September 11, 2008

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

Re: *Brinker Restaurant Corp. v. Superior Court of San Diego County (Hohnbaum)*
__ Cal.App.4th __, 2008 WL 2806613 (July 22, 2008)
Fourth Appellate District, Division 1

Honorable Chief Justice and Associate Justices:

I am writing in my capacity as a former member of the Industrial Welfare Commission (IWC) to urge this Court to grant review in the above-entitled case pursuant to California Rules of Court 8.500(g).

This case provides this Court with an opportunity to resolve a fundamental disagreement between courts of appeal and to settle an important question of statewide significance regarding the right of California workers to receive meal and rest periods.

STATEMENT OF INTEREST

I was appointed by former Governor Gray Davis to be a member of the Industrial Welfare Commission in 1999 and served until 2001. During my tenure on the IWC, the Legislature passed AB 60 (Stats. 1999, Ch. 134), which codified in Labor Code section 512 longstanding provisions of the IWC wage orders requiring California employers to provide their employees a meal period. AB 60 also required the IWC, among other responsibilities, to review its meal and rest break regulations. I participated in that review and the Commission declined to modify its longstanding view that meal and rest breaks were mandatory. Moreover, during the course of that review, I came to the conclusion that the remedy for the failure of an employer to provide meal and rest periods was inadequate. Consequently, I proposed and Commission adopted an amendment of the IWC's wage orders to establish a remedy for the failure of an employer to provide meal and rest periods. That remedy was subsequently codified as Labor Code section 226.7 by AB 2509 in 2000 (Stats. 2000, Ch. 876). As a member of the IWC, I was concerned that the remedy for the failure of an employer to give employees their meal and rest breaks was inadequate and I believed we had acted to strengthen the law.

I do not recall that the issue which is at the center of this case, whether "to provide" a meal period means something other than a requirement that the employer insure that a

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meal period is actually taken, was ever a subject of debate before the IWC during my tenure or since. That meal periods were mandatory was the longstanding enforcement position of the Division of Labor Standards Enforcement (DLSE) and the IWC itself.

The *Brinker* decision not only brings that longstanding view into question but conflicts with other appellate decisions on the subject. It has the potential to substantially erode or even destroy a fundamental workplace protection that has been a part of California law for many decades.

Since the Legislature codified the IWC's remedy for the failure of an employer to provide meal and rest breaks, the issue has become highly controversial and has been the subject of significant public policy debate. As a result, even before the *Brinker* case arose, there was a significant effort to modify the traditional enforcement position concerning the meaning of "providing" a meal period. Thus, on December 10, 2004, the DLSE submitted a proposed emergency regulation to the Office of Administrative Law (OAL) regarding the provision of meal and rest periods in the workplace. On December 20, 2004, DLSE withdrew the proposed emergency regulation and resubmitted a revised proposed regulation under the regular rulemaking process on January 4, 2005. After questions emerged about the legal authority of DLSE to promulgate the proposed regulation and the propriety of other actions taken to promote its position through allegedly fake news reports, the Assembly Committee on Labor and Employment conducted an oversight hearing on the subject on January 26, 2005. Subsequently, the Legislature passed ACR 43 (J. Horton) which, among other things, made legislative findings that the DLSE did not have the authority to promulgate the proposed regulation concerning meal and rest periods and that the proposal was inconsistent with existing law. On January 13, 2006, DLSE announced that it would not file the proposed regulation with the OAL by the applicable deadline.

Moving ahead to DLSE's response to this case, immediately after the *Brinker* decision was issued by the Court of Appeals, the DLSE immediately chose to enforce its holding statewide, knowing that it was in direct conflict with decisions of other courts of appeal. As a result, numerous workers represented by DLSE in meal break enforcement matters had their cases dropped. It is important that this court grant review so that those workers, who do not have lawyers, are not prejudiced by the conflict in opinions of different appellate courts and the DLSE's apparent rush to "pick sides" in a dispute between two appellate districts.

In light of these facts, and the likelihood that this decision will have a profound impact on the nature of these important workplace safeguards promulgated over a period of many decades by the IWC, enforced by the DLSE, and codified by the Legislature, I believe that it is of vital importance that this Court grants review in this matter.

WHY REVIEW SHOULD BE GRANTED

Pursuant to California Rules of Court 8.500(b)(1), this Court may order review of an appellate decision when "necessary to secure uniformity of decision or to settle an

important question of law." Both of these conditions are met in this case and therefore this Court should grant review.

First, the *Brinker* decision squarely conflicts with other decisions of the Courts of Appeal and this Court. The court in *Brinker* decided several significant issues related to the interpretation of California's meal and rest period requirements. Foremost among these, the court purported to hold that under current law, employers meet their obligations to provide meal periods in accordance with IWC Wage Orders simply by making them available to employees and not requiring that they are relieved of all duties so that they can really be taken.

The *Brinker* decision directly conflicts with the decision of the Court of Appeal in *Cicairos v. Summit Logistics, Inc.* (2006) 133 Cal.App.4th 949. In that case, the court concluded that an employer has "an affirmative obligation to ensure that workers are actually relieved of all duty" during their prescribed breaks. This standard, which is also consistent with the longstanding enforcement position of the DLSE and the IWC, insures that workers have a realistic chance of obtaining a remedy for their missed meal breaks – contrary to the standard set forth in *Brinker*. It is also a different standard than that applicable to rest periods, which employers need only "authorize and permit." However, the Court of Appeal in *Brinker* found that the standard on meal periods is akin to the standard on rest periods. This was not the intent of the Legislature and it was not the way in which the DLSE interpreted the Wage Orders until the *Brinker* decision was issued.

Moreover, my view on this matter is not merely personal. The *Cicairos* standard is consistent with the 2000 Statement as to the Basis of the IWC Wage Orders, which states that an employee working more than six (6) hours in a day "must receive" a thirty (30) minute, uninterrupted meal period. The Court of Appeal in *Brinker* chose to ignore this statutorily mandated system of memorializing the IWC's legislative intent and, instead, relied on a Webster's dictionary definition of the word "provide." Therefore, there is significant conflict between these two appellate decisions and the IWC's Wage Orders which, in and of itself, should justify this Court granting review.

In addition, other aspects of the *Brinker* decision purport to hold that certain forms of wage and hour cases (including meal and rest period claims) are uniformly not amenable to class treatment. However, this holding in *Brinker* conflicts with a long line of decisions of this Court that provide that the protections established by the Labor Code and the Wage Orders of the IWC are remedial statutes and regulations that must be liberally construed in a manner that protects workers, that class actions are favored in wage and hour cases, and that courts should be creative in finding ways to manage class actions because the alternative to such forms of litigation may result in a failure of justice. *Sav-On Drugstores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 339; *Gentry v. Superior Court* (2008) 42 Cal.4th 443, 462; *Industrial Welfare Commission v. Superior Court* (1980) 27 Cal.3d 690, 702; *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 453.

This view of the *Brinker* that wage and hour cases are not amenable to class treatment, conflicts with the way in which the DLSE enforces the law itself. Every day, the Labor Commissioner files claims on behalf of workers and enforces the law with regard to all similarly situated workers. It is, after all, the employer who frequently chooses to treat all workers within a job classification, location, or other grouping identically. Thus, this aspect of the *Brinker* decision significantly departs from well-established authority and so this courts review is both appropriate and necessary.

Second, review should be granted to settle an important question of law, namely the fundamental nature of an employee's right to meal and rest periods.

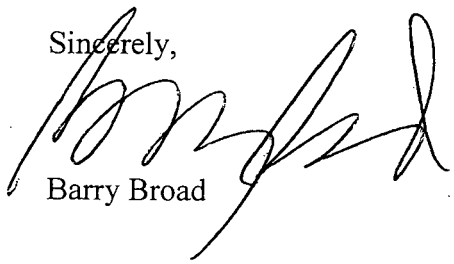
These important workplace protections have been enshrined in California law for decades. As this Court recently acknowledged in *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal.4th 429 (2007), the Industrial Welfare Commission Wage Orders have included meal and rest break requirements since "1916 and 1932, respectively." *Id.*, at 1105. As discussed above, the Legislature codified the meal period requirement in 1999 with the enactment of Labor Code Section 512. It is important to note that this legislation was in response to the adoption by the Industrial Welfare Commission, at the direct urging of the then gubernatorial administration, to eliminate California's system of daily overtime. The result of that action was for the Legislature to codify the eight-hour-day and meal period requirement through AB 60 in 1999, demonstrating the Legislature's clear desire to restore rights that had been taken by codifying them into statute.

In addition, as noted above, the IWC and the Legislature, recognizing the lack of an effective enforcement mechanism, in 2000 and 2001 respectively, established a remedy for employer noncompliance with the meal and rest period requirements in the form of an additional hour of pay for missed breaks. This is further evidence that the IWC and Legislature viewed these safeguards as needing protection from erosion by just the sort of result orientated judicial activism evidenced by the *Brinker* court.

This lengthy legislative and administrative history clearly demonstrates the important nature of this area of the law. Unfortunately, the holding in the *Brinker* case has the potential to undermine the fundamental right to meal and rest periods, a right which the Legislature sought to guarantee by enacting Labor Code Section 226.7. As discussed above, the *Brinker* decision directly contradicts holdings in other appellate cases and blurred the important distinction established by the IWC between an employer's obligation to authorize and permit rest periods and the requirement that employees be relieved of all duty so that their meal periods are received. *Brinker*, therefore has created significant confusion for both employees and employers as to the nature of this right. In essence, *Brinker* changes the fundamental view that labor law enforcement must be based on clear and unequivocal standards that may not be denied by employers using their superior power in the work place or sending messages to employees through a "wink and a nod" or, to coin another phrase used in this area of the law, the "iron fist in the velvet glove."

For the forgoing reasons, I respectfully urge this Court to grant review in this matter to settle this important issue of law and to resolve the disagreement between the courts of appeal.

Sincerely,



Barry Broad

CERTIFICATE OF SERVICE

I, Melissa Mayorga, certify as follows:
I am employed in the County of Sacramento, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 1127 11th Street, Suite 501, Sacramento, California 95822, in said County and State. On September 11, 2008, I served the following document(s):

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