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Arnold Schwarzenegger, Governor

October 29, 2007

Chief Justice Ronald M. George and
The Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, California 94102-4797

RE: Request for Publication of *Brinker Restaurant Inc. v. Superior Court, Adam Hohnbaum, Real Party in Interest,*
Fourth District Court Case No. D049331.

California Supreme Court Case No. S157479

Dear Chief Justice George and the Associate Justices of the California Supreme Court:

Pursuant to California Rule of Court 8.1120, enclosed please find a request to certify for publication the court's opinion in *Brinker Restaurant Inc. v. Superior Court.* The court's opinion was filed on October 12, 2007, and therefore this request is timely delivered within the 20-days prescribed by Rule 8.1120(a)(3).

Please also be aware that the attached request was transmitted to the Fourth District Court of Appeal on October 29, 2007. However, I have been advised that court declined to accept the request for filing on the basis that the court's recommendation concerning publication had already been transmitted to the Supreme Court on October 26, 2007—fifteen days after the decision was issued. Please note that the court's docket entry of October 26, 2007, states "The portion of the opinion stating it is final immediately is a clerical error, therefore this court respectfully requests that the Supreme Court grant review and transfer the case to this court." Whether or not this clerical error is corrected and the matter remanded, this request for publication is made within 20 days of the opinion's issuance pursuant to Rule 8.1120(a)(3) and should therefore be considered.

Thank your for your consideration.

Very Truly Yours,

Angela Bradstreet

Angela Bradstreet
Chief, Division of Labor Standards Enforcement

Encl.

cc: Karen J. Kubin, Counsel for Defendants
Rex S. Heinke, Counsel for Defendants
William Turley, Co-Counsel for Plaintiffs/Real Parties in Interest
Tracee Lorens, Co-Counsel for Plaintiffs/Real Parties in Interest
Frederick P. Furth, Co-Counsel for Plaintiffs/Real Parties in Interest
Timothy D. Cohelan, Co-Counsel for Plaintiffs/Real Parties in Interest
Hon. Patricia A. Y. Cowett
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October 29, 2007

Hon. Gilbert Nares, Acting Presiding Justice
Hon. Judith L. Haller Associate Justice
Hon. Terry B. O'Rourke, Associate Justice
California Court of Appeal
Fourth Appellate District, Division One
750 B Street, Suite 300
San Diego, California 92101

RE: Request for Publication of *Brinker Restaurant Inc. v. Superior Court, Adam Hohnbaum, Real Party in Interest,* Case No. D049331.

Dear Justices,

Pursuant to Rule 8.1120(a) of the California Rules of Court, the California Labor Commissioner requests that the Court certify for publication its opinion in *Brinker Restaurant Inc. v. Superior Court.* As the agency charged with both enforcing California's laws concerning meal and rest periods, and adjudicating claimed violations of these provisions through administrative hearings, this decision and its analysis significantly affects the Labor Commissioner. Moreover, the Court's opinion satisfies several standards for publication of California Rule of Court, Rules 8.1105(c) in that it: (1) advances a new interpretation, clarification, criticism, or construction of a statute; (2) addresses an apparent conflict in the law by rejecting interpretations of the law based on Industrial Welfare Commission Orders and Labor Commissioner opinions which do not comport with the statutory language of Labor Code section 512; (3) and involves a legal issue of continuing public interest.

Publishing the Court's opinion in *Brinker* will bring much-needed clarity to specific issues which, despite having engendered numerous class actions, have not been fully analyzed or resolved by California's appellate courts. *Brinker* fills that void. Specifically, absent its publication there will be no California precedents thoroughly considering some of the most fundamental aspects of California statutory meal and rest period requirements such as: (1) whether rest periods must be authorized at three and one-half hours of work; (2) whether a meal period must be provided after each five-hour block of time; (3) whether meal periods may be provided during the first hour of an employee's shift, and (4) the requisite factual and legal findings necessary to support class-wide litigation of claimed violations of an employer's duty to provide meal periods. Thus, without publication, confusion over employees' rights and employers' obligations involving meal and rest periods will, as it has to date, persist and trial courts will continue to decide important substantive and procedural issues on an ad hoc basis. This, in turn, encourages forum-shopping and the potential for inconsistent applications of the law.

I. Interest of Requesting Party

As is well known, the Labor Commissioner is charged with the enforcement of California's labor laws, including the Industrial Welfare Commission Orders. (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 561-562.) The Labor Commissioner also possesses authority to adjudicate employees' claims for the recovery of wages, penalties, and other demands for compensation. In an enforcement capacity, it is invaluable for the Labor Commissioner in highly controversial areas of law such as this to have the benefit of citeable precedent to guide policy decisions. Having clarity through appellate precedent informs the choices of how to dedicate and focus the state's finite resources to maximally ensure that employees receive the protections of the state's labor laws. Equally, having appellate precedent promotes the role of the Berman hearing process as an expedient and cost-effective administrative avenue for resolving employee-employer disputes, benefiting both the public and alleviating burdens on the courts. Lack of appellate authority on the issues decided in *Brinker* impedes both these salutary goals.

Moreover, as is clear in this Court's analysis, DLSE Opinion letters have previously been issued containing statements in tension with the discussion and holdings in *Brinker*. By publishing this decision, the Division of Labor Standards Enforcement will not be placed in the difficult position of enforcing the law consistent with the requirements of the statute as set forth in this decision, but lacking citable authority analyzing earlier opinion letters and the precise scope of earlier appellate decisions. This reaches acute importance in the Labor Commissioner's function to adjudicate wage disputes throughout the state in the Berman hearing process. Publishing *Brinker* brings clarity and guidance to the Divisions' hearings officers in order to make consistent substantive determinations of the parties' rights under the law.

II. New Rule of Law, Clarification of the Law and Conflict in the Law

Brinker conclusively resolves several sources of controversy and therefore merits publication. There are currently no published cases analyzing whether an employer must authorize and permit employees to take a rest period at three and one-half hours of work. Similarly, there are no precedents addressing the question of whether section 512 prohibits an employer from providing a meal period during the first hour of an employee's shift, nor whether Wage Order No. 5-2001 requires employers to authorize and permit a rest break before the first scheduled meal period. And central to the *Brinker* decision, there are no cases previously deciding whether Labor Code section 512 requires an employer to provide meal periods on a rolling basis, after every five hours of work. *Brinker's* consideration and analytical approach used in resolving these important issues merits publication.

The Court's decision contains extensive discussion on whether section 512 and Wage Order 5 require an employer to provide a meal period for each five-hour block of time an employee works, regardless of the total number of hours in the day. The confusion surrounding this issue is neither hypothetical nor isolated, and the Court's analysis illustrates the risk in

relying on inferences contained in prior case law or regulatory materials predating the enactment of section 512. In reaching the conclusion that current law requires an employer to provide a meal period for each five-hour block of time, the trial court cited both California Supreme Court precedent and an Industrial Welfare Commission Order issued in 1976 to discern the "spirit of section 512". *Brinker*, however, places the focus on the statutory language of section 512 and the currently applicable Wage Order. Significantly, *Brinker* finds the statutory language and current wage order consistent in defining an employer's meal period obligations on the basis of an employee's work period "per day", rather than a rolling basis dependant on "hours worked".

While relying on plain language to discern the scope of legal obligations over potentially competing sources of legislative intent is not a new proposition, *Brinker* is the first case to clearly demonstrate the implications of this doctrine for resolving the confusion over how often meal periods accrue under California law. In addition to the question of whether meal periods accrue on a "rolling" five hour basis, the Court's plain language approach conclusively settles related issues of first impression over the timing of meal and rest periods. As neither section 512 nor Wage Order 5 contain explicit prohibitions against providing a meal period during an employees first hour of lunch, "early lunching" does not violate California law. *Brinker* also informs that since neither statute nor regulation mandate rest periods to be taken prior to meal periods, an employer's failure to authorize and permit rest period prior to meal periods is not inherently unlawful. Similarly, while earlier DLSE opinion letters have indicated that an employer must authorize rest periods after three and one-half hours of work, *Brinker*'s analytical framework compelled the Court to find this interpretation incorrect.

Brinker's ability to harmonize argued conflicts between section 512 and the wage orders is significant in light of precedent that previously did not reconcile such suggested conflicts. In *Bearden v. U.S. Borax, Inc.* (2006) 138 Cal.App.4th 429, the Second District Court of Appeals issued its decision resolving a tension between the provisions of an Industrial Welfare Commission Wage Order presumably governing meal periods, and section 512's explicit statutory requirements. In doing so through precedent, *Bearden* eliminated one source of confusion and unnecessary litigation over California's meal period requirements. Despite *Bearden's* inability to harmonize section 512 with one provision of a wage order, it is important to emphasize that *Bearden*'s holding is thoroughly consistent with this Court's analytical approach. Both decisions rely on the primacy of the plain meaning of the statutes' specific words in determining the scope of employees' and employers' respective rights and obligations. Publishing *Brinker* alongside *Bearden* provides strong and consistent direction for resolving any other issues concerning meal periods—the plain meaning of section 512 governs; wage orders should be interpreted consistent with section 512; and where they cannot be harmonized, the statute prevails.

As this Court observed, *Brinker* involves another issue of first impression for a California court of appeal—whether an employer has an affirmative duty under Labor Code section 512(a) and Industrial Welfare Commission Order No. 5-2001, not only to provide a 30-minute meal period to its hourly employees, but also to ensure the employees actually take the meal period

once provided. While this Court remanded this case to the trial court with instructions to make specific findings on the important substantive question of the meaning of an employer's duty to "provide" a meal period, *Brinker* nonetheless provides valuable guidance by, as previously mentioned, setting forth the analytical parameters for the court to consider in resolving this issue. In discussing the issue of whether a meal period accrues every five-hour block of time, this Court looks to the plain meaning of the words used in the wage orders and section 512, stating:

> The term "employ" is defined in IWC Wage Order No. 5-2001 to mean "to engage, suffer, or permit to work."(Cal.Code Regs., tit. 8, § 11050, subd. 2(E).) The term "provide" is defined in Merriam-Webster's Collegiate Dictionary (11th ed.2006) at page 1001 as "to supply or *make available.*" (Italics added.)

Thus, the opinion is informative for identifying a disparity in the statutory language of section 512, and the plaintiff's description of an employer's obligation as one to "ensure" the meal period is taken. Isolating this as an unresolved issue and setting forth a framework for 512's statutory construction takes on further importance in light of the assertion that California precedent has held an employer has an affirmative duty to relieve the employee from duty. (*Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949.) Although the legal questions and factual circumstances this Court addresses in *Brinker* differ from those in presented in *Cicairos,* language in *Cicairos* understandably invites confusion on which *Brinker* provides guidance.

Even absent conclusively resolving this issue, publication of *Brinker* informs the discussion on this fundamental question of the meaning an employer's statutory obligation to provide meal periods. It is unknown whether the parties may ultimately choose to resolve their dispute on remand at the trial court level, thereby removing the potential for this Court to further analyze and issue any precedential opinion on this important issue. For that reason, it is acutely important that this Court accept the current opportunity to publish its decision and provide the maximum guidance to employers and employees on the most basic requirements of California's meal periods.

III. Continuing Public Interest.

In light of the great controversy surrounding issues over California's statutory meal period requirements, I recently held open forums in two cities in an attempt to discern both employees' and employers' understanding of their respective rights and obligations. Hundreds attended the forums and I received over two thousand written comments. Consistent with the dispute and arguments in *Brinker*, the statements at the forums and the comments I received revealed great confusion and disagreement on fundamental questions of what Labor Code 512 actually requires, and what steps employers must take in order to comply with their statutory obligations. In addition to the ongoing class action litigation involving some of the same issues this Court's decision resolves, the forums have led me to conclude that there is a substantial and continuing public interest in publication of this decision.

IV. Conclusion

Following the enactment of Labor Code 512, there has been considerable confusion and resulting litigation over the specific employee rights and employer obligations this Labor Code section created. This class action is only one of many which potentially affect hundreds of thousands of employees, with hundreds of millions of dollars at issue. This court's opinion provides essential guidance to employees and employers concerning their substantive legal rights and obligations, and also to lower courts faced with procedural questions as they attempt to manage widespread class actions involving meal and rest periods. As this case illustrates, there is widespread disagreement over section 512's fundamental requirements. Failing the publication of this opinion, employers and employees will again be faced with little guidance on these issues and will necessarily turn to statements in earlier cases and materials in tension with this Court's opinion. In contrast, publication of this decision promotes the public interest by assisting employers, employees and other courts confronting this issue to avoid constructions of Labor Code 512 that this court has held erroneous as a matter of law.

Based on the foregoing, the Labor Commissioner believes that the opinion meets the standard for publication set forth in California Rules of Court, rule 8.1105, and therefore respectfully urges this court to order publication.

Very Truly Yours,

Angela Bradstreet
Chief, Division of Labor Standards Enforcement

cc: Karen J. Kubin, Counsel for Defendants
Rex S. Heinke, Counsel for Defendants
William Turley, Co-Counsel for Plaintiffs/Real Parties in Interest
Tracee Lorens, Co-Counsel for Plaintiffs/Real Parties in Interest
Frederick P. Furth, Co-Counsel for Plaintiffs/Real Parties in Interest
Timothy D. Cohelan, Co-Counsel for Plaintiffs/Real Parties in Interest
Hon. Patricia A. Y. Cowett
Supreme Court of California

PROOF OF SERVICE BY FIRST CLASS MAIL

Brinker Restaurant Inc. v. Superior Court, Adam Hohnbaum, Real Party in Interest
Case No. D049331

I, Mary Ramirez, declare as follows:

1. I am over 18 years of age and not a party to this action. I am employed in the City and County of San Francisco. My business address is 455 Golden Gate Avenue, 9th Floor, San Francisco, California 94102.

2. On October 29, 2007, I mailed served California Labor Commissioner Angela Bradstreet's Request for Publication of *Brinker Restaurant Inc. v. Superior Court, Adam Hohnbaum, Real Party in Interest*, by first class mail. I served the Request for Publication by placing the envelop for collection and mailing following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelop, with postage fully prepaid.

3. The name and address of each person to whom I mailed the documents is listed on the attached list entitled "COPIES".

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 29, 2007

Mary Ramirez