAL SECTION
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ROBERT R. ROGINSON
Chief Counsel

MEMORANDUM

TO: DLSE Staff

FROM: Robert Roginson
Chief Counsel

DATE: March 7, 2008

SUBJECT: Meal and Rest Period Claims

On April 16, 2007, Deputy Chief Lupe Almaraz issued a Memorandum to the DLSE staff informing of the California Supreme Court decision in the case of *Murphy v. Kenneth Cole*. In that case, the California Supreme Court held that the remedy for meal and rest period violations of “one additional hour of pay” under Labor Code section 226.7 is a wage subject to a three-year statute of limitations rather than a penalty subject to a one year statute of limitations.

A copy of Deputy Chief Almaraz’s memo dated April 16, 2007 is attached.

Please post this Memorandum, including the April 16, 2007 memorandum attached, in the public bulletin boards in all DLSE offices until August 15, 2008.

Cc: A. Bradstreet, Labor Commissioner
D. Padres, Deputy Chief
C. Grafil, Special Assistant
Assistant Chiefs
Regional Managers
DLSE Attorneys



State of California
DIVISION OF LABOR STANDARDS ENFORCEMENT
MEMORANDUM

DATE: April 16, 2007

TO: DLSE Staff

FROM: Lupe Almaraz, Deputy Chief

SUBJECT: Meal and Rest Period Claims

Today, the California Supreme Court rendered, in a 31 page opinion, its decision in the case of *Murphy v. Kenneth Cole*. The Court specifically and definitively held that meal and rest period pay claims are wages subject to the three (3) year statute of limitations provided by CCP section 338. *Murphy* effectively overrules the *Hartwig v. Orchard commercial, Inc.* precedent decision to the extent that it held otherwise.

The *Murphy* decision, by implication, allows employees who are owed LC 226.7 pay at time of termination, to recover waiting time penalties pursuant to LC 203 if all final wages are not paid in accordance with LC 201/202. The Court also determined that reporting time pay and split shift premiums are wages, therefore, they would also be subject to LC 203 penalties (and interest).

Please ensure that any case filed with DLSE that has a meal or rest period issue (as well as reporting time or split shift pay) be reviewed by your Senior prior to making any final determination on its merit. This includes any claim now scheduled for hearing pursuant to LC 98a.

Cc: R. Jones, Acting Labor Commissioner
C. Grafil, Special Assistant
Assistant Chiefs
Regional Managers
Johanna Hsu, Assistant Chief Counsel