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PERSPECTIVE

Rest period compliance guidance

By David Martinez
and Christina Lincoln

Last year, the California Supreme Court held that an employer's discretion to provide employees with on-duty meal periods does not apply to rest periods. *Augustus v. ABM Sec. Servs. Inc.*, 2 Cal. 5th 257 (2016). The Supreme Court had previously outlined an employer's obligation to provide meal periods in *Brinker Rest. Corp. v. Superior Court*, 53 Cal. 4th 1004, 1017 (2012). *Augustus* clarifies *Brinker* by holding that employees cannot be required to be "on call" during rest periods. This holding also provides valuable insight for California employers.

In *Brinker*, a class of restaurant employees sued their employer for failing to provide off-duty meal periods or to otherwise pay the one-hour wage penalty for each workday in which an employee missed an off-duty meal period. The Supreme Court explained that employers must generally provide employees with unpaid 30 minute meal breaks relieving them of all duties. This obligation is excused, however, when the nature of the job prevents an employee from being relieved of all duties, and the employee agrees in writing to an on-the-job paid meal period. Such agreement must be revocable at the employee's discretion. Unless the employer provides either an off-duty or an appropriate on-duty meal period, it must pay the employee an additional hour of wages for each workday in which the employee misses a meal period.

Brinker went on to set the standard for providing off-duty meal periods — specifically, an employer must relieve its employees of all duty, relinquish control over the employees' activities, permit employees to take an uninterrupted 30-minute break, and not impede or discourage employees from doing

so. The court explained that an employer is not obligated to schedule or otherwise "police" meal breaks to ensure no work is performed. Importantly, the court underscored that the *Brinker* standard is necessarily industry-dependent, reasoning that it could not "delineate the full range of approaches that in each instance might be sufficient to satisfy the law."

Augustus Expands on Brinker

Augustus expanded on *Brinker* by addressing two issues: (1) whether employers are required to provide employees off-duty rest periods, and (2) whether employers may require their employees to remain "on call" during rest periods. The court answered the first question in the affirmative and the second question in the negative. In *Augustus*, a putative class of security guards challenged their employer's policies, which required the guards to keep their pagers and radio phones on — even during rest periods — and to remain vigilant and responsive to calls when needs arose.

The trial court granted the employees' motion for summary judgment on the rest period claim, concluding that the employer's policy provided rest periods subject to employer control and the obligation to perform certain work-related duties. It reasoned that because such control and work duties are indistinguishable from the rest of a workday, an on-duty or on-call break cannot be considered a break at all. The Court of Appeal reversed, holding that California law does not require employers to provide off-duty rest periods and that "simply being on call" is not actual work. It opined that "[a]lthough *Brinker* is instructive on several levels, it said nothing about an employer's obligation to relieve an employee of all duty on a rest break." As such, the Court of Appeal held that "[t]he discussion in *Brinker*

regarding the relieved-of-all-duty requirement concerned meal periods only."

The Supreme Court reversed again and held that *Brinker* applies to both meal and rest periods. It noted that Labor Code Section 226.7 prohibits employers from requiring employees to work during both meal or rest periods and imposes a one-hour wage penalty for each day an employee misses a meal or break. Further, while Wage Order 4-2001 (which relates to professional, technical, clerical, mechanical and similar occupations) empowers employers to provide "on-duty" meal periods if the nature of the work prevents the employee from being relieved of all duty and the employee has signed a revocable written agreement, neither Section 226.7 nor Wage Order 4-2001 provides such an exception for rest periods.

It further reasoned that during an on-duty meal period, the employee gains something — wages — he or she would not have received otherwise. In contrast, an employee who works during a rest period "essentially performs ... 'free' work," given that rest periods are already paid. If an employer could require its employees to remain on-duty during breaks, there would be no reason for Wage Order 4-2001 to declare that rest periods be counted as hours worked, given that an employee's time spent performing duties requires the payment of wages. Accordingly, rest periods are necessarily off-duty in nature.

Guidance on Compliance Options

Augustus provides useful guidance on employers' options for complying with rest period obligations. For example, employers may reasonably reschedule rest periods if a legitimate need arises by providing employees with a replacement rest period. Alternatively, employers can pay the one hour wage penalty set

forth in Section 226.7 and/ or the applicable wage order. Of course, "[n] either of these options implies that employers may pervasively interrupt scheduled rest periods, for any conceivable reason — or no reason at all." Rather, such options should be the exception rather than the rule, to be used when the employer — because of irregular or unexpected circumstances such as emergencies — has to summon an employee back to work.

Further, employers may obtain an exemption from rest breaks from the Division of Labor Standards Enforcement (DLSE) based on a showing that: (1) the exemption would not materially affect the welfare or comfort of employees; and (2) the employer would suffer undue hardship without the exemption. Indeed, in *Augustus*, the employer had previously obtained two one-year exemptions for security guards, which had expired. Industries with similar working conditions also are suitable for rest break exemptions.

David Martinez is a partner at Robins Kaplan LLP where he handles intellectual property, business, antitrust, and class action litigation across a broad range of industries, and co-chairs the firm's Retail Industry Group. He can be reached at dmartinez@robinskaplan.com.

Christina Lincoln is an associate at Robins Kaplan LLP where she handles business litigation and catastrophic loss insurance matters. She can be reached at clincoln@robinskaplan.com.



MARTINEZ

LINCOLN