S166350

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

BRINKER RESTAURANT CORPORATION,
BRINKER INTERNATIONAL, INC. and BRINKER
INTERNATIONAL PAYROLL COMPANY, L.P.
Petitioners,

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO
Respondent.

ADAM HOHNBAUM, ILLYA HAASE, ROMEO OSORIO,
AMANDA JUNE RADER and SANTANA ALVARADO,
Real Parties in Interest.

APPLICATION OF THE DIVISION OF LABOR STANDARDS ENFORCEMENT AND LABOR COMMISSIONER ANGELA BRADSTREET FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS; AMICUS CURIAE BRIEF OF THE DIVISION OF LABOR STANDARDS ENFORCEMENT IN SUPPORT OF PETITIONERS

After a Decision by the Court of Appeal, Fourth Appellate District,
Division One, Case No. D049331, San Diego County Superior Court,
Case No. GIC834348, Honorable Patricia A.Y. Cowett, Judge

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to rule 8.520(f) of the California Rules of Court, proposed Amici Curiae Division Of Labor Standards Enforcement of the Department of Industrial Relations of the State of California and its chief officer, State Labor Commissioner Angela Bradstreet ("DLSE" or "Labor Commissioner") respectfully submit the enclosed brief in support of Petitioners Brinker Restaurant Corporation, Brinker International, Inc. and Brinker International Payroll Company, L.P.. ("Petitioners"). The enclosed brief offers a unique perspective in support of the Court of Appeal ruling that California law requires employers to provide meal periods that are free from the employer's control but does not impose liability under Labor Code section 226.7 or the wage orders if the employee chooses, without coercion, to not take those meal periods.

I. INTEREST OF AMICI CURIAE

As the Chief of the Division of Labor Standards Enforcement, the Labor Commissioner is the chief enforcer of the state's minimum labor standards, including the laws governing meal periods as set forth in the Labor Code and the regulations of the Industrial Welfare Commission. (Lab. Code, §§ 21, 79, 82, subd. (b), subd. (b), 90.5.) The Labor Commissioner prosecutes actions for the collection of wages owed to employees arising out of an employer's failure to comply with the meal period requirements. (Lab. Code, § 95.) In addition, the office of the Labor Commissioner holds adjudicatory hearings on employee claims alleging that their employer failed to comply with California's meal period requirements. (Lab. Code, § 98.)

The question now before this Court is one of great interest to the Labor Commissioner. The DLSE urges this Court to adopt an interpretation of California's meal period requirements that is consistent with the plain language of

the applicable statutes and wage orders of the Industrial Welfare Commission, that is in accord with the DLSE's long-standing enforcement position that employers must provide employees with a 30-minute meal period that is free of employer control, and that recognizes fully the realities that these meal period obligations place upon employers and employees so as to avoid the imposition of requirements that lead to absurd results. In sum, California law requires that employers must provide meal periods to employees that are free from employer control. Once so provided, however, employers are not liable for meal period premiums under Labor Code section 226.7 or the applicable wage orders if the workers do not take the meal periods.

II. ISSUES IN NEED OF AMICUS BRIEFING

The Labor Commissioner is familiar with the briefing submitted by Petitioners and Real Parties in Interest and does not seek to repeat the arguments presented therein. Rather, the enclosed brief presents additional arguments based upon the Labor Commissioner's unique role in interpreting and enforcing California's meal period requirements, as well as adjudicating them in administrative proceedings. Specifically, the enclosed brief sets forth a description of the DLSE's historical enforcement practices. Those enforcement practices support the interpretation that California law requires that employers provide meal periods to employees that are free from the employer's control. Once so provided, however, employers are not liable for meal period premiums under Labor Code section 226.7 and the applicable wage orders if their employees do not actually take the meal period. The brief also places before the Court information and evidence from employers and employees throughout California describing the detrimental effects that would result for employers and their employees if employers were required to ensure that meal periods are taken, as argued by Plaintiffs and Real Parties. The Labor Commissioner heard this

evidence and information at public forums held by Labor Commissioner Bradstreet in 2007.

III. CONCLUSION

For the aforementioned reasons, the DLSE respectfully requests that the Court accept the enclosed brief for filing and consideration.

DATED: August 19, 2009

ROBERT ROGINSON
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I. THE ROLE OF THE LABOR COMMISSIONER IN ENFORCING WAGE AND HOUR LAW.

The case before the Court presents a straightforward issue that nonetheless is of enormous importance to California employers and employees. For several years now, employers and employees have engaged in protracted litigation on the question of whether an employer is liable for meal period premiums when it affords employees the opportunity to take a meal period in accordance with California law, but fails to ensure that the employee actually takes the meal period. The instant case presents the Court with the opportunity to resolve this issue and provide both employers and employees with a clear understanding of the law in this regard.

The Labor Commissioner is the chief of the Division of Labor Standards Enforcement of the Department of Industrial Relations for the State of California. (Lab. Code, §§ 79, 82.) By statute, the Labor Commissioner is authorized to enforce the state's minimum labor standards, including various laws governing the payment of wages, and the regulations of the Industrial Welfare Commission ("IWC"). (Lab. Code, §§ 90.5, 95(a), 1193.5, 1193.6.) It is the policy of the State of California to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions and to protect employers who comply with the law from those who attempt to gain an unfair competitive advantage at the expense of their workers by failing to comply with those minimum labor standards. (Lab. Code, § 90.5, subd. (a).)

Labor Code section 98.3, subdivision (b) authorizes the Labor Commissioner to "prosecute actions for the collection of wages and other moneys payable to employees or the state arising out of an employment relationship or order of the Industrial Welfare Commission." The Labor

Commissioner is also authorized to hold adjudicatory hearings on employee claims for unpaid wages, including demands for compensation based upon orders of the IWC and demands for meal period premiums for meal periods the employers fail to provide as required by the applicable statutes and regulations. (Lab. Code, § 98, et seq.)

A principle question now before this Court is one of great interest to the Labor Commissioner, to employers, and to employees. The enactment in 2000 of Labor Code section 226.7 and the corresponding amendments to the wage orders have caused considerable confusion over the employer obligations and employee rights regarding meal periods. This, in turn, has spawned considerable litigation, particularly class action litigation, upending employment relationships and causing considerable harm to employees as well as employers.

In light of the longstanding debate, we urge this Court to recognize an interpretation of California's meal period requirements that is consistent with the plain language of the applicable statutes as well as the wage orders of the Industrial Welfare Commission, that is in accord with the DLSE's long-standing enforcement position that employers must provide employees with a 30-minute meal period that is free of employer control, and that recognizes fully the realities that these meal period obligations place upon employers and employees, so as to avoid the imposition of requirements that lead to absurd and harmful results.

For the reasons set forth below, the DLSE respectfully requests that the Court affirm the holding of the Court of Appeal that while employers cannot impede, discourage or dissuade employees from taking meal periods, they need only provide them and not ensure that they are taken.

II. THE DLSE'S HISTORICAL ENFORCEMENT OF MEAL PERIOD REQUIREMENTS DOES NOT SUPPORT THE VIEW THAT EMPLOYERS ARE REQUIRED TO PREVENT THEIR EMPLOYEES FROM WORKING DURING MEAL PERIODS.

As briefs in this matter extensively discuss, meal period requirements in California law have existed for decades prior to their codification by Assembly Bill No. 60 ("AB 60"). (1999 Stats. Ch. 134 § 6) Until the enactment of AB 60 and the later enactment of Labor Code section 226.7, however, it was unnecessary to address the precise scope of actions by an employer and employee's actions that trigger an employer's obligation to pay an employee an additional hour of pay. Instead the DLSE's historical analysis and enforcement of whether an employer complied with its meal period obligations turned on whether that employer relinquished control over its employees during a 30-minute period which the employees could use effectively for their own purposes. In essence, employers satisfied the IWC Order's meal period obligations by creating circumstances in which the employees could use an unpaid 30-minute period for whatever purpose they wished, free from the employer's control. An employer that failed to relinquish control for the meal period was obligated to pay those employees their regular wages during that period of time, and also potentially subject to an injunction, prohibiting the employer from exercising control during the employees' duty-free meal periods. This is consistent with the historical policy of the DLSE that all hours which the employee is under the control of the employer are "hours worked" under California law. (*See* September 1989 DLSE Operations and Procedures Manual, Section 10.73 (RJN Ex. 13) and October 1998 DLSE Enforcement Policies and Interpretations Manual, § 43.1 (RJN Ex. 14).)

Fundamentally, this enforcement policy is consistent with the analysis of the obligation to compensate employees for their "hours

worked." An employer that claimed to have complied with its meal period obligations, but nonetheless exercised control over its employees during their unpaid 30-minute meal period, would have been found in violation of the IWC Orders and owed its employees regular compensation for that time worked. Conversely, under long-standing DLSE policy, meal periods need not be counted as "hours worked" if the employee was completely relieved of all duty, the employee was free to leave the employer's premises, and the meal period was at least an uninterrupted 30 minutes in duration. (*See Bono Enterprises v. Labor Commissioner* (1995) 32 Cal.App.4th 968, disapproved on other grounds, *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 574; *see also* DLSE Opinion Letter No. 1988.01.05 (RJN Ex. 1).) Significantly, compliance with this meal period policy did not require that the employer had affirmatively ensured that the employees performed no work of benefit to the employer during their 30-minute meal period.

The DLSE's historical understanding of the nature of an employer's meal period obligations is shown in the numerous opinion letters and the enforcement manuals the DLSE issued throughout the 1980s and 1990s. In these administrative materials, the DLSE's focus on the employee's right to be free from employer control in order for the meal period to be lawful and excluded from "hours worked" is illustrated by DLSE's position that during the meal period, employees must be free to leave the employer's premises. In 1984, DLSE sought and obtained a preliminary injunction against a company which employed security personnel at a nuclear power plant. (*DLSE v. Pinkerton's, Inc.*, (May 24, 1984) San Luis Obispo County Superior Court, Case No. 58395 (RJN Ex. 17).) In that case, the DLSE contended that the employer's policies and restraints placed upon employees impermissibly restricted the employees from taking a duty-free meal period and that such time therefore constituted hours worked. (*Ibid.*)

As then State Labor Commissioner Lloyd Aubry stated in the opinion letter issued January 5, 1988, "[t]he Division has historically taken the position that unless employees are relieved of all duties and are free to leave the premises, the meal period is considered as "hours worked." (DLSE Opinion Letter No. 1988.01.05 (RJN Ex. 1); *see also* DLSE Opinion Letter No. 1992.01.28 (RJN Ex. 2)["If the employee is simply required to wear a pager or respond to an in-house pager during the meal period there is no presumption that the employee is under the direction or control of the employer so long as no other condition is put upon the employee's conduct during the meal period."].)

The 1995 court of appeal decision in *Bono Enterprises, supra,* 32 Cal.App.4th 968, provides a clear illustration of this policy. In *Bono*, the employer specifically challenged the DLSE's policy that unless employees were free to leave the premises during their meal periods, this time was compensable as hours worked. It bears emphasizing that, in *Bono*, the affected employees had been relieved of all duties and provided a place to eat at an on-site cafeteria as well as relaxation facilities available for use during the meal period. The employees, however, were not free to leave the premises. Agreeing with the DLSE's position, the court reasoned:

> When an employer *directs, commands or restrains* an employee from leaving the work place during his or her lunch hour and thus prevents the employee from using the time effectively for his or her own purposes, that employee remains subject to the employer's control. According to IWC Order No. 1-89, that employee must be paid."

(*Bono*, *supra*, 32 Cal.App.4th at p. 975, emphasis added.) In so holding, the court stated that the language defining hours worked was "sufficiently clear to place employers on notice that *an employee must be paid for all hours during which he so she is subject to the employer's control, including meal periods*." (*Id.*, emphasis added.)

An opinion letter issued June 3, 1991, by the Chief Counsel of the DLSE, Thomas Cadell, also illustrates DLSE's longstanding position that the employer's meal period obligation amounts to freeing the employee from the employer's control, rather than affirmatively taking measures to prohibit the employee from performing any work or otherwise ensuring the meal period is actually taken. Significantly, the letter explicitly contemplates that where an employee chooses to perform work during a meal period, the employer still complied with the IWC's meal period obligations so long as the employer paid for all time worked:

> The California Industrial Welfare Commissioner Orders require that employees receive at least a 30-minute meal period after five hours. So long as the employer *authorizes* the lunch period within the prescribed period and the employee has reasonable opportunity to take the full thirty-minute period free of any duty, *the employer has satisfied his or her obligation.* The worker must be free to attend to <u>any</u> personal business he or she may choose during the unpaid meal period. In addition, of course, if the employee does work during the meal period and reports such hours, the employer must pay for the time at the applicable rate of pay.

(DLSE Opinion Letter No. 1991.06.03 (RJN Ex. 3), italic emphasis added, underline emphasis in original.) Perhaps prescient, this letter clearly demonstrates the relationship, but clear distinction, between an employer's duty to compensate employees for time worked, and the separate duty to provide meal periods to those employees. The employer that refuses to relinquish control over employees during an owed meal period violates the duty to provide the meal period and owes compensation for hours worked. The employer that relinquishes control but nonetheless knows or has reason to know that the employee is performing work during the meal period, has not violated its meal period obligations, but nonetheless owes regular compensation to its employees for time worked.

Following this letter, the DLSE issued several opinion letters describing the meal period requirements as they applied to the healthcare industry. (See DLSE Opinion Letter No. 1995.11.01 (RJN Ex. 4); DLSE Opinion Letter No. 1996.05.30 (RJN Ex. 5); DLSE Opinion Letter No. 1996.07.12 (RJN Ex. 6); and DLSE Opinion Letter No. 1998.12.23 (RJN Ex. 7)) The DLSE issued these letters following the adoption by the IWC, in August of 1993, of new regulations for the healthcare industry. The critical distinction addressed in these letters involved whether the employer's restriction of the employee to the job site premises was permissible. The amended regulation redefined the term "hours worked" for the healthcare industry so that the term was interpreted in accordance with the federal Fair Labor Standards Act ("FLSA") regulations, which expressly provide that an employer need not allow an employee to leave the work site for a bona fide meal period to occur.[1] But even so, the DLSE's analysis of the requirements for a bona fide meal period focused on the control exercised by the employer over the employee during the meal period. In this case, it is the prohibition against an employer requiring the employee to remain on the premises, except as permitted in the healthcare industry.

In an opinion letter dated July 12, 1996, while discussing an employee who is required to wear a pager and respond during a meal period, Chief Counsel Tom Cadell referring to the opinion letter issued in 1992 (*See* DLSE Opinion Letter No. 1992.01.28 (RJN Ex. 2).), opined on the type of control that an employer must exercise in order to be considered liable for wages.

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[1] Those regulations provide: "It is not necessary that an employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period." (29 C.F.R § 785.19(b).)

> So long as the employee who is simply required to wear the pager *is not called upon during the meal period to respond*, there is no requirement that the meal period be paid for. On the other hand, if the employee responds *as required*, to a pager call during the meal period, the whole of the meal period must be compensated.

(DLSE Opinion Letter No. 1996.07.12 (RJN Ex. 6), emphasis added.) Again, this analysis of compliance with meal period obligations turns on the degree to which the employer restricted the employees' use of the meal period for his own pursuits rather than looking to whether the employee has in any sense been suffered or permitted to work.

The DLSE's Enforcement Policies and Interpretations Manual issued in October 1998 also confirms the longstanding interpretation that the employer must not restrict the employee to the work place premises:

> **Meal Periods**. Where an employee, although relieved of all duties—*is not free to leave the work place during the time allotted to such employee for eating a meal*, the meal period is on duty time subject to the control of the employer, and constitutes hours worked. (*Bono Enterprises v. Labor Commissioner* (1995) 32 Cal.App.4th 968)

(October 1998 DLSE Enforcement Policies and Interpretations Manual, § 43.2.1 (RJN Ex. 14), emphasis added.) It is notable that there is *no reference* in any other section of the 1998 DLSE manual mandating any requirement that the employer "ensure" that the employee take the meal period within the specified time. Indeed, the only other discussion of meal periods is language concerning the effect of the waiver (*See* sections 48.1.2 through 48.1.4.1 of the DLSE manual (RJN Ex. 14).)

Effective January 1, 2001, the Legislature enacted Labor Code § 226.7, which provides:

> (a) No employer *shall require any employee to work* during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission.
>
> (b) 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.

(Lab. Code, 226.7, emphasis added.) Section 226.7 is entirely consistent with the DLSE's historical enforcement policy of prohibiting employers from restricting employees from taking a duty free meal period. The law, and corresponding provisions in the applicable wage orders, imposed liability upon employers which failed to comply with this obligation to free an employee from an employer's control so that the employee may take a duty free meal period.

Following the enactment of Labor Code section 226.7, the DLSE issued a series of opinion letters and made changes to its enforcement manual breaking from its historical meal period analysis and imposing new conditions upon employers. (*See* DLSE Opinion Letter No. 2001.04.02 (RJN Ex. 8); DLSE Opinion Letter No. 2001.09.17 (RJN Ex. 9); DLSE Opinion Letter No. 2002.01.28 (RJN Ex. 10); DLSE Opinion Letter No. 2002.09.04 (RJN Ex. 11); DLSE Opinion Letter No. 2003.11.03 (RJN Ex. 12); October 2001 DLSE Enforcement Policies and Interpretations Manual, §§ 45.2.1, 45.2.7, 45.2.7.1 (RJN Ex. 15), and June 2002 DLSE Enforcement Policies and Interpretations Manual, §§ 45.2.1 and 45.2.9.1. (RJN Ex. 16).)

Instead of maintaining its longstanding policy that employers must not restrict an employee from taking a duty-free meal period, these more recent opinion letters and manual changes reflected a new position by

DLSE that found a failure to comply with meal period obligations in circumstances in which an employer freed employees from control for 30 minutes, but had not actually ensured that the employee took the full 30 minutes. For instance, in an opinion letter dated April 2, 2001, contrary to the DLSE's June 3, 1991 opinion letter, the Chief Counsel of the DLSE, Miles Locker wrote the following:

> An employer is liable for the meal period penalty not only if the employer prohibits the employee from taking the required meal break, but also, if the employee (though authorized and permitted to take a meal break) works, with the employer's sufferance or permission, during the period that the employee had been authorized to take his or her meal period.

(DLSE Opinion Letter No. 2001.04.02 (RJN Ex. 8).) The DLSE subsequently modified its Enforcement Policies and Interpretations Manual, first in October 2001, articulating for *the first identified time* in its meal period enforcement manuals that the wage orders imposed a burden on the "employer to ensure meal periods." (October 2001 DLSE Enforcement Policies and Interpretations Manual, § 45.2.1 (RJN Ex. 15).) It is important to note that, along with this expansion of the scope of meal period obligations, in this version of the manual, the DLSE also set forth a defense to section 226.7's meal period premium, stating:

> **Defense**. It would be a defense to this penalty if the employer could show that the employee surreptitiously did not take the meal period despite being told to do so and the employer had no reason to know that the employee was not taking the meal period. In other words, the reasonable expectations of the employer must be considered in imposing the penalty."

(October 2001 DLSE Enforcement Policies and Interpretations Manual, § 45.2.7.1 (RJN Ex. 15).) While this stated defense makes the practical results of its analytical expansion of employer's meal period obligations partially consistent with DLSE's former interpretation, it assumes a

violation has occurred in circumstances that DLSE previously considered to have been compliant with the law. Namely, under the DLSE's historical analysis, the employer that relinquished control and told an employee to take the meal period did not violate the law or require a defense based on proof that the employee's work was surreptitiously performed and the employer's reasonable expectations. Rather, the focus of the DLSE was only that the employee be paid for time worked.

The DLSE modified its policy again in the next version of the manual issued in June 2002, specifically adding into the manual for the first time the explicit requirement that "[i]t is the employer's burden to compel the worker to cease work during the meal period." (June 2002 DLSE Enforcement Policies and Interpretations Manual, § 45.2.1 (RJN Ex. 16)) The June 2002 version also removed altogether the reference to the defense in the prior version of the manual, substituting in the following:

> **Relationship Between Record-Keeping Requirement And Meal Period**. Inasmuch as the employer has an obligation under the record-keeping requirements to track meal periods unless "all work ceases", the employer should know whether or not its employees have taken the required off-duty meal period. Therefore, it generally would not be a defense for an employer to assert that it had no knowledge that its employees were working during a meal period."

(June 2002 DLSE Enforcement Policies and Interpretations Manual, § 45.2.9.1 (RJN Ex. 16).) As described above, this new premise that the employer is obligated to compel the worker to cease work during meal periods was a clear departure from the DLSE's historical enforcement policy regarding meal periods, which based compliance upon the employer's relinquishing control over the employee so that he or she could take 30-minute meal periods.

These administrative changes following the enactment of AB 60 appear to be based on the same textual and linguistic argument that Plaintiffs offer now, that wage orders' prohibition on "employing" employees "without a meal period" must be construed as forbidding employers from "suffering or permitting" employees performing any work during a meal period provided as a consequence of the wage orders' definition of the term "employ." Under this construction, an employer that suffers and permits an employee to perform such work is liable for the additional hour of pay under section 226.7. This semantic argument, however, begs the fundamental question of what it means to "suffer and permit" an employee to work "without a meal period" under circumstances in which the employer has enabled the employee to effectively use the meal period time as he or she wishes. Considering a meal period to be a period of time free from the employer's control, an equally valid textual construction, and one that is more in accord with the DLSE's historical position, is that in circumstances where an employee voluntarily chooses to perform work during a meal period offered by the employer and in which the employer has relinquished control, the employer has employed (or suffered and permitted work by) the employee, and must compensate the employee for such work. The employer, however, has also complied with its obligation under the meal period requirements because it has relinquished control over the employee. In this scenario, the employer has not employed the employee for a period of work *without* the requisite meal period, it has employed the employee *with* a meal period. Thus, the employer has complied with the wage order obligation and would not be subject to the additional pay remedy under Labor Code section 226.7.

This construction is fully consistent with the wage orders' treatment of "on-duty" meal periods. An on-duty meal period is not characterized as a lack of a meal period, or a violation of the wage orders with a defense, but

rather simply a type of meal period in which the employer may *require* the employee to perform work duties. Specifically, where the nature of the employee's work prevents the employee from being relieved of all duty and the employee agrees in writing to an on-duty meal period, the employer need not relinquish all control over the employee and yet still fully complies with the obligation to afford the employee a meal period under the wage orders. The distinction between on-duty meal periods authorized by the wage orders and an employee's choice to voluntarily work during a meal period is not that in one situation the employee has been afforded a meal period and in the other the employee has not. Rather, the distinction is that in an on-duty meal period, the employer possesses the right to exercise control over the employee during a meal period; in the case of a non-on-duty meal period where the employee merely voluntarily chooses to perform work, the employer does not possess the right to exercise that control.

This construction is also consistent with the conditions for an exemption to the meal period requirements allowed under the wage orders prior to AB 60. Under Section 17 of Wage Order 5-98, for instance, the DLSE had the discretion to grant an exception to the meal period requirements if, in its opinion after due investigation, it found that the enforcement of the meal period requirements "would not materially affect the welfare and comfort of the employees and would work an undue hardship on the employer." (Wage Order 5-98 (RNJ Ex. 18).) The requirement that there be a finding of an "undue hardship on the employer" is consistent with the interpretation that the employer must provide a meal period free of the employer's control. That is, even if the requirements for an on-duty meal period could not be met (such as obtaining the written agreement of the employee), the employer could still be exempted from its obligation to relinquish control in order to enable the employee to take a

duty-free meal period, if the employer demonstrated that to do so would present an undue burden on the employer and the welfare and comfort of the employees was not materially affected. Notably, this exemption was deleted from the wage orders adopted following AB 60, which reflects the mandate under Labor Code section 512 that an employer comply with the obligation to free its employees from its control in order to take a 30-minute meal period.

In sum, the DLSE's longstanding enforcement policy was that employers must provide employees with a 30-minute meal period free of employer control, and if they failed to do so, then such time constituted hours worked. Though Labor Code section 226.7 imposes an additional liability upon employers which failed to comply with this obligation, it does not alter the scope of the employers' obligation concerning meal periods under the wage orders. Thus, under the DLSE's historical construction of meal period obligations, an employer that fails to allow for any meal period or fails to relinquish control over its employees during a meal period is liable for not only the time worked, but also an additional hour's pay. The employer that provides a meal period and relinquishes control has complied with its meal period obligations; but the employee who has chosen to work during that meal period is entitled to regular compensation for hours worked.

III. INTERPRETING "PROVIDE" TO REQUIRE THAT EMPLOYERS ENSURE THAT THE MEAL PERIOD IS ACTUALLY TAKEN LEADS TO ABSURD RESULTS WHICH ARE HARMFUL TO WORKERS AND TO BUSINESSES.

It is illuminating to examine the wholly incongruous and outright absurd results of Plaintiffs and Real Parties' contention that the Legislature

intended to impose liability under section 226.7 against employers which free employees from the control of the employer for 30 minutes so that the employee may take a meal period, but which do not force the employees to actually take the meal periods.

It is a maxim of statutory interpretation that a "statute should be interpreted to avoid an absurd result." (*Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1122.) Courts shall apply common sense to the language at hand and interpret the statute to make it workable and reasonable. (*See Regents of University of California v. Superior Court* (1970) 3 Cal.3d 529, 536-537.) Moreover, it is appropriate for the court to consider the impact of an interpretation on public policy, for "[w]here uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation." (*In re Social Services Payment Cases* (2008) 166 Cal.App.4th 1249, 1264-1265, *citing Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387.)

Public policy considerations warrant construing the meal period requirements to impose a make available and not ensure standard. (*See Behan v. Alexis* (1981) 116 Cal.App.3d 403, 406 [courts should interpret statutes to accomplish their legislative objective while accommodating important statutory and policy considerations].)

A report prepared by the California Labor Commissioner following public forums held by Commissioner Bradstreet in the summer of 2007 identifies the harmful and absurd results of the interpretation that employers must force their employees to take meal periods. (June 2008 Report of the Public Forums on Meal and Rest Breaks by State Labor Commissioner Angela Bradstreet (RJN Ex. 19).) Over 600 people attended and over 2000 written submissions were received. Individual workers, labor organizations, employers and advocacy groups covering a wide variety of industries testified and provided written submissions concerning the effects

of the meal period requirements. Many of the submissions emphasized the importance of meal periods and that employees, particularly employees in low-wage industries, need enforceable protection. The Labor Commissioner does not dispute this. Meal periods are minimum labor standards which are critical to the health and welfare of employees, and it is required under California law that employers provide them.

Neither the longstanding DLSE enforcement policy nor the language of the statute or regulations, however, supports the interpretation that an employer is liable under section 226.7 unless the employer not only frees its employees from its control for 30 minutes to take a meal period, but also ensures that such a period is actually taken. An overwhelming number of the submissions and much of the testimony highlighted the harm caused to both employees and employers under the ensure standard. In addition, the overwhelming testimony and submissions affirm that the ensure standard is absurdly inflexible and unworkable.

Significant testimony and submissions asserted that requiring employers to ensure that employees actually take meal periods results in economic harm to employees who must stop work during times in which they may be earning tips or commissions. As one large California employer cogently described the real world effects of the ensure standard on its sales force:

> a salesperson often is forced to interrupt his/her sale with a customer and remove him/herself from the sales floor for a half-hour lunch break. A customer will not wait for the salesperson's return, nor will the customer be willing to start anew with another salesperson or manager. The sale is lost; the commission is lost; and the result is both an unhappy customer who does not understand being abandoned by the salesperson, and unhappy salesperson forced to abandon his customer, who loses the sale and the resulting income.

> In turn, Lamps Plus, as a result of enforcing such regulations that cause our salespeople to lose potential income, becomes and [sic] adversary to our salespeople, rather than a partner with our salespeople.

(Letter from Lamps Plus, dated August 30, 2007 (RJN Ex. 20), emphasis in original.) There was also substantial testimony and written submissions showing that an ensure standard harms employees insofar as it results in their being disciplined for failing to stop work to take a 30-minute meal period. Many employers testified that they were forced to discipline employees who did not stop working at designated meal periods because of the consequences they faced if they were unable to prove that they not only afforded employees the opportunity to take meal periods, but also forced the employees to take those meal periods.

As such, the obligations imposed by the Legislature and the IWC to afford employees with a 30-minute off-duty meal period are elevated to the illogical consequence of actually harming employees. As the Labor Commissioner noted in her public report:

> Restaurant workers told me that their tips from customers are highest at that time when business is at its peak and that they are therefore losing valuable income by being forced to stop work. Commissions are often lost when sales employees are forced to leave their customers to take a lunch break. Truckers and delivery drivers explained that it is often unsafe to pull off the road, yet their employers require them to do so if they are about to enter into the fifth hour of work. Security officers and others who protect the public discussed the increased dangers posed by a lack of flexibility from a safety and homeland security perspective

(June 2008 Report of the Public Forums on Meal and Rest Breaks by State Labor Commissioner Angela Bradstreet (RJN Ex. 19).) Such statutory interpretations have a terrible effect on the myriad service occupations which now make up a substantial portion of California's labor market.

Employers and employees have the logical and realistic expectation that employees will be permitted to perform their services for which they were hired during the course of the day.

The falsity of Plaintiffs and Real Parties in Interests' analogy to an employer's obligation to enforce any prohibition against employees from working overtime is most apparent here because a restriction on overtime is nothing more than a limit on time spent by the employee working, i.e. if an employer intends to permit a worker to perform services beyond the normal eight hour day, then the employer must pay an employee a premium for doing so. Moreover, if an employee works for a period of time beyond the normal eight hour day, the employer must pay the appropriate premium rate only for that time worked. Tracking employees' time and forcing employees to stop working, or paying them a premium pay when they do so is, it is respectfully submitted, a far more achievable responsibility for management than policing employees, many of whom may be working in an unsupervised capacity in the field or remote locations, to ensure that they not only completely abandon and stop what they are doing in the middle of their shift, but also that they remain *completely* free from performing any such work related responsibilities for at least 30 minutes.

The testimony and submissions at the meal period forums also highlighted the considerable economic toll to businesses caused by attempting to enforce an ensure standard. Because the real consequence of the ensure standard is that an employer must pay an employee one hour's pay if the employee failed to take a full 30-minute meal period, that was recorded, and commenced before the end of the fifth hour of work, many businesses have found it necessary to employ supervisors whose *sole* duties are to monitor meal periods and discipline employees who choose or fail to take them in strict compliance with state law and company policies. This means disciplining workers who take a 29 minute meal period, or

commence a meal period 3 minutes after the beginning of the sixth hour of work. As one business owner testified:

> I would say that the impact on our business... has been severe in going from providing for breaks to policing them. We now employ a full time manager who does nothing but monitor breaks. That's – in addition to being very expensive, it creates an environment in our restaurant that is a little bit more like trying to gather the children in the schoolyard, than inspiring to deliver the best possible service to our guests.

(Transcript of Public Forums On Meal and Rest Breaks Held August 9, 2007 at California State University, Northridge ("8/9/07 Transcript")(RJN Ex. 21), 76:13-21.)

A registered nurse and nurse manager in an obstetrical unit similarly testified, comparing the time spent monitoring the meal period compliance by the nurses she supervised with other obligations faced by the nursing unit in caring for and laboring with women delivering babies:

> I feel as a manager too much of my time enforcing the meal break rules and counseling for lack of compliance on part of the staff. So where are our priorities? I just ask you to consider this and to please provide us with a set of clear realistic commonsense meal break rules that support the hospital environment.

(8/9/07 Transcript (RJN Ex. 21), 150:14-20.)

The same problem plagues other industries, including the security industry. As one human resources manager for a security guard company explained:

> These rest and meal periods have just become an administrative nightmare for me as I feel like I am the lunch police. I need to review timecards and punches each payroll period to insure that the employee took their lunch at the right [time] and for the right length. [P] If the employee doesn't start their lunch by the fifth hour or take a 30-minute uninterrupted lunch, I write them up and they think I'm crazy.

> That is the only way for me to protect the company from liability. I would rather be doing other important matters in my role as the HR Manager. When I explain to management the meal and rest period rules, they actually think I make this stuff up in my sleep. Only from California would it be so ridiculous.

(8/9/07 Transcript (RJN Ex. 21), 157:18-158:7.)

Petitioners contend that the Court of Appeal's holding "eliminates critical workplace protections for the very "low-wage workers" whom the uniform meal period laws were equally intended to protect." (Opening Brief at p. 73.) Many of those who testified at the Labor Commissioner's forums echoed similar concerns; that workers in low-wage industries like construction, car wash, garment, restaurants, cleaning and janitorial, security, etc. must have the protections of a strict ensure standard. As Kevin Kish of the Employment Rights Project of Bet Tzedek Legal Services testified, speaking about the workers he represents in the low-wage industries listed above:

> And when I'm talking about violations, I'm not talking about people occasionally working through breaks. I'm not talking about 25-minute lunch periods rather than 30 minutes. I'm talking about men and women who perform physical labor and who are physically prevented from taking breaks, including bathroom breaks, over the course of 10- and 12-hour days.

(8/9/07 Transcript (RJN Ex. 21), 39:4-10.)

The concerns of Mr. Kish are addressed, however, by a standard consistent with longstanding DLSE policy that imposes upon employers the *enforceable* obligation to free employees from the employer's control so that the employee can take a 30-minute off-duty meal. The existing statutes as well as controlling California law support this construction. For example, Labor Code section 226.7(a) specifically prohibits employers

from requiring employees to work through their meal periods. "No employer shall require any employee to work during any meal... period mandated by an applicable order of the Industrial Welfare Commission." (Labor Code § 226.7(a).) California case law is also in accord. In *Murphy v. Kenneth Cole Productions, Inc.*, this Court explained that employer liability under Labor Code § 226.7 is triggered when employees are "required to work" through or "forced to forgo" meal periods. (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1108.)

The Third Appellate District's decision in *Cicairos v. Summit Logistics* (2005) 133 Cal.App.4th 949, cited by Plaintiffs, actually supports the Labor Commissioner's position. In that case, the appellate court relied upon evidence which showed that the employer instituted practices that directly and measurably prevented drivers from taking meal breaks. (*Id.* at pp. 955-956.) The court found that the evidence established that the employer's management pressured drivers to make more than one daily trip which resulted in making drivers feel that they should not stop for lunch. (*Id.* at p. 963.) Coupled with the fact that the employer also had in place steps to track various aspects of the drivers' duties, including speed, start and stop times, and times, but the employer made no meaningful effort to free the employee from the employer's control for 30 minutes to take a meal period, such as scheduling meal periods, including an activity code for drivers, monitoring compliance, the court rejected the employer's reliance on their sole argument that they had a meal period policy. Thus, the court properly concluded, "[T]he defendant's obligation to provide the plaintiffs with an adequate meal period [was] not satisfied by assuming that the meal periods were taken..." (*Cicairos*, *supra*, 133 Cal.App.4th at 962.)

Here, by contrast, the trial court ruled that the employer had an absolute duty to ensure that meal breaks are taken. The Court of Appeal properly held that California law does not provide for such a legal standard.

In sum, the concerns that an ensure standard is required to protect the health and safety of California workers are unfounded. Under the existing statutes and regulations, and the DLSE's longstanding enforcement policy, it is plain that California law protects California workers by imposing upon employers the obligation to afford employees the opportunity to take a 30-minute meal period that is free from the employer control. Employers which fail to do so are liable for meal period premiums under Section 226.7. Nothing in the law, or the DLSE's enforcement practices, necessitates the unrealistic and impractical obligation to impose liability on employers when an employee is provided, but chooses not to take without employer coercion, a meal period.

IV. CONCLUSION

California law requires that employers must provide meal periods to employees that are free from the employer's control for thirty minutes. Once so provided, however, employers are not liable for meal period premiums under Labor Code section 226.7 or the applicable wage orders if the workers do not take the meal periods.

Respectfully submitted,

DATED: August 19, 2009

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CERTIFICATE OF COMPLIANCE
WITH WORD COUNT REQUIREMENT

The undersigned hereby certifies that pursuant to Rule 8.520, the amicus brief contains 6,844 words as counted by the Microsoft Office Word version 2003 word processing program used to generate this brief.

DATED: August 11, 2009

Robert Roginson

PROOF OF SERVICE BY NEXT-DAY DELIVERY

(Brinker, et al. v. Hohnbaum, et al)
(Supreme Court No. S166350)

I, Mary Ann E. Galapon, declare:

I am employed in the city and county of San Francisco. I am over the age of 18 years and not a party to the within action. My business address is Division of Labor Standards Enforcement, 455 Golden Gate Avenue, 9th Floor, San Francisco, California 94102. I am readily familiar with the Division's practice for collection and processing of correspondence for next-day delivery by an express mail service. In the ordinary course of business, correspondence would be consigned to an express mail service on this date.

On this date, I served **APPLICATION OF THE DIVISION OF LABOR STANDARDS ENFORCEMENT AND LABOR COMMISSIONER ANGELA BRADSTREET FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS; AMICUS CURIAE BRIEF OF THE DIVISION OF LABOR STANDARDS ENFORCEMENT IN SUPPORT OF PETITIONERS** on the person(s) listed below by placing the document(s) described above in an envelope addressed as indicated below, which I sealed. I consigned the envelope(s) to an express mail service by placing it/them for collection and

processing on this day, following ordinary business practices at the Division of Labor Standards Enforcement.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Francisco, California, on August 19, 2009.

Mary Ann E. Galapon