

California Rural Legal Assistance Foundation

September 26, 2008

The Honorable Ronald M. George, Chief Justice
and the Honorable Associate Justices of the California Supreme Court
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Re: ***Brinker Restaurant Corporation v. Superior Court (Adam Hohnbaum)***
Case No. S166350 (4th Appellate District, Div. One, Case No. D049331)
Amicus Curiae Letter (Rule 8.500(g))

Honorable Chief Justice and Associate Justices:

The California Rural Legal Assistance Foundation submits this letter in support of the petition for review in this matter.

STATEMENT OF INTEREST

The California Rural Legal Assistance Foundation ("CRLAF") is a non-profit legal services provider that represents low income families in rural California and engages in regulatory and legislative advocacy which promotes the interests of farm workers and other working poor. Since 1986 CRLAF has recovered wages and other compensation for thousands of farm workers who have worked in a broad variety of farm operations. These workers are routinely defrauded out of wages due them and endure dangerous working conditions which expose them to pesticides, heat illness, and acute and sustained ergonomic stress. CRLAF supported and provided testimony in support of Labor Code § 226.7 which chronicled the persistent and widespread failure of many agricultural employers to provide meals and rest periods to their employees. This testimony was based, in part, on surveys which suggest that from 50%-70% of farm laborers working at a piece rate in California's Central Valley raisin and grape harvests do not regularly receive the meal and rest periods mandated by Labor Code § 226.7 and the applicable provisions of the IWC Wage Orders. In industries such as dairy, unrealistic time pressures imposed on workers make it impossible to complete the work on time and still be able to take a meal or rest period.

REASONS REVIEW SHOULD BE GRANTED

A. REVIEW IS NECESSARY TO ADDRESS ISSUES OF LEGAL IMPORTANCE CRITICAL TO THE HEALTH AND SAFETY OF CALIFORNIA WORKERS.

In the last several years, we have been reminded of exactly how important it is for farm workers to take regular breaks during the work day. Between 2005 and 2008 no fewer than 13 workers have died in the fields

from confirmed heat stress illness.¹ In three of six agricultural heat fatalities confirmed in 2005, investigation reports show that the victims succumbed to the heat while working under conditions where all required meal and rest periods were not “taken.”² These tragedies in 2005 made clear that agricultural employers were not going to ensure the safety of their workers without explicit, mandatory requirements. The legislature and the Division of Occupational Safety and Health (“DOSH”) had already begun work on a standard and took steps to address the problem. The regulation that resulted from that effort, while flawed, specifically creates the right to additional rest or “recovery” periods when requested by workers. 8 Cal. Code Regs. § 3395(d). This standard was a compromise promulgated in lieu of an affirmative obligation to provide an additional break on days of extreme heat.³ It has been criticized for placing the burden on the worker to ask for the break because of the pressure on workers to keep up and not make trouble.⁴ Sadly, the *Brinker* decision now imposes the same burden on farm workers and others to affirmatively seek their breaks or have them deemed waived.

No one seriously questions the proposition that meal and rest periods are designed to promote the health and safety of workers. The Court in *Brinker* acknowledges, but then completely ignores, this factor when analyzing the scope and burden of the employer’s obligations. While purporting to construe the regulations and statute as a necessary function of determining class suitability, the Court narrows their protections and, in essence, shifts the burden to employees to affirmatively assert their right to each meal and rest period to which they are entitled under the law. The *Brinker* standard for meal and rest period enforcement is the equivalent to requiring that every worker insist on being paid minimum wage and overtime or be deemed to have waived it.

¹ State of California Memorandum to Len Welsh, DOSH Acting Director from Janis Prudomne, Public Health Medical Officer, DHS-OHB and Amalia Neidhardt, MPH, CIH, Cal-OSHA, RE:Cal-OSHA Investigations of (2005) Heat-Related Illnesses, February 17, 2006; DOSH Memorandum to Len Welsh, DOSH Director from Janis Prudomne, Public Health Medical Officer, DHS-OHB and Amalia Neidhardt, MPH, CIH, Cal-OSHA, RE:Cal-OSHA Investigations of 2006 Heat-Related Illnesses, October 18, 2007; Presentation by Len Welsh on 2008 Heat Fatalities and Illnesses at Cal-OSHA Advisory Committee meeting, September 11, 2008, Oakland, CA.

² See, Division of Occupational Safety and Health 2005 Investigation Reports for David Castillo, FLC, R and R Labor Services, and Zepeda’s Farm Labor Service.

³ AB 805 as introduced and subsequently amended included a provision in each version that required additional rest breaks in high heat situations. CRLAF respectfully requests that the Court take judicial notice of the bill as introduced on February 18, 2005 and its amendments and history which are maintained by the State of California and may be accessed at http://info.sen.ca.gov/cgi-bin/postquery?bill_number=ab_805&sess=PREV&house=B&site=sen. After 8 Cal. Code Regs. § 3395 was adopted no further action was taken by the legislature on AB 805.

⁴See, “California’s fields, risks rise with the temperature,” Susan Ferris, Sacramento Bee, August 21, 2008. A copy of the article is attached hereto as Exhibit A.

Farm workers and other low wage workers will be effectively denied the right to their meal and rest periods if “authorize and permit” is construed to allow employers to do nothing more than announce a policy of a right to meals and rest periods and then leave it up to the workers to take it upon themselves to stop working and rest, or eat their lunch.⁵ In the real world of farm work, a harvester who decides after 3 hours into her shift that she will take a break without express permission will likely be fired. Imagine the foreman’s response if his crew, having begun work at 6:00 a.m., decides unilaterally at 11:15 a.m. to stop for lunch despite the fact that tractors and packing trailers are continuing down the field.

The *Brinker* decision places the burden of guessing when a break can be taken solely on the worker. The worker – not the employer – must determine whether taking a break will interfere with the work operations. The burden is on the crew members – not the supervisor – to decide whether to take their breaks altogether and cease operations, or relieve each other so that the work can continue. So long as the meal and rest period policy has been posted or announced, *Brinker* allows management to stand by and take no action while employees work a 10 hour day without a break, pausing only long enough to run to the field toilet, relieve themselves, take a drink of water and eat their lunch while running back to their place in the field. Under *Brinker*, employers argue that a worker who later claims compensation under Labor Code § 227.6 must essentially prove a negative – that she did NOT waive her break – and that this showing is required for each denied meal or rest period.⁶

Brinker will significantly and negatively impact the efforts of workers to enforce their rights to meal and rest periods in individual and workforce-wide claims and actions. The impact of the decision, even before it becomes final, is dramatically demonstrated by the California Labor Commissioner’s rush to implement it through a directive to her staff.⁷ CRLAF has a

⁵ Unlike the other Wage Orders, the Agricultural Wage Order uses the “authorize and permit” language to define the right to meals as well as rest periods. 8 Cal. Code of Regs. § 11140 (11), 11140(12).

⁶ The *Brinker* Court appears to acknowledge that waiver is an affirmative defense and that the burden would ultimately lie with the employer to prove it. *Brinker, supra*, at 60. This is certainly consistent with the language of the statute and regulations. However, the Court in its analysis incorrectly suggests that these are individualized issues of proof that the employee must bear the burden of showing. *Brinker, supra*, at 59.

⁷ As demonstrated in the Rule 8.500 letter submitted by the Labor Organizations, the State Labor Commissioner has already rushed to implement the substantive holdings of *Brinker* and apply them to individual administrative wage claims, while ignoring the more relevant, analysis of what constitutes a denial of a meal or rest periods contained in *Cicairos v. Summit Logistics, Inc.* (2006) 133 Cal. App.4th 949. Indeed farm workers represented by CRLAF have been encouraged to abandon their claims, or had them dismissed when asked by deputy Labor Commissioners whether they had affirmatively “asked” for their meal or rest period. As pointed out below, this standard completely ignores the cultural and economic reality of today’s low wage workforce and repudiates nearly a century of labor law designed to address that reality by placing the burden on the employer to ensure compliance with labor protections.

current client whose claim for meal and rest period compensation is pending before the Labor Commissioner. At a settlement conference conducted by a deputy Labor Commissioner, the deputy advised the claimant and his attorney that the period of time a worker spends not actively working, while the cows are connected to a milking machine, can be counted as a rest period. The deputy went on to advise counsel for the employer that in light of the *Brinker* decision employers need only advise workers of their right to meal and rest periods and had no obligation to take any other steps. CRLAF advocates and their colleagues have already faced a myriad of motions to strike, to dismiss and for reconsideration arguing that *Brinker* resolves pending meal and rest period claims as a matter of law. Review of the *Brinker* decision is necessary to restore these basic working condition protections, and to ensure that they are rigorously enforced.

B. REVIEW IS NECESSARY TO ENSURE CONSISTENT APPLICATION OF WORKER PROTECTION LAWS.

1. The *Brinker* Decision Fails to Properly Apply the Standard That Labor Protections Must be Broadly Construed to Provide the Greatest Protection to Workers.

Amicus need hardly point out that California law, like federal law, has long recognized that the public policy supporting the establishment and enforcement of basic working conditions dictates that statutes and regulations establishing them be broadly construed. Supreme Court cases consistently support liberal construction of legislation regarding wages and working conditions in favor of employees. *Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 985 702, *Sav-On Drug Stores, Inc. v. Superior Court*, (2004) 34 Cal.4th 319, 340; *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794; *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal. 4th 1094. The impact of this broad policy is nothing less than a mandate that the Court interpret wage and hour statutes and regulations by deeming the health and welfare of the employees paramount over the business interests of the employer.

"Remedial statutes such as those under consideration ...are to be liberally construed. [Citation.] They are not construed within narrow limits of the letter of the law, but rather are to be given liberal effect to promote the general object sought to be accomplished"

Industrial Welfare Com. v. Superior Court of Kern County, supra, 27 Cal. 3d 690, 702, citing *California Grape etc. League v. Industrial Welfare Com.* (1969) 268 Cal. App. 2d 692, 698. These legislative and regulatory protections are founded upon the understanding that the relationship between employer and employee is not one of equal standing and that the benefit of the doubt, when construing a statute, must be resolved in favor of granting the greatest protection to employees. *Kerr's Catering Service v. Department of Industrial Relations*, (1962) 57 Cal. 2d 319, 327. While the *Brinker* Court acknowledges this mandate in the second paragraph of the opinion (*Brinker, supra*, at 786), the Court does not return to this fundamental notion when construing the regulation. In fact, the Court focuses on the "burden" imposed on the employer when reaching its conclusion that employers need not ensure that meal periods are taken, but need only make them available. *Brinker, supra*, at 56.

Had the Court begun with the plain language of the regulation and statutes, construed as a whole, in harmony with the entire regulatory scheme and in the context of the “object of the law” – to establish minimum wage and working conditions – a much different conclusion would have been reached with respect to each of the substantive questions posed and answered by the Court.

2. The Court Fails to Consider the Wage Order as a Whole When Construing the Mandatory Nature of the Meal and Rest Period Requirements Contained in the Express Language of the Regulations and Statute.

The Wage Orders do not just regulate compensation. Each order contains provisions which embody the constitutionally established power of the legislature to provide for the “general welfare” of employees (Cal. Const. Art. XIV) and the statutory mandate that the IWC investigate the “...health, safety, and welfare...” of California employees and “...ascertain the hours and conditions of labor and employment.” Labor Code § 1173. It is clear from the language of the Wage Orders that employers must provide these minimum conditions and employees need not take affirmative steps to trigger these rights. Yet the *Brinker* Court construes two of the most important of these health and safety mandates - meal and rest periods - as imposing a lesser duty on employers, that is, the employer need only make these periods of relief from work “available.” *Brinker, supra*, at 51, 52, 54, 56, 58.

The word “available” does not exist in the meal and rest period provisions. Nor does “available” appear in Labor Code §§ 512 or 226.7. Like minimum wage and overtime provisions, these are obligations triggered only by the fact that a worker completes a certain number of work hours in a work day. One assumes that the Court would not seriously argue that minimum wage or overtime pay need only be “made available” to workers upon request. Yet that is the ultimate standard established by the Court with respect to meal and rest periods. So long as an employer has some published policy stating that meals and rest periods are “available” the burden shifts to employees to insist upon the right to take them.

“Available” is used at various locations in the Wage Order to describe rights that are triggered by an employee’s request or the exercise of an option. Records are to be made “available” on request. (11050(7)) Accommodations must be made for workers unable to work a 10 hour shift only if such accommodations are “available.” ((11050(3)(B)(4); 11050(3)(B)(8)(f)) Break rooms and rest areas must be made “available” but obviously do not have to be used by employees. (11050(3)(H)), 11050(13)(B) Likewise, lodging is defined as accommodations “made available” to employees, but not mandated by the Order. (11050(10)(B)) The IWC’s use of “available” in these sections, but not with respect to meal and rest periods, compels a conclusion that the employer has a burden to provide meal and rest periods that is different from the obligation to make these other working conditions “available.”

The Court fails to analyze the actual language of the mandates imposed upon employers with respect to both meals and rest periods.

a. It is the Employer’s Burden to Authorize and Permit Rest Periods

The rest period provision includes mandatory language with respect to the employer's responsibility to provide rest breaks. The section creates two clear mandates. The employer must affirmatively authorize and permit rest periods to be taken:

(A) Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof.

8 Cal. Code of Regs. § 11050(12).

This mandate is unambiguous. There shall be a rest period of 10 minutes for each four hour work period (or major fraction thereof) in the work day and it must be scheduled in the middle of the work period unless it is impossible to do so.

It is a maxim of statutory construction that "Courts should give meaning to every word of a statute if possible, and should avoid a construction making any word surplusage." *Reno v. Baird* (1998)18 Cal. 4th 640, 658. Under this standard, the Court must consider both the obligation to authorize and the obligation to permit.

The employer clearly has the right to control the timing of rest periods – within the parameters established in the Wage Order – by defining when the workers are permitted to take their breaks. It is equally clear that in order to fulfill the responsibility to authorize rest periods, the employer must reasonably and expressly define those parameters in a way that makes it possible for a worker to know specifically when to take a rest or meal break without risk of discipline or termination. Therefore, necessarily, along with the right to control the work day, the employer has the primary burden to “authorize” the break at a specific time during the day unless he has otherwise informed all workers that rest periods and meal periods will be taken at the same exact time each workday. The Brinker company policy did not provide this notice to workers and the *Brinker* Court, by relying on it, relieves employers of this obligation to “authorize” breaks.

The Appellate Court does not examine the discrete obligations imposed by the Wage Order on employers, and instead creates a new standard: “As long as employers make rest breaks 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 Regulation 11050(12)(A).” *Brinker*, at page 47.

The Court errs by construing the regulation in a manner most protective of employers rather than workers when it construes the term “practicable” and concludes that “[b]ecause the applicable provisions of Regulation 11050(12)(A) provide only that rest periods should be scheduled in the middle of each work period “insofar as practicable,” the propriety of permitting a rest break near the end of a typical four-hour work period depends on whether the scheduling of such a rest break was practicable in a given instance, and thus cannot be litigated on a class basis.” *Brinker* at 48. Later the Court states that “... the language of Regulation 11050(12)(A)

is clearly intended to provide employers with some *discretion* to not have rest periods in the middle of a work period if, because of the nature of the work or the circumstances of a particular employee, it is not “practicable.”“ (emphasis supplied). However, the term “discretion” is not found in this subsection and determining whether something is “impracticable” is, by definition NOT a matter of discretion.⁸ If it is possible to have a rest period in the middle of the work period, IT MUST BE DONE.

Real Parties made a proper showing that the practices which existed at the restaurants impeded the ability to take rest periods within the time frames allowed by the Wage Orders, in essence demonstrating that Brinker had not “permitted” the breaks to take place. The lower court agreed and properly certified the class, leaving for trial the proof on the ultimate issues of fact and application of law to those facts.

The *Brinker* Court focuses only on the employer’s articulation of a general policy. It does not consider the proof offered by Real Parties which showed that the restaurants had failed to authorize rest periods at a particular time, and that employees were not able to take those rest periods. It replaces this examination with speculation about the circumstances under which workers might have “waived” their rest periods. *Brinker* at page 49. The Appellate Court refuses to acknowledge the burden placed on the employer to both authorize and permit, instead suggesting there must be an affirmative demonstration that there was not a waiver before liability could attach, even where the plaintiffs were able to demonstrate that rest periods were scheduled in violation of the express time mandates of the regulation.

The Appellate Court ignores the fact that the Wage Order itself allows for only one exception to the rest period mandates.

However, a rest period need not be authorized for employees whose total **daily work time** is less than three and one-half (3 ½) hours.

Id. This exception is clearly intended to relieve employers from the obligation of both authorizing and permitting rest periods on days where the workday is short, and arguably, there is no need for periodic periods of respite. However, the *Brinker* Court applies this language to situations where an employee works in excess of 3 ½ hours to support its construction that the employer has the discretion to deny a rest break for any work period that is less than 3 ½ hours! That is not what the regulation says, and under this interpretation, a worker could have a regularly scheduled shift of 6 hours and 59 minutes and be allowed only one 30 meal period with no rest breaks.

⁸ The *Brinker* Court did not avail itself of the dictionary when construing this section. The American Heritage College Dictionary, Third Edition, defines practicable as “1 : capable of being effected, done, or put into practice; feasible.” *Id.*, Houghton Mifflin Company, 1993, page 1073. The Court’s conclusion that the term provides discretion to the employer is not consistent with this definition. Had the IWC meant to make the timing of these breaks a matter of discretion, or standard practice, it could have done so by inserting one of those phrases. It did not.

There is one other mechanism for obtaining an exemption from providing a rest period. Section 17 of the Wage Order allows for exemptions to be granted by the Division of Labor Standards and Enforcement:

If, in the opinion of the Division after due investigation, it is found that the enforcement of any provision contained in Section 7, Records; Section 12, Rest Periods; Section 13, Change Rooms and Resting Facilities; Section 14, Seats; Section 15, Temperature; or Section 16, Elevators, would not materially affect the welfare or comfort of employees and would work an undue hardship on the employer, exemption may be made at the discretion of the Division. Such exemptions shall be in writing to be effective and may be revoked after reasonable notice is given in writing.

There are no other provisions for waiver, exception or exemption from the rest periods applicable to Brinker.⁹ The rest periods must be given if the workday exceeds 3 ½ hours. The IWC knew how to provide for a waiver of such a mandated right, but did so only with respect to meal periods. It expressly included a process whereby an employer could obtain an exemption if necessary. It cannot be inferred that the IWC intended to allow a general waiver of the right to a rest period when language allowing such a waiver was not included in the regulation. *Rocklite, supra*, 217 Cal.App. 2d at 645; *Ford Motor Co. v. County of Tulare* (1989) 145 Cal.App. 3d 688, 691-92.

The mandatory nature of the “authorize and permit” language is also demonstrated by its use in the Agricultural Wage Orders. Under Wage Order 14, 8 Cal.Code of Regs. § 11140, the “authorize and permit” language is used to define both the obligation to provide rest periods, and the obligation to provide meal periods. Testimony from the IWC hearings demonstrates that the use of this language demonstrated a concern about requiring the active monitoring of agricultural operations which may be spread out over large areas. The discussion of the “authorize and permit” language in that Order makes clear that the duty to provide these periods of respite is mandatory and designed to ensure enforcement of protections designed to protect the health and safety of workers. Grower representatives requested, but did not obtain, language that would allow for a waiver or a reduction of the meal period time – in addition to the exceptions already included in the Wage Order. (Transcript p. 140:18-25). In response to an argument that an agricultural worker ought to be allowed to take a 10, 15 or 20 minute meal period and not be told what to do, the chairman responded:

I think it is a question of how within reason—whether it is 10 or 15 minutes— that they do take a proper or have a proper meal period, particularly when they are working these long hours.

⁹ The Wage Order does allow employers of individuals attending the needs of children or disabled adults to require them to generally supervise their charges while on breaks. 8 Cal. Code. Regs. § 11050(11)(c). This is clearly not applicable to nor is it asserted by Brinker.

IWC Transcript, supra, at 143:23 - 144-1. The IWC knew how to put waiver language into Wage Orders – and in fact had done so specifically in the meal and rest period provisions. They were asked to put additional general waiver provisions modifying the “authorize and permit” mandate in the meal period section of the Agricultural Wage Order, and they did not do so. The clear and only intent that can be ascribed to these actions is that the IWC considered these provisions mandatory and waivable only under the explicit conditions set forth in the regulation.

There is no suggestion in the regulation that this language creates an individualized right that is not susceptible to class wide proof. All workers must be authorized and permitted to take rest periods. If the actions of an employer interfere with that right on a workforce wide basis, then class treatment is appropriate. The lower court found that those issues were susceptible to proof on a class wide basis and properly certified the class. The Appellate Court erred in reversing that determination.

b. Meal Periods Are Mandatory and May Only Be Waived Under Defined Circumstances.

i. The Meal Period Requirements Are Explicit and The Employer Has the Burden of Demonstrating that They Have Been Waived in Conformance With the Provisions of the Statute or the Wage Order.

Section 11 of the Wage Order states that

(A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes. . . .

8 Cal. Code of Regs. § 11050(11).

That section defines the specific circumstances when a meal period need not be given. The first exception is for employees with a workday of less than 6 hours. Section 11 of the Wage Order provides that meal periods are mandatory,

...except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and employee.

8 Cal. Code of Regs. § 11150(11).

The Wage Order also provides an exception in limited circumstances and allows an “on duty” meal period.¹⁰

¹⁰ Additionally, the Wage Order allows for the waiver of a meal periods by employees in the health care industry, or residential care facilities. 8 Cal.Code Regs. § 11050(11)(D), 11050(11)(D).

An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.

Id.

Notably, section 17 of the Wage Order allowing exceptions by the Division of Labor Standards Enforcement to grant an exemption to employers does NOT apply to meal periods. This demonstrates the IWC's intent to ensure that meal periods be provided except under extremely limited circumstances expressly defined under the regulation. Yet, the Appellate Court completely ignored this intent when construing the nature of the employer's obligation to provide a meal period.

Additionally, Labor Code § 512 mandates a second meal period for certain employees who work in excess of 10 hours. Section 512 then adds an additional exception which allows for waiver of the second meal period only, providing that "if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived." Labor Code § 512.

The *Brinker* Court does not rely upon any of these exceptions to support its conclusion that meal periods need only be made "available." Nor do these factors figure into the conclusion that individualized proof is necessary to determine whether there has been a waiver.

Instead, the Court inserts discretion where none is found in the statute and defines the employer's obligation – to make meal periods "available" using a term that is not contained in the applicable statute or regulation. "In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted..." Code of Civil Proc. § 1858. Courts themselves have recognized that this is not their purview. *Steven S. v. Deborah D.* (2005) 127 Cal. App. 4th 319, 327. "The courts are often called upon to construe statutes in factual settings not contemplated by the Legislature, and in doing so, may not disregard the statute and decide the case according to other criteria, such as the court's own 'sense of the demands of public policy.'" *Id.* (quoting *Johnson v. Calvert* (1993) 5 Cal.4th 84, 89.) The *Brinker* Court ignores these fundamental notions of statutory construction when reaching its conclusion that meal and rest periods need only be made "available."

Making a meal break "available" and "providing" one are two completely different things. By inserting the term "available," the *Brinker* Court places the burden on the employee to affirmatively assert and insist upon his/her right to each meal break for each work period.

Both the Industrial Welfare Commission (hereinafter "IWC") and the Legislature took specific steps to address the need for flexibility on the part of employers and workers when mandating meal periods, and provided explicit exceptions to those mandates in the regulation

and statutes. “It is presumed that the Legislature knows how to create an exception to the provisions of a statute, and that where it does not create an exception, it is presumed that it did not intend to do so.” *Steven S. v. Deborah D.*, *supra*, 127 Cal. App. 4th 319, 327 (citing *California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349). The IWC and the Legislature did provide for a waiver of this mandated right, but did so only with respect to the express exceptions provided. It cannot be inferred that they intended to allow a waiver by some other manner that was not specifically addressed. *Rocklite Products v. Municipal Court for Los Angeles Judicial Dist.* (1963) 217 Cal. App. 2d 638, 645; *Brown v. Kelly Broad. Co.* (1989) 48 Cal. 3d 711, 724. It is clear that the employer must provide meal periods unless they are waived in conformance with the explicit terms of the Wage Order. The Appellate Court creates new exceptions and circumstances under which an employer may be excused from complying with the law.

The Court rejects the argument that the lack of a written waiver is controlling or even relevant by noting that: “There is no statutory requirement under section 512(a) that the “mutual consent” necessary to a waiver must be in writing. Had the Legislature intended such a requirement, they could have, and would have, placed such a requirement in the statute.” *Brinker, supra*, at 59. However, the Legislature has not included all labor protections in statutes. The IWC has been specifically charged with defining these protections with respect to particular industries and occupations. A standard of legal review that allows an employer to ignore a mandate contained in a Wage Order because it is not reiterated in a statute is inconsistent with the IWC’s charge under Labor Code § 1173 and the Legislature’s exercise of its discretion to allow some but not all labor standards to be set by the IWC consistent with Cal. Const. Art. XIV.

ii. Early Lunching Defeats the Purpose of Providing for Regular Periods of Respite During the Workday.

When rejecting the late lunching claim, the Court seizes on a language difference that has no real substantive impact. Both Labor Code § 512 and the Wage Order compel a meal period when an employee has worked “for a work period of more than five hours.” Labor Code § 512(a), 8 Cal. Code of Regs. § 11050(11)(A). The use of the term work period is consistent and designed to trigger the obligation based on periods of time worked in the work day. This is confirmed by the fact that § 512 goes on to require a second meal period for workdays that exceed 10 hours. These provisions must read in conjunction with the statutory and regulatory provisions that establish the regular eight hour day (Labor Code § 510) and the mandate that workers be provided a rest period “within the middle of each work period...” 8 Cal. Code of Regs. § 11050(12)(A). Read in harmony, it is clear that this health and safety scheme requires that workers be given regular periods of rest, during their workday, which will provide an opportunity to recover from the stress imposed by their work. Early lunching is completely at odds with that scheme and undermines rather than promotes the health and safety protections afforded by the statute and regulation.

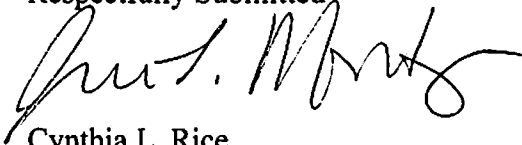
Contrary to the Court’s analysis, there is absolutely nothing to suggest that when the Legislature passed Labor Code § 512 it intended to **reduce** the protections afforded by the Wage Orders. The Legislature, in passing sections 512 and 516, sought to both restore and preserve the rights of workers. *Bearden v. U.S. Borax, Inc.* (2006) 138 Cal. App. 4th 429 does not hold

otherwise. That case specifically addressed and disallowed a collective bargaining unit provision that decreased the protections afforded by Labor Code § 512. The Court held that this lower standard of protection was not lawful even if authorized by an administrative regulation. It does not address the question of whether superior protections are enforceable.

CONCLUSION

As demonstrated in the petition for review, cases are pending in state and federal trial courts and appellate courts which turn on the question of what constitutes "provide" under Labor Code § 226.7. While the employers' bar would have the court believe that this is a function of the difficulty in applying this standard, in fact, it is a consequence of the wholesale violation of mandates imposed by the Wage Orders for decades. The employers' interest in preserving ambiguity and limiting the enforcement of these protections is no less now than it was when there were wholesale challenges to the implementation of the Wage Orders. *See, Industrial Welfare Com. v. Superior Court of Kern County* (1980) 27 Cal. 3d 690, 699 and *Rivera v. Division of Industrial Welfare* (1968) 265 Cal. App. 2d 576, 580-581. California workers are equally in need of a definitive construction of the obligation of an employer to provide meal and rest periods and the burden an employee must bear to prove they have been denied. Granting review in *Brinker v. Superior Court* will provide this Court with the opportunity to resolve this question of critical importance to California workers.

Respectfully Submitted



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EXHIBIT A

In California's fields, risks rise with the temperature

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Photo Gallery: Dealing with the heat

BURNHAM – Francisco Muñoz's hands grabbed at unripe salad tomatoes as fast as they could, filling two buckets that together earned him \$1.05.

Heat waves visibly undulated overhead as he bent over to pick, raced to a truck to dump the buckets – each 25 pounds – then raced back to start again.

"I'm the champion. I can earn up to \$20 an hour," Muñoz, 42, said in Spanish, his chest heaving, his face glistening with sweat.

The option of piece-rate pay allows a farmworker like Muñoz to vault far above the \$8-an-hour state minimum that he and 200 other workers were guaranteed, no matter how fast they picked this field east of Stockton. But during heat waves, job safety specialists say, the ubiquitous piece-rate system may be contributing to laborers working – or being worked – to death.

Since May, half of 12 heat-related job deaths under investigation in California have been of Latino farmworkers, four of them in jobs paying piece rate. The deaths are consistent with a new study by the federal Centers for Disease Control and Prevention that documents a disproportionate number of crop worker fatalities.

The June report found that between 1992 and 2006, U.S. crop workers died from heat illness at a rate 20 times greater than all other workers, and three and a half times greater than construction workers.

The six farm fatalities in California between May 16 and July 31 this year match the total farmworker death toll in 2005 – the year California enacted emergency heat regulations to protect workers. The rules, which require shade and the right to rest breaks for those who work in the sun, were the nation's first.

Yet, even with Gov. Arnold Schwarzenegger supporting the rules and with outreach aimed at employers, workers in the massive California food industry have continued to die.

Negligence, ignorance cited

Gross negligence and persistent ignorance on the part of field supervisors and workers are to blame, said Len Welsh, chief of Cal-OSHA, the state's occupational health and safety agency. Critics such as the United Farm Workers Union also say the state has too few inspectors and hasn't punished violators enough.

Dr. Robert Harrison, a University of California, San Francisco, occupational medicine expert, said there are more reasons.

Harrison served on the job safety standards panel that adopted the heat rules in 2005. He called them "path breaking" because they order every single worker to be provided shade, specific amounts of water and heat stress training in their native language.

But the rules were a compromise to gain support from industries and health and labor advocates, Harrison said. Their Achilles' heel may be their reliance on workers, not supervisors, to step forward, even in 100-degree-plus heat, and ask for an extra heat "recovery" break.

All workers in California, on any day, have the right to two 10-minute breaks and a lunch period. The heat recovery break is extra, and supervisors must allow it for at least five minutes in 100 percent shade.

Harrison said workers are unlikely to step forward if it means appearing weak or being scolded for falling behind in production quotas, which are common even for hourly wage workers.

Piece-rate workers are especially hesitant to volunteer to lose wages, Harrison said. "Do they feed their families, or protect their health? It's a choice someone shouldn't have to make."

By the time heat forces them to pause, he added, they may already be seriously ill.

Dr. Marc Shenker, who directs the University of California at Davis' Western Center for Agricultural Health and Safety, agreed. "If they don't toe the line, then they're out of there," he said. "The reality is, rest is a luxury."

In the tomato field near Stockton, Muñoz's co-workers accused him, teasingly, of becoming a champion because he doesn't rest as much as others. "I eat well, and drink lots of sodas," he said, but "hunger for money" makes it hard to rest.

Continued from [previous page](#)

Ordering breaks seen as critical

In the early 1990s, safety specialists with a now defunct state-federal job safety project warned about the consequences of not ordering piece-rate workers to rest.

In a report filed with the National Ag Safety Database – at the Centers for Disease Control and Prevention – investigators described the 1991 death of a melon worker, who had worked four hours in 95-degree heat, filling and hauling 50-pound bags of fruit.

"Crews are paid by the number of trucks they load in a day, and so workers do not stop for breaks," the report observed of melon pickers. "If breaks had been encouraged and workers provided with an incentive to take them, then this death may have been prevented."

In 2004, and again in 2005, the California Rural Legal Assistance Foundation pushed for a law to provide an incentive to rest. Both years, the state Legislature approved the bill requiring employers to pay workers for piece-rate wages lost during 10-minute breaks.

More than 70 percent of harvesters said they worked through breaks to avoid losing money, a CRLAF survey found.

Mark Schacht, the group's deputy director, said that without a compensation bill, "the evidence is that large numbers of piece rate workers will continue to be pressured by the piece rate pay system to work through mandated daily rest periods, putting them at severe health risk."

The governor vetoed the bill in 2004 and 2005. In his veto message, he wrote that piece rates already compensated workers for rest periods, and that the then recently adopted heat rules would protect their health.

In 2006, CRLAF backed a different bill that would have mandated 10-minute breaks every hour for outdoor workers when the heat index – temperature, humidity and degree of heat rising from the ground – reached levels considered dangerous.

The bill died when the state's job safety standards panel made the 2005 heat rules permanent in 2006.

Martha Guzman, a CRLAF lobbyist, said it's time to think again. "When it's over 100 degrees, of course people need more breaks," she said. "Even the Army has rules on that."

The Army, in fact, calls heat-stress prevention a "command responsibility." Commanders use a heat-index tool to calculate the level of danger during a hot day, and then order soldiers to rest for however long a chart says is necessary.

In high heat, those intervals can range from 10 minutes to 30 minutes an hour, depending on the index level and type of work soldiers are doing.

In 2005, Harrison recalled, he showed colleagues on the labor standards board how a \$20 tool, a heat pen, could help field supervisors measure the heat index so they can require appropriate breaks.

"If you're out in Bakersfield, and a crew boss," he said, "you can whip out your pen."

Welsh, the Cal-OSHA chief, said he doesn't think heat pens or more laws are needed to know it's hot and that it's time to follow the rules.

"It sounds terribly simple," he said, but the best way to save lives is for supervisors and workers to understand that drinking water is vital.

The state rules require employers provide at least one quart of cold water per worker per hour and that supervisors encourage workers to drink it.

"I would be willing to bet that 70 percent of the deaths are from people not drinking enough water," Welsh said.

Barry Bedwell, president of the California Grape and Fruit Tree League in Fresno, said farm groups are hosting seminars this summer to make sure employers grasp the risks of heat and know the law.

"They're just busting their rears, and going 120 percent," Bedwell said of workers. "We need to say, 'Hold on, take care of your body.' "

New, veteran workers succumb

Maria Vasquez Jimenez, 17, died May 16, two days after falling ill in a San Joaquin Valley vineyard after nine hours with no shade and little water. Supervisors didn't get her to a clinic for 90 minutes, and they now face \$263,700 in fines and possible criminal prosecution.

The undocumented teen was paid \$8 an hour to prune vines, was two months pregnant and not acclimated to field work in 100-degree heat.

Two other victims, however, were veteran field hands and legal immigrants, who, according to relatives, were in good health the days they labored in 106 degree temperatures.

Abdon Felix, 42, and Jorge Herrera, 37, were swampers, who often work in pairs, distributing boxes in vineyards at dawn, and loading them – by tossing them onto trucks – after other workers fill them with grapes.

Herrera's brother, Gerardo, said Jorge worked with another brother, earning as much as \$250 a day, loading 3,000 boxes or more and splitting 15 cents per box.

"The companies don't want the fruit to sit in the sun," said Gerardo, who is also a swamper.

"There are some supervisors out there, though, who care more about the fruit than the people."