Westlaw Journal
EMPLOYMENT

Litigation News and Analysis • Legislation • Regulation • Expert Commentary

VOLUME 29, ISSUE 3 / SEPTEMBER 3, 2014

WHAT'S INSIDE

RETIREE BENEFITS

CBA's silence on benefits duration not golden, biz group tells Supreme Court

Companies will face substantial costs if the U.S. Supreme Court does not reverse an appellate ruling that said retiree health care benefits are presumed to last for life when a collective bargaining agreement does not define the duration, the U.S. Chamber of Commerce says.

M&G Polymers USA LLC et al. v. Tackett et al., No. 13-1010, amici brief filed (U.S. July 24, 2014).

The 6th U.S. Circuit Court of Appeals' ruling contradicts Supreme Court precedent, federal labor law and the collective bargaining process, the Chamber said in a July 24 brief in support of M&G Polymers USA's petition to the high court.

"The 6th Circuit's interpretive approach misreads silence as reflecting an affirmative agreement by the parties. Silence is not how sophisticated parties memorialize an agreement to provide costly, immutable health care benefits," the brief says.

Business Roundtable joined the Chamber in the *amici curiae* brief. Together they represent the interests of more than 300,000 businesses and executives.

REUTERS/Jim Young

The U.S. Chamber of Commerce says the 6th Circuit's ruling on collective bargaining agreements goes against U.S. Supreme Court precedent and federal labor law.

CONTINUED ON PAGE 23

COMMENTARY

2 years later, *Brinker*'s impact still felt

Rex S. Heinke, Christopher K. Petersen, and Joshua A. Rubin of Akin Gump discuss the California Supreme Court's landmark wage-and-hour decision in *Brinker Restaurant Corp. v. Superior Court*, examine how other courts have interpreted that ruling in subsequent decisions and consider the impact *Brinker* has had on class certification.

SEE PAGE 3

COMMENTARY

The 3rd Circuit tells employers that saying 'it's in the mail' does not prove receipt of FMLA notice

Mark T. Phillis and Barbara Rittinger Rigo of Littler Mendelson discuss a recent appeals court decision requiring an employer to show it supplied an employee with notice of Family and Medical Leave Act rights, and they consider how the ruling may affect a company's practices.

SEE PAGE 8

41561572

2 years later, *Brinker*'s impact still felt

By Rex S. Heinke, Esq., Christopher K. Petersen, Esq., and Joshua A. Rubin
Akin Gump

In its landmark 2012 decision, the California Supreme Court ruled in *Brinker Restaurant Corp. v. Superior Court* that employers are not obligated to ensure their employees take required meal and rest breaks, but rather must only provide those breaks for employees to take or decline as they wish.[1] This decision had its largest impact on the issue of class certification.[2]

Despite the clarity that *Brinker* provided, the decision raised questions at the same time as it answered them. State and federal courts have reached different conclusions as they have attempted to define the employees' ability to challenge their employer's policies and practices on a class-wide basis.

This article follows up on previous research, surveying how *Brinker* has been implemented and applied over the past year.[3] It describes different mechanisms that plaintiffs have used to obtain class certification, as well as judicial responses to those attempts. Ultimately, the *Brinker* court's clarification of the "provide" versus "ensure" distinction has made it exceedingly difficult for plaintiffs to obtain certification when their employers have adopted formal policies that comply with California's wage orders. Nonetheless, some — though not all — courts have latched onto certain language in the *Brinker* opinion to certify break classes where employees claim their employer's written policy (or lack of a policy) is facially illegal.

REUTERS/Paul Sakuma/Pool

***California Supreme Court Justice Kathryn M. Werdegar, shown here in 2009, wrote both the majority opinion and a concurring opinion in* Brinker.**

OFF-THE-CLOCK CLAIMS

First, *Brinker* has largely put an end to class certification in cases where employees allege that their employers required them to work off the clock. In affirming the Court of Appeal's decision to vacate class certification on this issue, the *Brinker* court held that because "[t]he only formal Brinker off-the-clock policy disavow[ed]" working off-the-clock, violations of the wage order could not be proved on a class-wide basis.[4] Given that written policies rarely if ever condone off-the-clock work, courts applying *Brinker*'s rationale have been wary of certifying these classes.

For example, in *Ortiz v. CVS Caremark*, a federal district court determined that because plaintiffs were explicitly prohibited from working unless they were clocked in, liability could only be established through "mini-trials," and common questions did not predominate.[5] Most California courts have adopted this reasoning as well.[6]

While employees have continued to bring rest- and meal-break claims in the last two years, there has been a conspicuous drop in the number of off-the-clock claims. Perhaps sensing the judiciary's skepticism of these classes in light of *Brinker*, employees may opt to pursue off-the-clock claims individually or not at all.

> Since *Brinker*, state and federal courts have reached different conclusions as they have attempted to define the employees' ability to challenge their employer's policies and practices on a class-wide basis.

REST- AND MEAL-BREAK CLAIMS

Taking their cues from the California Supreme Court, post-*Brinker* courts have divided rest- and meal-break claims into two categories: those in which plaintiffs allege the employer's policy is facially illegal, and those in which plaintiffs allege the employer maintains an informal, unwritten practice of denying legally required breaks.

The category into which a particular plaintiff's claim falls strongly affects the likelihood that a court will certify the class.

Rex Heinke (L) represented the defendant in the case discussed in this commentary and is co-head of **Akin Gump**'s Supreme Court and appellate practice. **Christopher Petersen** (C) is an associate in the firm's labor and employment group. **Josh Rubin** (R) is currently a third-year law student at New York University. He has been a summer associate at Akin Gump the past two summers.

Courts rarely certify classes alleging an informal practice of denying breaks

If employees cannot point to an arguably illegal policy, they have been largely unsuccessful in obtaining certification of break claims. This result follows naturally from *Brinker*, which held that employers only need to provide employees with breaks, not ensure that employees take them. Where there is no policy plaintiffs can contest, they are forced to submit time records or declarations as evidence of an employer's uniform practice of denying breaks. However, courts have noted time records fail to answer the question of *why* those breaks were missed.

If an employee skipped a break because he or she was not authorized to take one, the employer has violated the law; if an employee chose to skip a break to increase his or her hours worked, then there has been no violation.[7] Furthermore, declarations — even from many employees — provide nothing more than anecdotal evidence of the individuals' experiences and crucially provide "no evidence of a *class-wide* policy that preclude[s] adequate break relief."[8] So in the absence of a formal policy, this question of "why" cannot be answered on a class-wide basis — thus "defeat[ing] commonality."[9]

> *Brinker* has largely put an end to class certification in cases where employees allege their employers required them to work off-the-clock.

Since the *Brinker* decision, cases of plaintiffs alleging an informal practice of denying breaks have arisen in two different situations. The first is where an employer does have a break policy, but that policy is obviously valid. For example, in *In re Bowers Cos. Wage and Hour Cases*, the employer's written policy tracked the language of the wage order as interpreted by the Supreme Court in *Brinker*.[10] Because the "[d]efendants' only express policy regarding meal breaks required field employees to receive legally compliant breaks," plaintiffs were forced to argue that the employer had illegally deviated from its admittedly compliant policy.[11] And because this theory "presents a host of individual issues requiring separate adjudications concerning the *reasons* each field employee missed each break," certification was denied.[12]

The second situation in which plaintiffs must argue there exists an illegal practice of denying breaks is when there is *no* formal policy. As in the case of the obviously legal policy, plaintiffs in this situation are unable to point to a uniform policy that is arguably illegal. And just as in the case of the obviously legal policy, plaintiffs have been largely unsuccessful in obtaining class certification.

> Courts have yet to rule on the merits of the claim that *Brinker* requires an employer to implement a formal break policy and have not uniformly held that an illegal policy is sufficient to obtain certification.

For example, in *Dailey v. Sears Roebuck & Co.*, plaintiffs alleged that their employer, who had no written break policy, had a uniform practice of "routinely interrupt[ing] and/or fail[ing] to permit" the required rest and meal breaks.[13] The plaintiffs submitted declarations in which they asserted they rarely took breaks. In denying certification, the court again focused on *Brinker*'s distinction between providing and ensuring breaks, pointing out that plaintiff's evidence failed to show "Sears *requires* them to be available for work during [meal and break] periods."[14]

However, employers with no formal policy provide employees with one class-certification strategy not available to employees governed by an obviously legal policy. Some plaintiffs have obtained certification by arguing not that their employer with no written policy has a practice of denying breaks, but rather that the employer's failure to adopt a written policy *itself* constitutes a violation of California Labor Law.

This strategy was effective in a trio of Court of Appeal cases: *Bradley v. Networkers International*,[15] *Faulkinbury v. Boyd & Associates*[16] and *Benton v. Telecom Network Specialists*.[17] In these cases, the courts reasoned that regardless of the assertion's merit that the lack of a policy could violate the law, the assertion provided a basis for a class determination of the common issue of illegality. The state Supreme Court has expressly declined to offer an opinion on the correctness of these cases or on the certification of these "non-policy" classes generally.[18]

Despite the relative success of "non-policy" claims in the Court of Appeal, there are at least two reasons it might be short-lived. First, courts have yet to rule on the merits of the claim that *Brinker* requires an employer to implement a formal policy. If the California Supreme Court were to rule that employers are not so affirmatively obligated, then the legal theory underlining certification would be destroyed. Second, as discussed in more detail below, courts have not uniformly held that an illegal policy is sufficient to obtain certification. To the extent that it is not, a potentially illegal *lack* of a policy would have a similarly limited effect.

When to certify claims challenging the legality of a formal policy

Unlike situations where plaintiffs allege an informal, unwritten practice of denying breaks, plaintiffs directly challenging the legality of a formal policy have been somewhat successful. However, there is not a consensus among courts on what precisely plaintiffs must demonstrate before certification can be granted. At one extreme, some courts have indicated certification flows essentially automatically from an allegation that a uniform policy violates the law, if such an allegation is not clearly meritless.

These courts have grasped on to language from *Brinker,* stating "[c]laims alleging that a uniform policy consistently applied to a group of employees is in violation of the wage and hour laws are of the sort routinely and properly found suitable for class treatment."[19]

The logic underlying this permissive view of certification is straightforward: Whether or not a formal policy is in accordance with the California Labor Code is a common question that can be answered all at once.

However, other courts have been more hesitant, noting the existence of a common question is insufficient to satisfy the procedural requirements of California's class-action statute or Federal Rule of Civil Procedure 23. Both require that common questions *predominate* over individualized questions and that class actions be manageable.

Cummings v. Starbucks represents an example of the hesitancy to presume the appropriateness of certification based only on a formal break policy.[20] The Starbucks rest-break policy challenged in *Cummings* was nearly identical to Brinker's policy in that it omitted language guaranteeing employees a second rest break after six hours of work. But the court held that the question of facial illegality did not predominate over individualized questions because liability would not be established without plaintiffs showing that the rest period policy "was *consistently applied* to deprive class members of a [required] rest period."[21]

Because there was evidence that, notwithstanding Starbucks' policy, its employees were in fact provided with their legally mandated breaks, deciding the question of the policy's legality would not drive the resolution of the litigation. Certification was therefore inappropriate.

While California state court judges have seemingly been more receptive than their federal colleagues are to certifying classes solely based on a formal policy, a recent California Supreme Court decision has provided reason to think this might change.

Duran v. U.S. Bank did not concern breaks but rather dealt with allegations that U.S. Bank improperly classified its loan officers as exempt employees under the "outside salesmen" exemption.[22] Nonetheless, the logic of the case applies equally to purported meal- and rest-break classes.

The Supreme Court cautioned against the automatic certification based on the question of the legality of a formal policy, positing that "when a party seeks class certification based on allegations that the employer consistently imposed a uniform policy or de facto practice on class members, the party must still demonstrate that the illegal *effects* of this conduct can be proven efficiently and manageably within a class setting."[23]

The court went further, stating that "[o]nly in an extraordinary situation would a class action be justified where, subsequent to the class judgment, the members would be required to individually prove ... liability."[24] This logic would counsel against automatic certification in the break context. No matter how important or fundamental the question of a formal policy's legality is, the illegal policy cannot alone establish liability if the court's language regarding "illegal effects" is to be taken seriously. And because individualized questions of liability would remain following class judgment, *Duran* appears to foreclose the argument that the existence of a formal policy is a sufficient condition for certification.

CONCLUSION

While certain questions remain unanswered, the two years following *Brinker* have made at least one thing clear: So long as an employer's formal break and off-the-clock policies comply with California's requirements, his or her employees will be unable to obtain class certification on the theory that wage violations occurred notwithstanding these policies.

The two years following *Brinker* have made at least one thing clear: So long as an employer's formal policies comply with California's requirements, employees will be unable to obtain class certification on the theory that wage violations occurred notwithstanding these policies.

In other situations, the results are less certain.

Courts are split on the consequences of an employer having no break policy whatsoever. Some lower state courts have certified classes on the common issue of whether an employer is legally obligated to enact a break policy, while the Supreme Court has avoided this novel legal theory. Likewise, when plaintiffs claim that a written policy itself is facially illegal, some courts have taken this allegation (assuming it is not obviously meritless) to constitute a common question upon which to base certification.

Other courts, noting that an employer's liability is not established until an illegal policy is actually *applied* to an employee, hesitate to certify a class when individual issues are at play on the question of liability. Ultimately, these questions and conflicts will have to be resolved by the California Supreme Court. WJ

NOTES

1 53 Cal. 4th 1004 (Cal. 2012).

2 Rex S. Heinke & Christopher K. Petersen, *Brinker's Legacy, One Year In,* 27 No. 25 Westlaw J. Employment 1 (July 10, 2013).

3 *Id.*

4 *Brinker,* 53 Cal. 4th at 1051.

5 2013 WL 6236743 No. C–12–05859 EDL (N.D. Cal. Dec. 2, 2013).

6 *See, e.g., Johnson v. Cal. Pizza Kitchen Inc.,* 2013 WL 6858373 B234542 at *8 (Cal. Ct. App. Dec. 30, 2013) (affirming the trial court's denial of the off-the-clock subclass after noting that "CPK's company policy expressly prohibits off-the-clock work").

7 *See Hernandez v. Chipotle Mexican Grill Inc.,* 146 Cal. Rptr. 3d 424, 438 (2012), ordered not published (Dec. 12, 2012).

8 *In re Sutter Health Wage & Hour Cases,* No. A137875, 2014 WL 2467018 at *12–13 (Cal. Ct. App. June 3, 2014).

9 *Ebo v. TJX Cos.,* No. B214937, 2013 WL 1820768 at *6 (Cal. Ct. App. May 1, 2013).

10 2013 WL 3286182 (Cal. Ct. App. June 27, 2013).

11 *Id.* at *18.

12 *Id.* (emphasis added).

13 214 Cal. App. 4th 974 (2013).

14 *Id.* at 1001.

15 211 Cal. App. 4th 1129 (2013).

16 216 Cal. App. 4th 220 (2013).

17 220 Cal. App. 4th 701 (2013).

18 *Duran v. U.S. Bank Nat'l Assoc.,* 59 Cal. 4th 1, 31 n.28 (2014).

19 *Brinker,* 53 Cal.4th at 1033.

20 2014 WL 1379119, No. CV 12–06345–MWF (C.D. Cal. Mar. 24, 2014).

21 *Id.* at *21 (emphasis added).

22 59 Cal. 4th 1 (2014).

23 *Id.* at 23 (emphasis added).

24 *Id.* at 25.