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September 8, 2008

Via Overnight Mail

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*
Supreme Court Case No. S166350
Fourth Appellate District, Division 1, Case No. D049331

Honorable Chief Justice and Associate Justices:

I am a former California State Assemblyman (D-Los Angeles) and author of Assembly Bill 60, the Eight-Hour-Day Preservation and Workplace Flexibility Act of 1999. Governor Davis signed this measure into law, effective January 1, 2000, to require overtime to be paid for those hours worked beyond the normal eight-hour work day, rather than after a 40-hour work week. The measure was written to counteract the action of the Industrial Welfare Commission (IWC), which had voted in 1997 to eliminate daily overtime, making overtime pay available only after 40 hours of work in one week.

AB 60 also included Labor Code section 512 ("Section 512"), which directly codified the IWC wage order meal period provisions. The Court of Appeal decision in *Brinker Restaurant Corp. v. Superior Court* ("*Brinker*") takes out of context two words section 512 adds to the wage order meal period language and thereby misinterprets restrictively the legislation I authored with the consequence of contracting workers' entitlement to meal periods provided in a rational time frame during the typical eight-hour workday. *Brinker* also interprets an employer's obligation in section 512 to "provide" a meal period as requiring simply that the meal be offered, rather than the wage order requirement that workers shall not be employed for work periods exceeding five hours without a meal period. This expansive interpretation favoring employers was never discussed by the legislature during consideration of AB 60 and directly contrary to other California case law properly construing the legislation broadly in favor of protecting the health and welfare of employees.

I am thus writing as amicus under rule 8.500(g), California Rule of Court, to urge this Court to grant review in *Brinker* to effectuate an appropriate statutory construction of workers' meal period rights, to resolve a disagreement between the courts of appeal, and

to settle an important statewide question of law regarding the meal period protections codified in the legislation I authored.

STATEMENT OF INTEREST

As a former California State legislator and Chair of the Assembly Labor Committee, and especially as the author of AB 60 which finds itself at the center of *Brinker*, I have an acute interest in the accurate interpretation and harmonization of laws and regulations governing employee workplace protections.

WHY REVIEW SHOULD BE GRANTED

Pursuant to rule 8.500(b)(1), California Rules of Court, review is warranted when "necessary to secure uniformity of decision or to settle an important question of law." Both circumstances are presented in *Brinker* with respect to defining how and when an employer's obligation to provide meal periods is in accordance with IWC wage orders or instead requires payment of an hour of pay for non-compliance.

Section 512 provides, in pertinent part, as follows:

> 512. (a) An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except 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.
>
> (b) Notwithstanding subdivision (a), the Industrial Welfare Commission may adopt a working condition order permitting a meal period to commence after six hours of work if the commission determines that the order is consistent with the health and welfare of the affected employees.

The IWC wage order meal period provisions state as follows:

> Section 11. Meal Periods.
> 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, 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 the employee.
>
> Labor Code section 226.7(b) provides:
>
> If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided.

Brinker misinterprets Section 512 as purportedly authorizing employers to provide meal periods any time during the workday at the employer's convenience. It did so by taking out of context two words in Section 512 ("An employer may not employ an employee for a work period of more than five hours **per day** without providing the employee with a meal period of not less than 30 minutes") that do not appear in Section 11 of the wage orders ("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"). *Brinker* found that the inclusion of the words "per day" indicated the legislature's intent only that an employer must offer a meal period to workers employed for a period of more than five hours in a given day, with no consideration as to the timing of the meal period.

In other words, *Brinker* ignored the prohibition evident in Section 11 of the wage orders from employing workers for "work periods" of more than five hours without a meal period, e.g., compelling the worker to take the meal period in the sixth, seventh, or eighth hour of work or so early in the shift that work periods exceeding five hours elapse after the meal period. Under *Brinker's* interpretation of Section 512 and the wage orders, such practices would not constitute a violation of Labor Code section 226.7(b) for meal periods not in accordance with the applicable wage order. [Slip. Op. pp. 37-40.]

The error of this ruling is easily identified, however, by looking at Section 512(b), which confirms the legislature's recognition of the timing requirement disallowing meal periods following work periods exceeding five hours:

> Notwithstanding subdivision (a), the Industrial Welfare Commission may adopt a working condition order permitting a meal period to commence after six hours of work if the commission determines that the order is consistent with the health and welfare of the affected employees.

Brinker fails to analyze, address, or harmonize Section 512(b).

Brinker's predominant support for its conclusions and efforts to harmonize Section 512 and Section 11 of the wage orders was its finding that the language in Section 512 narrows meal period obligations and governs over any interpretation of the wage orders finding more expansive employee protections. [See Slip Op. pp. 39-40.] In order to elucidate the error of this interpretation of Section 512, it is instructive to examine the historical context in which AB 60 was enacted.

Overtime protections initially emerged in California law as regulations promulgated by the IWC in the early years of the twentieth century. Daily overtime, a California innovation which compels overtime after eight hours work in a day, were first established by the IWC for the protection of women and children, and were later extended to men by the courts as a matter of equal protection. In the 1990s Assemblyman Aguiar introduced AB 398 which sought to repeal the daily overtime regulations by statute. On April 5, 1995 I chaired the Assembly Labor and Employment Committee which killed AB 398. The IWC then proceeded in 1997 to amend the wage orders to accomplish what the State Legislature would not.

AB 60 was proposed in 1998 as worker *protective* legislation, reestablishing the rights of employees to receive daily overtime. With the change of administration in the election of November, 1998, it became evident that there was sufficient support for the restoration of daily overtime. With that knowledge, consideration was given as to what additional employee protections might be added to the bill, which is the context under which Section 512 was included. Accordingly, AB 60, including Section 512, was introduced on December 7, 1998. My recollection is that it was the intention solely to codify the existing wage order meal period provisions and certainly with no intention to contract worker's rights in any way. It was never discussed or intended to insert the word "provide" to relax the standard in any way from what the wage orders state. It was never discussed or intended that the insertion of the words "per day" was an effort to legislate an unlimited right for employers to provide meals any time during the workday they chose.

The folly of *Brinker's* interpretation of Section 512 as narrowing employee's workplace rights is that it makes utterly no sense that the legislature would add a provision to a bill that *expands* employee rights by changing the wording of the wage orders it intended to codify so as to *contract* employee rights. That would just be irrational. The politics of doing so would also be senseless, as it would also have given legislators who were not in favor of the eight hour workday but were compelled to vote for it under political pressure a reason to vote against the bill. To do so would have jeopardized the whole bill.

If anything, the inclusion of the words "per day" were intended as a topical reference to relate the legislation to the fact that this was the "eight-hour workday" bill. The whole bill concerns daily work, and the legislature wanted to establish the meal period rights as pertaining to the same topic. There was never any discussion of taking the opportunity of enacting a bill that expands daily pay protections to limit, narrow, change, revise, or amend daily meal period protections.

Brinker's contrary interpretation implicates an important question of law for this Court to settle.

In addition, focusing on the word "providing" in Section 512 ["an employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes"], a word that does not appear in Section 11 of the wage orders, *Brinker* determined that Section 512 and the wage orders are not inconsistent and both require only that employers comply by "offering" a meal period, based on one dictionary definition of the word "provide." *Brinker* held employers meet their obligations to provide meal periods in accordance with IWC wage orders simply by making the time for taking a meal available to employees and not requiring employees actually take the break time from working. [Slip. Op. p. 44.]

To the degree that this interpretation purports to reflect the intention of the legislature in enacting AB 60, it is simply inconsistent with the wage order differentiations between an employer's obligations to provide meal periods as distinguished from rest periods. Section 11 of the wage order mandates a prohibition on employers from employing workers for periods exceeding five hours without breaking them for 30-minute meal periods. This is consistent with ensuring the health and welfare of both the workers and the general public who may be served by them. By contrast, Section 12 of the wage orders provides that rest periods need only be "authorized and permitted," a standard more in line with *Brinker's* interpretation of the meal period requirements. At no time did the State legislature discuss or consider an interpretation of Section 11 or AB 60 consistent with that advanced by *Brinker*, nor anything less than the mandatory, non-optional meal period requirement that had existed in the wage orders for decades.

Brinker's finding that employers do not owe an hour of pay under Labor Code section 226.7(b) because they meet their obligations with respect to providing meal periods in accordance with IWC wage orders by merely making meal periods available to employees directly conflicts with the Court of Appeal decision in *Cicairos v. Summit Logistics, Inc.* (2006) 133 Cal.App.4th 949. In *Cicairos*, the court concluded that while rest periods need only be made available by authorizing and permitting employees to take them, meal periods are treated differently under the wage orders. An employer has "an affirmative obligation to ensure that workers are actually relieved of all duty" during meal periods. This mandatory standard prohibits the mischief possible by employers

claiming to have offered meal periods or made them available but in fact pressuring employees not to take them.

Due to the conflict between these two appellate decisions, employers are at odds with which standard is the appropriate one for them to follow. Accordingly, this Court should grant review in order to resolve this split in authority.

Based on the foregoing, I respectfully urge this Court to grant review in to settle these important issues of law and to resolve the disagreement between the courts of appeal.

Sincerely,

Wally Knox
Executive Officer

PROOF OF SERVICE

I am a resident of the State of California, over the age of 18 years, and not a party to the within action. My business address is 605 "C" Street, Suite 200, San Diego, California 92101-5305.

On September 8, 2008, I served the foregoing documents described as **Amicus Letter to Supreme Court of California, dated September 8, 2008** on the interested parties in this action by placing a true copy thereof in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

I then served each document in the manner described below:

[ ] **BY MAIL:** I placed each for deposit in the United States Postal Service this same day, at my business address shown above, following ordinary business practices.

[ ] **BY FAX**: I transmitted the foregoing document(s) by facsimile to the party identified above by using the facsimile number indicated. Said transmission(s) were verified as complete and without error.

[XX] **BY UNITED PARCEL SERVICE:** I placed each envelope for deposit in the nearest United Parcel Service drop box for pick up this same day and for "next day air" delivery.

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

Executed September 8, 2008 at San Diego, California.

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Matthew Atlas

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