No. S166350

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

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

vs.

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.

Petition for Review of a Decision of the Court of Appeal, Fourth Appellate District, Division One, Case No. D049331, Granting a Writ of Mandate to the Superior Court for the County of San Diego, Case No. GIC834348
Honorable Patricia A.Y. Cowett, Judge

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF; [PROPOSED] AMICUS CURIAE BRIEF IN SUPPORT OF REAL PARTIES IN INTEREST

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APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF REAL PARTIES IN INTEREST

To the Honorable Chief Justice Ronald M. George:

Barry Broad and Miles E. Locker, on behalf of themselves and proceeding *in pro se*, hereby seek permission to file the attached brief as *amici curiae* in support of Real Parties in Interest Hohnbaum et al. This application is timely made within 30 days of the filing of the last party brief.

Applicants' Interest in This Matter

Earlier in these proceedings, both Barry Broad and Miles Locker filed letters in support of the petition for review, and both have extensive involvement and interest in the issues presented in this litigation.

Mr. Broad was appointed by former Governor Gray Davis to a position as a commissioner on the Industrial Welfare Commission ("IWC") in 1999, and he served in that capacity until 2001. During his tenure on the IWC, the Legislature passed AB 60 (Stats. 1999, Ch. 134), which codified in Labor Code section 512 longstanding provisions of the IWC wage orders requiring California employers to provide meal periods to their employees. AB 60 also required the IWC, among other responsibilities, to review its meal and rest break regulations. The commissioners, including Mr. Broad, undertook that review, and concluded that there should be no change in the existing and long-standing substantive meal and rest period requirements.

However, during the course of this review, Mr. Broad came to the conclusion that the existing remedy for employer non-compliance with meal and rest period requirements was inadequate, and that in order to further compliance, the wage orders had to be strengthened. Consequently, he proposed, and the Commission adopted an amendment of the IWC's wage orders to establish a new remedy for non-compliance – the extra hour of pay for each workday the employer fails to provide a meal period, or a rest period, in accordance with the provisions of the applicable wage order. That remedy was subsequently codified as Labor Code section 226.7 by AB 2509 in 2000 (Stats. 2000, Ch. 876).

Mr. Locker was employed as an attorney with the Division of Labor Standards Enforcement ("DLSE") from 1990 to 2006, and served as chief counsel for the Labor Commissioner from 1998 to 2001. He had a prominent role in the development of the DLSE's meal and rest period enforcement policy following the enactment of Labor Code section 226.7, issuing several opinion letters interpreting meal and rest period requirements under California law. During the period following the enactment of AB 60, he provided advice to the IWC regarding the Labor Commissioner's enforcement policies, and in particular, addressed the IWC at a public hearing on May 5, 2000 on the need for a stronger remedy to

secure employer compliance with substantive meal period requirements. As a DLSE attorney, Mr. Locker litigated several cases involving meal and rest period issues, including his role as counsel for the DLSE in a civil action filed against Brinker Restaurants in 2002 for pervasive meal and rest period violations, a case which resulted in a $10,000,000 settlement.

We believe that as a former IWC Commissioner and as a former DLSE chief counsel, having held our respective offices precisely during the time when the extra hour of pay remedy was adopted, we are uniquely situated to provide assistance to the Court on the meaning of the substantive meal and rest period provisions that are to be enforced through this remedy.

How The Proposed Brief Will Assist the Court

In this *amicus* brief, we propose to focus our presentation on a detailed account of the development of the substantive requirements, contained in the IWC orders, for meal and rest periods. This account is based upon a review of the IWC's voluminous archives, from the date meal and rest period requirements were first adopted in the early years of the 20th century to the present. By closely tracking the history of the meal period provisions in the wage orders, we will show how the substantive requirements for meal periods have been largely unchanged over a period of more than half a century, and how the IWC always understood the essential

core protection mandates employers to ensure that employees are not permitted to work during a required meal period, and that there is a timing requirement under which work must cease for required meal periods at some point during a specified window period of time of the workday when it makes sense to take a meal break. This account will also show that the IWC's meal period recording requirements, which have been unchanged for almost half a century, were designed and intended to make it possible to measure employer compliance with substantive meal period requirements by merely looking at the required records. Finally, our analysis of the regulatory history will show that for more than half a century, the IWC believed that its rest period provisions operated in conjunction with meal period requirements, so that rest periods would typically be required both during the work period before the meal period, and during the work period after the meal period.

Our analysis is founded upon a veritable treasure of archival materials that illuminate the meaning of the wage orders' substantive meal and rest period provisions, and the intent of the IWC in enacting these provisions, and in maintaining them essentially unchanged for so many decades. We believe that this account of these archival materials will prove to be of substantial assistance to the Court in its consideration of the issues

presented in this case.

Disclosure Under Rule 8.520(f)(4) of the California Rules of Court

No party or counsel for a party or any other person or entity has made a monetary contribution to fund the preparation and submission of the proposed brief. The proposed brief was authored in part by plaintiffs' counsel, and was intended to be part of plaintiffs' reply brief on the merits, but due to size constraints, plaintiffs could not include this material in their brief. Plaintiffs' counsel had previously forwarded this material, which consisted of a detailed account of the historical evolution of the IWC's meal and rest period requirements, to Mr. Broad and Mr. Locker. Both Mr. Broad and Mr. Locker carefully reviewed the material to ensure that it accurately comports with their understanding of the history of the wage orders. Satisfied that this historical account was accurate, and recognizing this examination of the development of the wage order requirements would provide invaluable assistance to this Court in grappling with the issues presented herein, Mr. Broad and Mr. Locker decided to use this portion of the plaintiffs' draft as a basis for this proposed *amicus* brief, editing, deleting, and adding additional material and argument where appropriate.

Conclusion

We therefore request that the Court grant this application and accept

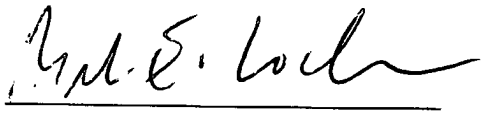
the attached brief for filing and consideration.

Dated: August 19, 2009

Respectfully submitted,

Miles E. Locker
LOCKER FOLBERG LLP

Barry Broad
BROAD & GUSMAN, LLP

By: 
Miles E. Locker

AMICUS CURIAE BRIEF OF FORMER IWC COMMISSIONER BARRY BROAD AND FORMER DLSE CHIEF COUNSEL MILES E. LOCKER, IN SUPPORT OF REAL PARTIES IN INTEREST

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I. INTRODUCTION

The review of the historical development of the Wage Orders' meal period language, at Section II(A) below, demonstrates the IWC's intent to require (a) mandatory meal periods, (b) of at least thirty minutes, (c) during which employees are relieved of all duties and not permitted to work, (d) spaced at regular intervals through the day that eliminate work periods exceeding five hours. These substantive requirements first appeared in the IWC's initial wage orders, over 90 years ago, and have been essentially unchanged since 1952. These are the requirements that were codified by the Legislature, first with the passage of AB 60, and subsequently, with the enactment of Labor Code section 226.7. The adoption of the extra hour of pay remedy, by both the IWC and the Legislature in 2000, was designed to enforce these substantive provisions, not to weaken them.

Our review of the development of the Wage Orders' meal period recording requirements, at Section II(B) below, confirms the IWC intent to make it possible to measure employer compliance with substantive meal period requirements by simply looking at required records. These record keeping requirements, which have been unchanged since 1963, make it relatively easy to prosecute or defend alleged meal period violations on a class-wide basis.

Finally, the review of the development of the Wage Orders' rest period requirements, at Section II(C) below, reveals that for more than sixty years, the IWC has required a second rest period if the employee works more than six hours, with an additional rest period for each four hours thereafter, with rest periods to be made available during the work periods preceding and following the meal break, such that all of these breaks function in a meaningful way to provide employees with needed respite from their labor.

II. THE HISTORY OF THE WAGE ORDERS' LANGUAGE, SHOWN IN DOCUMENTS FROM THE DIR ARCHIVE, FULLY SUPPORTS PLAINTIFFS' INTERPRETATION

A. Meal Periods: Employers Must Relieve Workers of All Duty for Mandatory Meal Periods and Must Do So For Each Five-Hour Work Period

1. IWC Wage Orders, 1916-1998

The IWC's first Wage Order with a meal period requirement was issued in 1916. It barred employers from "permit[ting]" employees to "return to work" during a "noon day meal" of not "less than one-half-hour":

> 1. *No person, firm or corporation shall employ or suffer or permit any woman or minor to work* in any fruit or vegetable canning establishment in which the conditions of employment are below the following standards:
>
> ....
>
> (20) TIME FOR MEALS. Every woman and minor shall be entitled to *at least one hour for noon day meal*; provided, however, that ***no woman or minor shall be permitted to return to work in less than one-half hour.***

Wage Order 2, ¶1(20) (Feb. 14, 1916, eff. Apr. 14, 1916) (MJN Ex. 76).[1] (emphasis added).[2] In other words, the order required a meal period of at

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[1] "MJN" refers to the consecutively-numbered exhibits to the motions for judicial notice, filed by Real Parties In Interest on January 20, April 20, and July 6, 2009. "ABM" and "OBM" mean the Answering Brief and Opening Brief on the Merits. "PE" refers to Brinker's exhibits in support of its writ petition.

[2] From 1916 to approximately 1933, the IWC used a numerical numbering system (1-18) to identify its Wage Orders by industry. Wage Order 18 (Dec. 4, 1931, eff. Feb. 26, 1932) (MJN Ex. 80) is the last in this series. Most of the orders were amended from time to time. In 1942-1943, the IWC abandoned the original numbering system, assigned new numbers to each industry, and adopted the suffix "NS" to refer to them. *See, e.g.*, Wage Order 1NS (Apr. 9, 1942, eff. Jun. 29, 1942) (MJN Ex. 92). That

least thirty minutes during which employees are not permitted to work—just as the Wage Orders do today.

The commissioners who adopted this Order agreed that work should stop for at least thirty minutes, and that, as to timing, meal periods should take place at "noon day"—after the employee has worked several hours. *See* IWC Transcript of Public Hearing (Feb. 11, 1916) at 38-43, *passim* (MJN Ex. 283). The only point of debate was how long the meal period should be, thirty minutes or one hour. *See id.* at 41 ("half an hour would not give [workers] dyspepsia"). As a compromise, the order makes it "obligatory upon the employer, to permit them an hour for lunch if they desire, leaving it to...the employee as to whether they shall return earlier if they choose." *Id.* at 39:8-11; *see also* IWC Transcript of Public Hearing in the Fruit and Vegetable Canning Industry (Mar. 28, 1917) ("1917 Transcript") at 43 (MJN Ex. 284) (Wage Order 2 decreed that employees "could not go back to work in less than a half hour").

In 1917, the IWC readopted the same meal period language, but added a new sentence: "If work is to be continued through the evening, every woman and minor shall be entitled to at least one hour for the evening meal." Wage Order 4 (Apr. 16, 1917, eff. Jun. 15, 1917), ¶21 (MJN Exs. 77, 117).[3] The new order contemplated two meals—one "noonday meal" and one "evening meal."

In 1919, the IWC issued Wage Order 4 Amended (Jan. 7, 1919, eff. Mar. 8, 1919) ¶21 (MJN Ex. 78). This order retained the same "noon day" meal and "evening meal" language, and also prohibited employees from

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numbering system is still in use today, except that the year, rather than the "NS" suffix, is used to identify the orders.

[3] When the IWC adopted a Wage Order for mercantile establishments two years later, it included identical meal period language. Wage Order 13 (Dec. 19, 1919, eff. Feb. 17, 1920) (MJN Ex. 79).

remaining in the work room if a lunch room is available—making it even clearer that employers may not permit employees to work during meals:

> ....*[W]ithout exception where [lunch room] space is provided,* ***all women shall be required to leave and remain out of the workroom during the meal.***

Id. ¶22 & n.* (emphasis added).

In March 1928, the IWC added a meal period requirement to Wage Order 3 (for the canning industry). The language was identical to that of Wage Order 4 Amended, except that Wage Order 3a made clear that both the "evening meal" and the "noon-day" meal shall be at least thirty minutes, and included a more precise *timing* requirement for the evening meal:

> Every woman and minor shall be entitled to at least one hour for noon-day meal; provided, however, that *no woman or minor shall be permitted to return to work in less than one-half hour.* ***If work is to be continued beyond 7.30 p.m.,*** every woman and minor shall be entitled to at least one hour for the evening meal, and ***no woman or minor shall be permitted to return to work in less than one-half hour.***

Wage Order 3a (May 11, 1923, eff. Aug. 8, 1923, amended Mar. 26, 1928, eff. Jun. 4, 1928), ¶12 (MJN Ex. 125).[4] This change was intended to make clear that "in no case shall [employees] have less than one-half hour." IWC Transcript of Public Hearing (Feb. 14, 1928).

Meanwhile, in the mid-1920s, the IWC adopted a series of Wage Orders for the motion picture industry. The first such order expressly required employers to comply with Wage Order 4 Amended, and included, for extras working on location, this language: "***Every woman and minor shall be entitled to not less than ½ hour for each meal.***" Wage Order 16

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[4] When Wage Order 3 was again amended in 1929, the meal period language was unchanged. *See* Wage Order 3a (Jun. 26, 1929, Sept. 14, 1929) (MJN Ex. 126).

(Jan. 8, 1926, eff. Mar. 16, 1926), ¶¶4, 5(g) (MJN Ex. 242). In a bulletin dated January 1928, the IWC emphasized that "***the minimum meal period shall be one-half hour.***" Wage Order 16–Bulletin No. 1 (Jan. 6, 1928) (MJN Ex. 243) (emphasis added).

The next Order, applicable to extras, not only required a minimum meal period of thirty minutes, but also imposed a more precise *timing* requirement—within 5½ hours after reporting for work:

> **Meal periods.** Designated meal periods are not included in computing time of employment. ***Minimum meal period shall be one-half hour.*** Maximum meal period shall be one and one-half hours. *A meal period shall be provided* ***no later than five and one-half hours after an extra is told to and does report for employment.***

Wage Order 16A, ¶3 (Jan. 30, 1931, eff. Apr. 11, 1931) (MJN Ex. 245) (emphasis added). Notably, the IWC used the generic word "provide" to reference the mandatory meal period requirement.

Four months after that, the IWC adopted a separate order for motion picture production workers with a modified timing requirement. Instead of requiring a single meal period within 5½ hours after reporting to work, the new order prohibits all "excessive" periods of work without a meal:

> **Meal Periods.** Every woman shall be entitled to at least one hour for meals. *Minimum meal period shall be one-half hour*; maximum meal period shall be one and one-half hours. ***No woman shall be permitted to work an excessive number of hours without a meal period.*** Food and hot drinks shall be provided for women who are required to work after 11.30 p.m.

Wage Order 17 (Jun. 1, 1931, eff. Aug. 11, 1931) (MJN Ex. 246) (emphasis added). This order makes clear that *no* periods of "excessive" work may be "permitted" without a meal period.

Six months later, in December 1931, the IWC adopted Wage Order 18, which contained uniform sanitary regulations to govern "any

establishment or industry." Wage Order 18 (Dec. 4, 1931, eff. Feb. 26, 1932) (MJN Exs. 11, 80). This order's meal period requirement combines three elements from earlier orders. Employers may not "permit[]" employees to "return to work" in less than thirty minutes (*see* Wage Order 2 (1916)); must require employees to leave and remain out of the work room if a lunch room is available (*see* Wage Order 4 Amended (1919)); and may not "permit[]" employees to work "an excessive number of hours" without a meal period (*see* Wage Order 17 (1931)):

> *No person, firm or corporation shall employ* or suffer or permit any woman or minor to work in any establishment or industry in which the conditions of employment are below the standards set forth hereinafter ....
>
> ....
>
> **10. MEALS**
>
> Every woman and minor shall be entitled to at least one (1) hour for meals; provided however, that ***no woman or minor shall be permitted to return to work in less than one-half (½) hour***, and provided, further, that ***no woman or minor shall be permitted to work an excessive number of hours without a meal period.***
>
> ... *[W]ithout exception where [lunch room] space is provided, all women and minors* ***shall be required during the meal period to leave and remain out of the room in which they are regularly employed.***

Wage Order 18 (Dec. 4, 1931, eff. Feb. 26, 1932), ¶¶10, 11 & n.* (MJN Exs. 11, 80) (emphasis added).

Instead of specifying two specific meals ("noonday" and "evening"), like the earlier orders, the 1931 order prohibited all periods of "excessive" work without a meal. *Id.* ¶10. The order thus continued to require multiple meal periods depending the length of time worked. *See id.* ¶4(j) (contemplating employers maintain "regularly established meal periods").

The word "excessive" came to be generally "interpreted to mean after four and a half or five hours of work." Minutes of a Meeting of the IWC (Jan. 6, 1933) at 701443122 (MJN Ex. 288); *see also* Wage Order 16A (1931) (MJN Ex. 245) (quoted above; meal period required no later than 5½ hours after reporting to work). The IWC interpreted the requirement strictly. It declined to grant an exemption for the mercantile industry requiring "only a fifteen-minute lunch period for women employed *six* hours," noting that "the regulations on meal periods must apply alike to all industries." *Id.* at 701443125 (emphasis added).

Every Wage Order issued since Order 18 has included not only a mandatory thirty-minute meal period requirement, but also a timing requirement. In 1933, the IWC amended Wage Order 9, governing general and professional offices, to require a meal period after not more than five hours' work and to make clear that the employer bears the burden of relieving employees of duty:

> A meal period of not less than one-half (½) hour must be given to all employees *after not more than five (5) hours of employment.* ***The employer is responsible for seeing that this time is taken.***

Wage Order 9 Amended (Jun. 21, 1933, eff. Aug. 28, 1933), ¶9(a) (MJN Ex. 141) (emphasis added); *see* Minutes of a Meeting of the IWC (Jun. 21, 1933), at 701443225 (MJN Ex. 289) (adopting Order 9 Amended and declining to impose four-hour timing limit rather than five).

The meal period requirement applied even during night shifts, and even if compliance required the employer to hire a "relief" worker "to leave her home at 4:30 a.m. to relieve the night [worker] for a half-hour." Minutes of a Meeting of the IWC (Jul. 26, 1935), at 701446108 (MJN Ex. 290) (interpreting Wage Order 9 Amended). Every employee working an eight-hour shift "must be allowed a meal period of not less than one-half

hour after five hours of employment"—unless a special exemption was granted. *Id.* at 701446106-107 (special exemption granted allowing the employer to require the night worker to take an on-duty meal period).

In 1939, the IWC clarified that "an excessive number of hours" means 4½ hours for an eight-hour shift (or, in professional offices, 5 hours), and that, under both Order 18 and Order 9 Amended, "the employer is responsible for seeing that the time is taken":

> Meal period of ***not less than one-half hour*** must be given to all women working on an eight hour shift ***after 4½ hours of employment***, except under the Office Order, which provides that a meal period of not less than one-half hour must be given after five hours of employment. ***The employer is responsible for seeing that the time is taken.***

Minutes of a Meeting of the IWC (Aug. 19, 1939), at 701450133 (General Card No. 14) (MJN Ex. 291) (emphasis added).

In 1942 and 1943, the IWC issued a new set of Orders covering ten industries. Wage Orders 1NS, 2NS, 3NS, 4NS, 5NS, 6NS, 7NS, 8NS, 9NS, 10NS (MJN Exs. 92, 104, 127, 142, 12, 164, 180, 197, 210, 222). Each "NS" order required employers to comply with the sanitary regulations of Order 18[5] and also included separate meal period language, which remains essentially unaltered today.

Wage Order 5NS, for the public housekeeping industry, continued the same mandatory thirty-minute meal period language from Wage Order 18, but: (a) introduced the term of art "work period"; (b) designated five

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[5] *See, e.g.*, Wage Order 1NS, ¶14 ("Every employer in the manufacturing industry, in addition to the foregoing provisions, is required to comply with the provisions of the [IWC] Order prescribing sanitary regulations for all industries."); *see also* Wage Order 5NS, ¶14 (MJN Ex. 12) (same); 7 Ops.Cal.Atty.Gen. 124, 125 (1946) (MJN Exs. 357, 379) ("Order No. 18...is to be read in connection with each order as though it were an integral part thereof.").

hours as the longest work period without a meal; and (c) created an exception for shifts not exceeding six hours:

> ***No employer shall employ*** any woman or minor for a ***work period of more than five (5) hours*** without an allowance of not less than thirty (30) minutes for a meal. If during such meal period the employee cannot be ***relieved of all duties and permitted to leave the premises***, such meal period shall not be deducted from hours worked. ***However, if the employee's work for the day will be completed within six (6) hours, such meal period need not be given.***

Wage Order 5NS (Apr. 14, 1943, eff. Jun. 28, 1943), ¶3(d) (MJN Ex. 12) (emphasis added).[6] (Later, "need not be given" would be changed to "may be waived.")

Also, each "NS" order included definitions for the first time. *See, e.g.*, Wage Order 5NS, ¶2. "'**Employ**' means to engage, suffer, or permit to work." *Id.* ¶2(c). Hence, "no employer shall employ" means "no employer shall engage, suffer or *permit* to work." (Emphasis added.) As a result, Wage Order 5NS prohibits employers from "*permit*[*ing*] any woman or minor [to work]" without the specified meal periods—just like Order 18 and the current Orders.

The IWC Wage Boards' findings bear this out: "***The Commission finds it is necessary to insure a meal period after not more than 5 hours of work in order to protect the health of women and minors***." Minutes of a Meeting of the IWC and Wage Order 5NS (Apr. 14, 1943), at 703439106 (MJN Ex. 302) (emphasis added).[7] The Wage Boards determined that

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[6] Each Wage Order contained meal period language similar to Order 5NS, with minor wording variations. *See* Wage Orders 1NS, ¶5(c); 2NS, ¶5(c); 3NS, ¶5(d); 4NS, ¶4(e); 6NS, ¶3(d); 7NS, ¶3(d); 8NS, ¶3(e); 9NS, ¶3(e); 10NS, ¶3(d).

[7] *See also* Transcript of Proceedings of Wage Board in Public Housekeeping Industry (Oct. 7, 8 and Nov. 16, 1942) ("Oct. 1942 Transcript"), at 703428119 (MJN Ex. 294) (same); Minutes of a Meeting of

"thirty minutes is the least time in which an employee can eat a meal without impairment of health." *Id.*; *see also* Minutes of a Meeting of the IWC (Jun. 14, 1943), at 703445145 (MJN Ex. 303) (Wage Board for Order 8NS; "[n]ot less than 30 minutes for lunch"). Eight Wage Boards found that to protect workers' health, their meal periods must be "***insure[d]***."[8]

The meal period requirement of the "NS" series prohibits "early lunching" of the kind practiced by Brinker. One IWC agent inspected a mercantile establishment and found that "employees who work from 9:00 a.m. to 6:00 p.m. receive their meal period between 11:00 a.m. and 12:00 noon, *leaving a stretch of 6 hours to be worked after lunch.*" Minutes of a Meeting of the IWC (Jan. 29, 1943), at 703426115 (MJN Ex. 297) (emphasis added). The IWC refused to allow it, finding it contrary to the Wage Orders, and instructed the employer that "women or minors may not be employed more than five (5) hours unless such period is broken by a meal period of not less than thirty (30) consecutive minutes during which the employee is relieved of all duties." *See id.* (citing Order 2NS, ¶5(c)).

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the IWC and Wage Order 5NS (Apr. 6, 1943), at 703438107 (MJN Ex. 301) (same). This Wage Board adopted two earlier versions of Order 5NS, one on Feb. 5, 1943 (MJN Ex. 294) and another on April 6, 1943 (MJN Ex. 301), but each of these was rescinded before it went into effect (*see id.* at 703438102; *see also* MJN Ex. 302 at 703439101-102; MJN Ex. 304). Each time, the Wage Board made identical findings.

[8] Minutes of a Meeting of the IWC (Oct. 24, 1942), at 703415197 (Order 3NS; Canning and Preserving) (MJN Ex. 295); Minutes of a Meeting of the IWC (Dec. 28, 1942), at 703423109 (Order 4NS; Professional, Technical, Clerical and Similar Occupations) (MJN Ex. 296) (same); Minutes of a Meeting of the IWC (Apr. 5, 1943), at 703437110 (Order 6NS; Laundry, Dry-Cleaning and Dyeing) (MJN Ex. 300); *id.* at 703437144 (Order 7NS; Mercantile); Minutes of a Meeting of the IWC (Jun. 14, 1943), at 703445153 (Order 8NS; Products after Harvest) (MJN Ex. 303); *id.* at 703445194 (Order 9NS; Transportation; six hours' work instead of five); *id.* at 703445227 (Order 10NS; Recreation and Amusement).

The responsibility to "insure" meal periods remained the employer's. The mercantile order contemplates that a relief worker "be employed regularly to work a lunch hour to relieve the full time clerk [and to] report[] to work expecting and knowing that she is to receive but one hour's employment per day...." 2 Ops.Cal.Atty.Gen. 235, 236 (Sept. 21, 1943) (MJN Exs. 357, 378).

To deviate from the Wage Orders' requirements, employers had to petition for an exemption—which IWC granted on a limited basis, particularly during wartime.[9] The IWC denied one manufacturer's request to allow on-duty meal periods, but granted an exemption reducing the meal period to twenty minutes. *See* Minutes of a Meeting of the IWC (Sept. 21, 1942), at 703405102-103 (MJN Ex. 293).[10]

Without such an exemption, however, the Wage Orders prohibited employers from allowing employees to work more than five hours without

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[9] The War Production Act, effective February 5, 1943, required that, "to increase production and to win the war...restrictions upon the hours and conditions of work be relaxed to such an extent as may be compatible with [worker] health and safety." War Production Act (Stats. 1943, ch. 14) (Feb. 5, 1943) (MJN Ex. 357). The IWC adopted procedures for issuing war production permits, including procedures for "meal period relaxations." Procedure–War Production Permits (Jan. 27, 1944) (MJN Ex. 357).

[10] *Accord*: Minutes of a Meeting of the IWC (Feb. 27, 1943) (MJN Ex. 298) (allowing on-duty meal periods for female gas station attendants); Minutes of a Meeting of the IWC (Apr. 3, 1943)) (MJN Ex. 299) (granting exemptions allowing on-duty meal periods for female factory workers); Letter to Canning Industry re Order No. 3NS (Jun. 2, 1943) (MJN Ex. 356, #2) (granting permission to employ women after 11 p.m.—which the wage order would otherwise prohibit—provided that "a meal period of not less than thirty consecutive minutes shall be given after not more than five (5) hours of work" and that "the standards set up in [IWC] Order No. 18, 'Sanitary Regulations ...,' shall be observed"); Procedure – War Production Permits (Jan. 27, 1944) (MJN Ex. 357#2) (allowing on-duty, paid meal periods so long as "there is ample uninterrupted time on the job for eating").

relieving them of duty for a thirty-minute meal period. The Wage Orders prohibited work periods exceeding five hours either before or *after* a first meal period. *See* MJN Ex. 297, at 703426115.

In 1947, the IWC introduced three short-lived changes that were eliminated when the Orders were reissued in 1952. Wage Orders 1R, 2R, 3R, 4R, 5R, 6R, 7R, 8R, 9R, 10R (Feb. 8, 1947, eff. Jun. 1, 1947) (MJN Exs. 93, 105, 128, 144, 13, 165, 181, 198, 211, 223).

First, instead of "no employer shall employ," the 1947 Wage Orders (¶10) said "no employee shall be required to work." In 1952, however, the IWC restored the "no employer shall employ" language to all of the Orders (¶11)—reconfirming that employers may not permit employees to work without "insuring" their meal periods. Wage Orders 1-52, 2-52, 3-52, 6-52, 8-52, 9-52, 10-52 (May 16, 1952, eff. Aug. 1, 1952) (MJN Exs. 94, 106, 129, 166, 199, 212, 224); Wage Orders 4-52, 5-52 (May 15, 1952, eff. Aug. 1, 1952) (MJN Exs. 145, 14).[11] The 1952 orders continued to define the word "Employ" as "engage, suffer or permit to work." *See id.*, ¶2(d).

Second, eight of the ten 1947 orders (all except Orders 3R and 8R) required a meal period within five hours "after reporting to work," temporarily limiting the meal period requirement to just one meal period within the first five-hour work period of the day. *See, e.g.*, Wage Order 5R (MJN Ex. 13), ¶10. Indeed, in the 1947 orders, the meal period paragraph's heading was written in the singular—"MEAL PERIOD." *Id.* In 1952, "after reporting to work" was removed from all the orders, and the "NS" series language, requiring a meal period for all five-hour work periods, was restored. *See, e.g.*, Wage Order 5-52, ¶11 (MJN Ex. 14). Additionally, the

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[11] The IWC did not adopt any Wage Order 7-52. Instead, Wage Order 1-52 covered both the manufacturing and the mercantile industries. *See* Wage Order 1-52 (May 16, 1952, eff. Aug. 1, 1952) (MJN Exs. 94, 182).

heading was changed to the plural—"MEAL PERIODS." *Id.*

Third, only two of the 1947 orders continued the exemption (first appearing in the "NS" series) stating that "no meal period need be given" to employees working shifts not exceeding six hours. Wage Orders 3R, 8R, ¶10 (MJN Exs. 128, 198). In 1952, the IWC restored the six-hour-shift language to all of the orders, but instead of saying "no meal period need be *given*," the 1952 orders state that "the meal period may be *waived*." *See, e.g.*, Wage Order 5-52, ¶11 (MJN Ex. 14) (emphasis added). This change conforms with the amendment substituting "no employer shall employ" for "no employee shall be required to work." Both changes confirm that the employer must relieve *all* employees of duty for mandatory meal periods, which only those on six-hour shifts may choose to "waive."

In other words, contrary to Brinker's contentions, a holding that meal periods need only be "made available," rather than "insured," would make *all* meal periods waivable, when the IWC's intent was that only *some* should be. ABM35-36, 122-23. Under such an interpretation, the six-hour waiver language would have no meaning at all.

One of the Wage Board reports bears this out. In urging adoption of the six-hour-shift language, the industry members of the manufacturing Wage Board observed that the "5-hour requirement" could only be "waive[d]" "voluntarily":

> We feel that in those operations where a break in the continuous production process might not be practical or too expensive, that *employees may voluntarily waive the 5-hour requirement* without hardship. We point out in this connection that *this is a voluntary waiver on the part of the employee only in such instances as the entire day's shift is completed in six hours.*

Recommendations of Industry Members of the Wage Board (approx. Nov. 1951), at 7 (MJN Ex. 315) (emphasis added).

For the first time, all of the 1947 Orders imposed a rest period requirement for all employees (not merely those who were required to remain standing). *See, e.g.*, Wage Order 5R, ¶11 (MJN Ex. 13). The rest period requirement imposed a notably different substantive compliance standard than for meal periods:

> *Every employer shall authorize* all employees to take rest periods which, insofar as practicable, shall be in the middle of each work period. ....

Id. (emphasis added).

In 1952, the IWC changed this to "[e]very employer shall authorize *and permit*" rest breaks (not merely "authorize" them, as in the 1947 orders). *See, e.g.*, Wage Order 5-52, ¶11 (emphasis added). Notably, the IWC considered, and declined, "changing the word 'authorize' to 'require'." Minutes of a Meeting of the IWC (Mar. 1, 1952), at 703455254 (MJN Ex. 318). The compliance standard for rest breaks ("authorize and permit") was, and continues to be, materially different than for meal periods ("no employer shall employ"). As further discussed below, the IWC has maintained the distinction between meal periods and rest breaks through the present day—with the notable exception of Wage Order 14.

In May 1957, the IWC issued a set of eleven new Wage Orders, followed by a twelfth order in October 1957. *See* Wage Orders 1-57, 2-57, 3-57, 4-57, 5-57, 6-57, 7-57, 8-57, 9-57, 10-57, 11-57 (May 30, 1957, eff. Nov. 15, 1957) (MJN Exs. 95, 107, 130, 146, 15, 167, 183, 200, 213, 225, 234); Wage Order 12-57 (Oct. 7, 1957, eff. Jan. 1, 1958) (MJN Ex. 248). In April 1961, it issued orders 13-61 and 14-61 for two new industries. Wage Orders 13-61 (Industries Preparing Agricultural Products for Market, On the Farm), 14-61 (Agricultural Occupations) (Apr. 28, 1961, eff. Aug.

28, 1961) (MJN Exs. 256, 267).[12]

The meal period language of twelve of these fourteen orders was identical and unchanged from the 1952 series. *See, e.g.*, Wage Order 5-57, ¶11 (MJN Ex. 15).[13] All fourteen orders maintained the laxer compliance standard for rest breaks, requiring employers merely to "authorize and permit" them. *See, e.g.*, Wage Order 5-57, ¶12.

In 1957, as in 1952, employee representatives proposed substituting the word "require" for "permit" in the rest break provision. The manufacturing industry Wage Board voted down this motion, evincing its intent to continue the more lenient compliance standard—and reinforcing the conclusion that the meal period compliance standard is stricter. *See* Wage Order 1-57, ¶12 (MJN Ex. 95); Summary of Actions Taken by the Wage Board for Order No. 1-52 for the Manufacturing Industry following Oct. 1 and 2, 1956 Meetings (Oct. 1956), at 2 (MJN Ex. 320).

Preliminarily, the Chair observed "that when the Commission adopted this section [on rest periods] it obviously intended that it be permissive only and not mandatory." Record of Proceedings – Wage Board for Order 1, Los Angeles, Oct. 1 and 2, 1956 (Oct. 4, 1956) at 3 (MJN Ex.

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[12] Wage Order 14-61 was the first order for agricultural occupations since Wage Order 14 (May 25, 1920, eff. July 24, 1920) (MJN Ex. 266) was rescinded in 1922. *See* Explanatory Note re Wage Orders for Agricultural Occupations (MJN Ex. 265); Minutes of a Meeting of the IWC (Feb. 24, 1922) (MJN Ex. 285) (rescinding the agricultural order). As a result, the sanitary provisions of Wage Order 18 (1931) (all occupations and industries) continued to govern the agricultural industry into the 1960s.

[13] Order 12-57, governing the motion picture industry, imposed the same mandatory meal period requirement on employers, but: (a) allowed 5½ hour work periods; (b) fixed a maximum meal period length of one hour; and (c) authorized no waiver for six-hour shifts. Wage Order 12-57, ¶11 (MJN Ex. 248). Order 14-61, governing agricultural occupations, had no meal period language. (MJN Ex. 267.)

322). The Secretary to the IWC agreed: "[T]he Commission's intent is that the employer should authorize this time. If the employer does not authorize the time he is in violation of the law." *Id.*

The employee representatives argued that the permissive rest period requirement was "unenforceable":

> [A] number of small, unorganized shops in the garment industry deprive women employees of the rest periods by virtually undetectable methods. ...[I]n these shops there is simply an understanding that any employee who demands a rest period will be fired. These employees are so intimidated...that they will not even ask for the rest periods guaranteed them by the Order. ...[T]he proposed amendment...would simply make it possible to carry out the original intent of the Commission.

Report of the Wage Board for Order 1-52 for the Manufacturing Industry following Oct. 1 and 2, 1956 Meetings (Oct. 1956), at 10 (MJN Ex. 321); *see also* Record of Proceedings, *supra*, at 3 (MJN Ex. 322) ("employer can by devious methods coerce the employee not to take the rest period, by the threat of losing her job").

The employer representatives disagreed—offering the same arguments Brinker advances today respecting mandatory meal periods:

> [The amendment] would constitute an infringement upon individual liberty. They argued that *an employee has a right to take a rest period, but should not be forced to take one against her will.* Some employees prefer to work during the rest period in order to catch up or, in the case of piece workers, to increase their earnings.

Report, *supra*, at 11 (MJN Ex. 321) (emphasis added). The Chair believed that "if the rest-period requirement were made mandatory, then each employer would be in technical violation of the Order each time an employee, with or without [the employer's] permission, worked during a prescribed rest period." *Id.* The Chair also disagreed that the existing

standard was "unenforceable." Record of Proceedings, *supra*, at 9 (MJN Ex. 322). Because of these concerns, the Chair voted against the motion, and the permissive compliance standard for rest periods was preserved. *Id.*; Summary of Actions, *supra*, at 2-3 (MJN Ex. 320).

Notwithstanding concerns that a mandatory compliance standard "forces" employees to take breaks "against [their] will," no one on the manufacturing Board, or any other Board, moved to relax the mandatory meal period compliance standard. The distinction between mandatory meal periods and permissive rest breaks was preserved in Order 1-57, as in the rest of the Orders—and remains in the Orders to this day.

In 1963, the IWC issued thirteen amended Orders. Wage Orders 1-63, 2-63, 3-63, 4-63, 5-63, 6-63, 7-63, 8-63, 9-63, 10-63, 11-63, 12-63, 13-63 (Apr. 18, 1963, eff. Aug. 20, 1963) (MJN Exs. 96, 108, 131, 147, 16, 168, 184, 201, 214, 226, 235, 249, 257).[14] The meal period language is uniform across all but one of these orders, and incorporates three changes from the 1957/1961 series.

First, it clarifies that the six-hour waiver applies only if the meal period is "waived *by mutual consent of employer and employee*." Second, it adds a sentence clarifying that a meal period is considered "on duty," and must be paid, unless the employee "is relieved of all duty."[15] Third, it

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[14] No amended agricultural order was adopted in 1963. In 1965, however, a meal period requirement identical to the first sentence of the other orders was introduced into the agricultural order. *See* Wage Order 14-65, ¶10 (MJN Ex. 268); *see also* Summary of Wage Board Recommendations for Consideration by the IWC in Revision of Commission Orders (Feb. 24, 1967) at 32 (MJN Ex. 335) (quoting "present" meal period provisions of all orders).

[15] The amendment to the "on duty" language served to "require a meal period of less than thirty minutes duration be counted as time worked." Minutes of Executive Sessions (1963), at 800410141 (MJN Ex. 376#19).

requires employers to designate suitable eating space if "employees are required to eat on premises":

> **11. MEAL PERIODS**
>
> (a) No employer shall employ any woman or minor for a work period of more than five (5) hours without a meal period of not less than thirty (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 employee. Unless the employee is relieved of all duty during a thirty (30) minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked.* An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty.
>
> (b) In all places of employment where employees are required to eat on premises, a suitable place for that purpose shall be designated.

See, e.g., Wage Order 5-63, ¶11 (MJN Ex. 16).[16]

The laxer "authorize and permit" rest period standard was unchanged across all the 1963 Orders. *See, e.g.*, Wage Order 5-63, ¶12.[17]

The change to the language authorizing "waiver" for six-hour shifts resulted because "there was doubt as to whether the election should be the employee, by the employer, or by mutual consent." Report of the Wage Board for IWC Order 5 – Public Housekeeping Industry (Jun. 7-8, 1962), at 7 (MJN Ex. 324); *see also* Report and Recommendations of 1962 Wage

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[16] Order 12-63, for the motion picture industry, had the same variations as Order 12-57. *See* Wage Order 12-63, ¶11 (MJN Ex. 249).

[17] The motion picture industry Wage Order required "additional interim rest periods" for "performers engaged in strenuous physical activity." Wage Order 12-63, ¶12(b). The "authorize and permit" rest period requirement was added to the agricultural order in 1965. Wage Order 14-65, ¶11 (MJN Ex. 268).

Board for Order No. 9-57 – Transportation Industry (Jun. 11, 1962, at 6) (MJN Ex. 325) (current language "fails to specify who may waive").

Employer representatives in the mercantile industry argued that the employer, not the employee, should be allowed to decide—making some of the same arguments still heard from employers like Brinker today:

> [W]aiver by mutual consent would interfere with management's right to schedule the hours of work. The employer must make arrangements for coverage on the sales floor at all times, and these arrangements require advance planning. ....[A] change would infringe on the right of the employer to manage the operation of his own business. .... The 6 hour shift without a meal period is important in order to provide for full coverage of the sales floor at all times.

Report of the Wage Board for IWC Order 7–Mercantile Industry (Jun. 26, Jun. 27 and July 9, 1962), at 14 (MJN Ex. 326).

The IWC rejected these arguments, and a "mutual consent" requirement was adopted, thereby "put[ting] in formal language what has been the policy and approach of the Commission and its Staff." *Id.* at 14, 19 (comment of Chair); *see also, e.g.*, Wage Order 5-63, ¶11; Summary of Recommendations by Wage Boards for Consideration by the Commission in the Reopening of the IWC Orders (Nov. 7, 1962), at 15 (MJN. Ex. 327). In the full IWC's words: "For the convenience of both employer and employee, the Commission felt *the requirement for a meal period within a work period not exceeding six hours* may be waived *by mutual consent.*" Findings, IWC Meetings (1963), at 800410133 (MJN Ex. 376#14) (emphasis added).

In 1968, the IWC issued another set of amended Wage Orders, but did not change the meal period language.[18] Wage Orders 1-68, 2-68, 3-68,

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[18] That of the agricultural Order was amended to track paragraph 11(a) of the other orders. Wage Order 14-68, ¶10 (MJN Ex. 269); Report of the

4-68, 5-68, 6-68, 7-68, 8-68, 9-68, 10-68, 11-68, 13-68, ¶11 (MJN Exs. 97, 109, 123, 148, 17, 169, 185, 202, 215, 227, 236, 258). [19]

The Wage Board for the mercantile industry considered—and rejected—a proposal to eliminate waivers for six-hour shifts entirely. *See* Report of the IWC Wage Board for Order 7 – Mercantile Industry (Dec. 14-15, 1966), at 6 (MJN Ex. 330).[20] The amendment's opponents acknowledged that the six-hour-shift waiver is the orders' *only* exception to "a forced meal period" after five hours. Minority Report of Employer Members of Wage Board for Order No. 7 Mercantile Industry (Feb. 15, 1967) at 8 (MJN Ex. 334). According to another industry Wage Board, the mandatory language "requires the employer to *provide* meal periods" at appropriate "intervals"—another generic use of the word "provide." Report and Recommendations of the Wage Board for IWC Wage Order 12 – Motion Picture Industry (Oct. 21, 1966) at 6 (describing Order 12-63) (MJN Ex. 328).

In 1976, when it issued the next series of Orders,[21] the IWC made only one change to the meal period language, which made it more difficult for an employer to claim that an "on duty" meal period was proper:

> An "on-duty" meal period is permitted only when the nature of the work prevents an employee from being relieved of all

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IWC Wage Board for Order 14 – Agricultural Occupations (Dec. 19-20, 1966 and Jan. 5, 1967), at 14 (MJN Ex. 331).

[19] The motion picture Wage Order continued to impose slightly different requirements. *See* Wage Order 12-68, ¶11 (MJN Ex. 250).

[20] The proposed amendment initially carried (Report, *supra*, at 6 (MJN Ex. 330)), but ultimately failed (Wage Order 7-68, ¶11 (MJN Ex. 185)).

[21] Wage Orders 1-76, 3-76, 4-76, 5-76, 6-76, 7-76, 8-76, 9-76, 10-76, 11-76, 12-76, 13-76, 14-76 (Jul. 27, 1976, eff. Oct. 18, 1976) (MJN Exs. 98, 133, 149, 18, 170, 186, 203, 216, 228, 237, 251, 259, 22); Wage Order 2-76 (Sept. 17, 1976, eff. Oct. 18, 1976) (MJN Ex. 110); Wage Order 15-76 (Jul. 17, 1976, eff. Oct. 18, 1976) (MJN Ex. 275).

> duty *and when by written agreement between the parties an on-the-job paid meal period is agreed to.*

See, e.g., Wage Order 5-76, ¶11(a) (italicized language added in 1976).[22]

The amendment "requir[ing] a 'written agreement'" "was requested by employee representatives," but "such documentation [of] mutual consent would also serve to protect employers in case of complaint." Statement of the Basis for Order 1-76, *supra*, at 800410137 (MJN Ex. 376#15); *see also* Draft Statement as to the Basis, Order 5-76, *supra*, at 33 (MJN Ex. 361) (same). No other changes were made.

If, as Brinker argues, meal periods need only be "made available," then any employee could choose at any time to work while eating—that is, to take an "on duty" meal. The Wage Orders, however, expressly prohibit this except when "the nature of the work prevents an employee from being relieved of all duty" *and* the employee agrees in writing.

In reissuing the mandatory meal period compliance standard, the IWC repeatedly emphasized that meal periods, to be compliant, must be *off-duty*. It saw:

> no reason to change its earlier findings that *a 'duty free' meal period* is necessary for the welfare of employees, and that 30 minutes is the minimum time that will serve the purpose. The section is sufficiently flexible to allow for situations in which such an arrangement is not possible.

Statement of Findings by the IWC in Connection with the Revision in 1976 of its Orders Regulating Wages, Hours, and Working Conditions (Aug. 13,

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[22] The IWC amended the motion picture order's meal period language to make it identical to the other orders. *Compare, e.g.*, Wage Order 5-76, ¶11, *with* Wage Order 12-76, ¶11. Orders 14-76 and 15-76, for agricultural and household occupations, are also identical except they omit subparagraph (B). *Compare* Wage Order 15-76, ¶11 *with* Wage Order 14-76, ¶11.

1976), at 42, ¶11 (MJN Ex. 337) (emphasis added).[23] The IWC also noted that since 1916, the Wage Orders have "made some provision for meal periods *away from work*, varying over the years from 30 minutes to 45 minutes to one hour." Statement of the Basis for IWC Order No. 1-76, at 800410137 (MJN Ex. 376#15) (emphasis added).[24]

The more lenient rest period compliance standard ("authorize and permit") was unchanged and uniform across all the 1976 orders. *See, e.g.*, Wage Order 5-76, ¶12.

The Wage Orders issued in 1980 retained the same meal period and rest break language, with one notable exception. Wage Orders 1-80, 2-80, 3-80, 4-80, 5-80, 6-80, 7-80, 8-80, 9-80, 10-80, 13-80, 15-80 (Sept. 7, 1979, eff. Jan. 1, 1980) (MJN Exs. 99, 111, 134, 150, 19, 171, 187, 204, 217, 229, 260, 276).[25] The meal period language of Wage Order 14-80, agricultural occupations, was changed from "No employer shall employ" to "authorize

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[23] In *California Hotel & Motel Assn. v. Industrial Welfare Commission*, 25 Cal.3d 200, 216 (1979), this Court held that the Statement of Findings was not sufficiently detailed to satisfy Labor Code section 1177, which requires the IWC to prepare a Statement as to the Basis for each change to its Wage Orders. As evidence of the IWC's intent, however, the Statement of Findings remains relevant. Indeed, the DLSE included an excerpt from the Findings in its analysis folder on "Meal Periods." *See* MJN Ex. 376#15 (pp. 800410134-35).

[24] *See also* Draft Statement of the Basis for Wage Order 5-76 (draft Nov. 1, 1979) at 33 (MJN Ex. 361) (same); IWC 1976 Wage Orders Booklet, at 3 (MJN Ex. 373) ("an employee working a full day *must have* a 30-minute *off-duty* meal period") (emphasis added); Summary of Basic Provisions, 1976 Wage Orders (MJN Ex. 374) (same).

[25] The other exception was that the motion picture and broadcasting Orders restored the 1968 meal period language, requiring a meal period after six hours' work instead of five. Orders 11-80, 12-80 (MJN Exs. 238, 252). This was done after a former motion picture Wage Board member pointed out that most industry collective bargaining agreements "called for meal periods after six hours." Transcript of Proceedings before the IWC (Aug. 15, 1979), at 796419358-360 (MJN Ex. 338).

and permit"—the same lenient compliance standard as for rest breaks. Wage Order 14-80, ¶11 (MJN Ex. 23). As discussed in plaintiffs' opening brief, the IWC made this change knowing that it was relaxing the meal period compliance standard for this industry. OBM51-53; *see also* Highlights of Labor Standards in Agriculture from IWC Order 14-80 (MJN Ex. 362) (under Order 14-80, "[e]mployers must *allow*" both meal *and* rest periods (emphasis added)).

The Statements as to the Basis for the 1980 amendments again emphasize that compliant meal periods are duty-free:

> A "*duty free*" meal period is necessary for the welfare of employees. This section is sufficiently flexible to allow for situations where that is not possible. [¶] The Commission received no compelling evidence and concluded that there was no rationale to warrant any change in this section, *the basic provisions of which go back more than 30 years.*

See, e.g., Statement as to the Basis for Order No. 1-80, ¶11 (MJN Ex. 99) (emphasis added). And the IWC continued to summarize the Orders as requiring that "an employee...*must have* a 30-minute *off-duty* meal period." IWC 1980 Wage Orders Booklet, at 3 (MJN Ex. 375) (emphasis added).

As for timing, a 1982 IWC letter confirmed that, unless a formal exemption is granted, the Wage Orders require a meal period at proper intervals, for *each* five-hour work period—even if the employees would prefer to forego their second meal. Letter from IWC Executive Officer Margaret T. Miller to Mr. Klaus Wehrenberg (Jul. 13, 1982) (MJN Ex. 376#20). The letter flatly rejects the notion that the Wage Order does not require a meal period after the second five-hour work period:

> Another kind of problem that has arisen where employers have scheduled 11- or 12-hour shifts has been *the failure to provide for a second meal period after the second five hours of work.* ....One major employer recently argued that the IWC meal periods regulation does not require the two meal

> periods, but the meaning of that section is [that] meal periods must be *provided* "*at such intervals as will result in no employee working longer than five consecutive hours without an eating period.*"

Id. at 800410113 (emphasis added). The Labor Commissioner has granted formal exemptions "[w]here employers can show that the employees do have a chance to eat a second time *and* employees prefer to forego the second meal period in order to leave earlier," but without an exemption, the Wage Orders require mandatory meal periods at appropriate "intervals"—including a second meal following a second five-hour work period. *Id.*[26] Also, the letter's use of the word "provide" confirms, again, that in IWC parlance, this word is simply a general way to reference the mandatory meal period requirement, and is not intended to define that requirement.

The IWC's Executive Officer expressly rejected an employer's argument (identical to Brinker's) that "Section 11 [means] that after an employee has worked five hours, he or she qualifies for a meal period at some time during the workday, no matter how long that work day may be," calling that argument "contrary both to the IWC intent and to a reasonable reading of the order." Memorandum of Margaret Miller, IWC Executive Officer, "MEAL PERIODS" (March 5, 1982) (MJN Ex. 376#24, p. 800410152). The use of the term of art "work period" in the meal period provision ("no employer shall employ any employee for a *work period* of more than five hours without a meal period") bears this out:

> **In the context of IWC orders, "work period" is a continuing period of hours worked.** .... [¶] .... It is not the same as a shift. **A period of work ends when a meal or recess period begins, and a new work period begins after the meal period.**

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[26] As of the 2000 series, exemptions from the meal period requirements are no longer available. *See, e.g.*, Wage Order 4-2000, ¶17 (MJN Ex. 154).

> Thus when employees work a twelve-hour shift, they are entitled to one meal period after the first five hours of work and a second meal period after their second *work period* of five hours.

Id. (emphasis added). Accordingly, if another five-hour "work period"—such as those created by Brinker's early lunching practice—ensues after the first meal period, the Wage Orders' plain language requires another mandatory meal period. Alternatively, the employer may time the meal periods at appropriate "intervals" that avoid all five-hour work periods. Or (since 2000) the employer may pay premium wages.

In a memorandum of the same vintage, the IWC confirmed that on a 12-hour shift, "*[t]wo* (unpaid) meal periods of 30 minutes each ... are required." IWC undated document "Meal and Rest Periods: On 12-Hour Shifts" (MJN Ex. 376#22, p. 800410149) (emphasis added). This is so even if the employees "would rather work through 6½ or 7 hours after the first meal period and go home than take a second meal period." IWC undated document "Exemptions" (MJN Ex. 376#23, p. 800410150).[27] Generally speaking, the IWC "stick[s] with the most protective standard." Research: Meal Periods (Jun. 15, 1984) (MJN Ex. 376#25; 800410156).

In 1988, the IWC amended four Wage Orders without changing the meal period, rest period, or recording language. Wage Orders 1-89, 4-89, 5-89, 10-89 (Sept. 23, 1988, eff. Jun. 1, 1989) (MJN Exs. 100, 151, 157, 230).[28] The IWC "found no rationale to warrant any change in [the meal

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[27] *See also* IWC Note to File: Meal Periods (Sept. 12, 1986) (MJN Ex. 376#21, p. 800410142) (Wage Orders do not permit employers and employees to agree to on-duty paid meal periods simply "because the [employee] wants to leave a half hour early every day"; instead, a formal exemption is required).

[28] The IWC also made a number of amendments in the mid-1980s with no relevant changes. *See* Wage Orders 8-80 (amendment to Section 3A), 13-80 (amendment to Section 3A), 2-80 Updated, 3-80 Updated, 5-80

period] section, the basic provisions of which date back more than 30 years." Statement as to the Basis, Wage Order 1-89 (MJN Ex. 100).

A 1989 DLSE Interpretive Bulletin confirms, once again, that the Wage Orders require a meal period for *each* five-hour work period. Notably, the Bulletin uses the word "provide" to refer generically to the two differing compliance standards for meal periods and rest breaks:

> Under sections 11 and 12 of the Orders, meal periods and rest periods must be *provided* to employees based on the number of hours worked. Under Section 11, *employees on 12 hour shifts would have to be provided 2 meal periods* unless an agreement is reached in writing...pursuant to the language in Section 11 [for on-duty meals] or an exemption is granted by the Labor Commissioner pursuant to section 17 of the Orders. Rest periods pursuant to Section 12 must also be *provided for every 4 hour work period* and, accordingly, in a 12 hour schedule 3 rest periods must be *provided.*

Interpretive Bulletin No. 89-1 (Jun. 13, 1989) at 796410105-106 (MJN Ex. 373) (emphasis added). In this Bulletin, as elsewhere, the word "provide" refers simultaneously to the mandatory "no employer shall employ" standard for meal periods, and to the permissive "authorize and permit" standard for rest breaks.

In 1993, the IWC added new paragraph 11(C) to Wage Orders 4 and 5, allowing health care industry employees working lengthy shifts to waive (in writing) one of their *two* meal periods:

> (C) Notwithstanding any other provision of this order, employees in the health care industry ***who work shifts in excess of eight (8) total hours in a workday may voluntarily waive their right to a meal period.*** In order to be valid, any such waiver must be documented in a written agreement that

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(amendment to Section 3), 6-80 Updated, 7-80 Revised, 2-80 Updated, 8-80 Revised, 11-80 Updated, 12-80 Revised, 13-80 Revised, 14-80 Revised, 15-86 Updated, 8-80 (amendment to Section 3), 9-90 (MJN Exs. 205, 261, 112, 134, 156, 172, 188, 113, 206, 238, 253, 262, 272, 277, 278, 207, 218).

> is voluntarily signed by both the employee and the employer. The employee may revoke the waiver at any time by providing the employer at least one day's written notice. The employee shall be fully compensated for all working time, including any on-the-job meal period, while such waiver is in effect.

Wage Orders 4-89, 5-89 (Amendments to Sections 2, 3, & 11), ¶11(C) (Aug. 21, 1993) (MJN Exs. 152, 158) (emphasis added). As discussed in plaintiffs' Opening Brief, this amendment was needed because, without it, the meal period language "does not permit employees to waive their *second* meal periods." OBM85 (quoting IWC Charge to the 1996 Wage Boards, IWC Orders 1, 4, 5, 7 and 9) (MJN Ex. 29) (emphasis added)).

This amendment was carefully crafted to permit waiver of only a single meal period:

> ...only insofar as waiving "a" meal period or "one" meal period, not "any" meal period. Since the waiver of one meal period allows employees freedom of choice combined with the protection of at least one meal period on a long shift,...the [amendment] permits employees to waive *a second meal period* provided the waiver is documented in a written agreement voluntarily signed by both the employee and the employer....

Statement as to the Basis, Wage Order 5-89 (Amendments to Sections 2, 3 & 11) (Aug. 21, 1993) (MJN Ex. 158) (emphasis added).

In sum, there can be no doubt that the Wage Orders require a meal period for *each* five-hour work period, and that long shifts trigger *two* meal periods, only one of which may be waived, and then only in writing.

In 1998, the IWC removed the words "in the health care industry," thereby granting all employees the right to waive their "second meal period" "on a long shift." Wage Orders 4-98, 5-98, ¶11(C) (Apr. 1, 1997, eff. Jan. 1, 1998) (MJN Exs. 20, 153). The IWC added identical language to three more orders amended that year. Wage Orders 1-98, 7-98, 9-98 (eff.

Jan. 1, 1998), ¶11(C) (MJN Exs. 101, 153, 189, 219).

Again, "[t]he IWC decided that waiver of one meal period allows an employee freedom to choose between leaving work one half-hour earlier or taking *a second meal period* on a long shift." Statement as to the Basis, Overtime and Related Issues (Orders 1, 4, 5, 7 and 9) (Apr. 11, 1997) at 8 (MJN Ex. 30); *see also* MJN Exs. 101, 153, 189, 219 (same); Minutes of Public Meeting of IWC (Jun. 28, 1996) at 712406112 (MJN Ex. 341) (before amendment, Orders "require[d] that employees ***must take*** *a second meal period* on an extended shift when they preferred to waive that meal period and leave earlier"; "the language in [the meal period section] does not permit employees to waive their second meal periods on a shift").[29]

Paragraphs (A) and (B)—including the core "no employer shall employ" language—were unchanged across all the orders, and remained identical to the 1976, 1980, and 1989 series, discussed above.

As this history shows, as of 1998, the core meal period language, unchanged since 1952, required employers to ensure that workers are actually relieved of duty for meal periods each five-hour work period, and that no work is to be performed during these meal periods.

2. Post-AB 60 Wage Orders, 2000-2001

In 1999, the Legislature enacted AB 60, adding Labor Code section 512, intended to "codify" the "existing wage orders'" meal period requirements (OBM60 (citing AB 60, Legislative Counsel Digest, at 2 (July 21, 1999) (MJN Ex. 58)).

Notably, AB 60 not only adopted section 512, but also simultaneously "reinstated" "Wage Orders 1-89, 4-89 as amended in 1993,

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[29] *See also* Transcript of Public Hearings of the IWC (Apr. 4, 1997) (MJN Ex. 345) (reflecting general understanding that, without amendment, a second meal period would accrue that could not be waived).

5-89 as amended in 1993, 7-80, and 9-90"—reflecting the Legislature's approval of those Orders' provisions—and its understanding that they were wholly consistent with the new statute. *Id.*, §21, at p. 14 (MJN Ex. 58).[30] At the same time, it *revoked* the five 1998 Orders (1-98, 4-98, 5-98, 7-98, and 9-98 (MJN Exs. 101, 153, 20, 189, 219)), which had instituted weekly, instead of daily, overtime (¶3(A)), and which had expanded the meal period waiver right (¶11(C)), as discussed above. *Id.*

Accordingly, as of AB 60's effective date, California's meal period requirements included *not just* Labor Code section 512, *but also* the language of the expressly "reinstated" Wage Orders. If the Legislature had intended to substantively change the meal period compliance standard, it would not have reinstated any Orders imposing that standard. To understand California's meal period laws, therefore, section 512 and the reinstated Orders must be read together.

The reinstated Orders' meal period language originated in the 1952 Orders and had been unchanged since the 1976 Orders. The language was identical across all the Orders, except that Orders 4 and 5, as amended in 1993, included an additional paragraph for health care workers:

> **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 thirty (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 employee. Unless the employee is relieved of all duty during a thirty (30) minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period shall be permitted only when the nature of the work prevents an

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[30] *See Carter v. California Dep't of Veterans Affairs*, 38 Cal.4th 914, 925 (2006) ("An uncodified section is part of the statutory law.").

> 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.
>
> (B) In all places of employment where employees are required to eat on premises, a suitable place for that purpose shall be designated.
>
> (C) **[Wage Orders 4 and 5 Only]** Notwithstanding any other provision of this order, employees in the health care industry who work shifts in excess of eight (8) total hours in a workday may voluntarily waive their right to a meal period. In order to be valid, any such waiver must be documented in a written agreement that is voluntarily signed by both the employee and the employer. The employee may revoke the waiver at any time by providing the employer at least one day's written notice. The employee shall be fully compensated for all working time, including any on-the-job meal period, while such waiver is in effect.

Wage Orders 1-89, 4-89 (Amendments to Sections 2, 3 & 11), 5-89 (Amendments to Sections 2, 3, & 11), 7-80, 9-90 (MJN Exs. 100, 151-52, 157-58, 187, 218).

As discussed above, reinstated Orders 4 and 5 permitted health care workers to waive (in writing) *either one* of the two meal periods that would accrue to them on shifts exceeding eight hours. The second sentence of section 512 (AB 60, §6) accorded a modified version of this right to all workers:

> ....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.*

Under this language, the second meal period (but not the first) may be waived (in writing) by workers on shifts exceeding 10 but not 12 hours.

Labor Code §512(a), second sentence. This preserved the written waiver right that had been added to five Orders in 1998, but that AB 60 expressly revoked. *See* AB 60, §21.

Health care workers governed by reinstated Orders 4 and 5—the only ones who, under the reinstated Orders, may waive (in writing) their first meal period—may waive one of their two meal periods, but not both. Reinstated Orders, ¶11(C). Those who work more than 12 hours may waive neither. Lab. Code, §512(a), second sentence. The only other employees who may waive *any* meal period are (a) those on shifts not exceeding six hours (Reinstated Orders, ¶11(A), first sentence, Lab. Code §512(a), first sentence), or (b) those for whom "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" (Reinstated Orders, ¶11(A), third sentence).

What the IWC did next confirms this.

Shortly after AB 60 passed, the IWC issued the Interim Wage Order, which combined section 512 and the reinstated Orders. The meal period text consisted of the first sentence of the reinstated Orders plus the second sentence of section 512. Interim Wage Order—2000, ¶10 (eff. Mar. 1, 2000) (MJN Ex. 21). The Interim Order also confirmed that the same Orders "reinstated" by AB 60 (Orders 1-89, 4-89 (as amended in 1993), 5-89 (as amended in 1993), 7-80 and 9-90) were again "reinstated, as modified in the Interim Wage Order, until the effective date of wage orders promulgated by the Commission pursuant to Labor Code §517"; and that Orders 2-80, 3-80, 6-80, 8-80, 10-89, 11-80, 12-80, 13-80 and 15-86 "remain in full force and effect except to the extent that they are modified

by the Interim Wage Order."[31] *Id.*, Summary (emphasis added).[32]

The Interim Wage Order significantly "modified" the earlier Wage Orders' alternative workweek provisions. *See id.*, Summary & ¶5. The meal period provisions, however, were not "modified" except to add the additional written waiver right from section 512. As the IWC's Summary of those provisions explains:

> An employee *must receive a thirty-minute meal period for every 5 hours of work.* Pursuant to mutual consent by the employer and the employee: (1) an employee may waive a thirty-minute meal period if the day's work will be completed in no more than 6 hours; (2) an employee may waive the second of 2 thirty-minute meal periods when the day's work will be completed in no more than 12 hours and the first thirty-minute meal period was not waived.

Interim Wage Order—2000, Summary (MJN Ex. 31) (emphasis added). The "reinstated" orders also preserved a third waiver right—the right to agree (in writing) to an "on duty" meal period. *See, e.g.*, Wage Orders 1-89, 2-80, 5-89 (amended 1993) (¶11(A), second and third sentences).

In other words, in the IWC's view, nothing in AB 60—including its use of the word "provide"—changed the mandatory meal period compliance standard from the Orders that AB 60 expressly "reinstated" and that had been in place since 1916. Rather, the Legislature simply used the word "provide" as it had been used in DLSE Interpretive Bulletin No. 89-1

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[31] This wreaked temporary havoc in the motion picture industry because Wage Order 12-80 (¶11) (MJN Ex. 253) had required meal periods after six hours' work, not five. *See* Transcript of Public Meeting of IWC (May 5, 2000), at 712427154-147 (MJN Ex. 349). The six-hour limit was restored in Wage Order 12-2000. (MJN Ex. 254).

[32] "Except for the section pertaining to penalties, the Interim Wage Order does not apply to any person" covered by Order 14-80, governing agricultural occupations. Interim Wage Order—2000, Summary (eff. Mar. 1, 2000) (MJN Ex. 21).

(MJN Ex. 372), discussed above—as a generic way to reference and codify the reinstated Wage Orders' mandatory standard.[33]

Nor did AB 60 change the requirement for "a thirty-minute meal period for every 5 hours of work," as Brinker contends. Rather, it merely preserved employees' right to waive the second meal period that accrues on shifts of between 10 and 12 hours. AB 60 revoked the 1998 series of Orders, which contained overtime language offensive to the Legislature, but which had allowed employees on overlength shifts to waive (in writing) their second meal period. The reinstated earlier series of Orders had proper overtime language, but limited the waiver right to health care workers. The second sentence of Labor Code section 512 preserved that element from the revoked 1998 Orders, and expanded it to cover all workers.

In AB 60, the Legislature also directed the IWC, by July 1, 2000, to "adopt wage, hours, and working conditions orders consistent with this chapter," and to "include regulations" on specified matters relating to the workweek, as well as "such other regulations as may be needed to fulfill the

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[33] Brinker cites a transcript of an IWC public meeting in which the participants talked about "providing" meal periods. ABM42-43 (citing Transcript of a Public Hearing of the IWC (Jun. 30, 2000) (Brinker MJN Ex. 3)). The participants simply used that word as it had been used by IWC commissioners since 1931—as a generic way to refer to *either* the mandatory meal period requirement *or* the permissive rest period requirement, depending on the context. Wage Order 16A, ¶3 (Jan. 30, 1931, eff. Apr. 11, 1931) (MJN Ex. 245); Report and Recommendations of the Wage Board for IWC Wage Order 12 – Motion Picture Industry (Oct. 21, 1966) at 6 (describing requirement Order 12-63) (MJN Ex. 328); Wage Orders 1-76, ¶7(A)(6), 9-76, ¶7(A)(6) (MJN Exs. 98, 216); Letter from IWC Executive Officer Margaret T. Miller to Mr. Klaus Wehrenberg (Jul. 13, 1982) (MJN Ex. 376#20); Interpretive Bulletin No. 89-1 (Jun. 13, 1989) at 796410105-106 (MJN Ex. 373); *see also* Transcript of Public Meeting of IWC, at 712427170 (May 5, 2000) (MJN Ex. 349) (before premium pay remedy, all DLSE could do was "file an action for injunctive relief and get a court order ordering an employer to *provide* the workers...with the *appropriate meal and rest periods*" (emphasis added)).

duties of the commission pursuant to this part." AB 60, §11 (enacting Lab. Code §517(a)).

The 2000 Orders (eff. October 1, 2000) all continued to retain the mandatory meal period compliance language from the reinstated orders—which had been unchanged since the 1976 Orders—including the "no employer shall employ" language originating from the 1916 order.[34] Indeed, when the IWC began drafting its next series of Orders, it used the text of the reinstated orders as a starting point. *See, e.g.*, Draft of Amendments to Wage Order 5-89 (as amended in 1993) (draft Nov. 5, 1999) (MJN Ex. 367); Draft of Amendments to Wage Order 5-89(93) – *Draft compliance with Interim Wage Order 2000* (undated; approx. 2000) (MJN Ex. 368).

Every sentence of the reinstated Orders' meal period language was preserved in the 2000 series. The "no employer shall employ" language of the first sentence became part of paragraph 11(A) of each 2000 order. The "on-duty" meal period language of the second and third sentences became paragraph 11(C) of each 2000 order (except Orders 4, 5, and 14, where it was added to paragraph 11(A), and Order 12, where it became paragraph 11(B)). The "eating space" language of the fourth sentence was retained as either paragraph 11(C), (D), or (E) of each 2000 order.

In addition, the second sentence of Labor Code section 512 was adopted verbatim as paragraph 11(B) of each order except Orders 4, 5, 12, and 14, in which that language was not included. Instead, the language allowing health care workers on extended shifts to waive "a meal period" was included as paragraph 11(D) of Orders 4-2000 and 5-2000, after being

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[34] Wage Orders 1-2000, 2-2000, 3-2000, 4-2000, 5-2000, 6-2000, 7-2000, 8-2000, 9-2000, 10-2000, 11-2000, 12-2000, 13-2000, 14-2000, 15-2000 (eff. Oct. 1, 2000) (MJN Exs. 102, 114, 136, 154, 383, 173, 190, 208, 220, 232, 239, 254, 263, 273, 279).

amended to read "one of their two meal periods." MJN Exs. 154, 383. Hence, the Wage Orders and section 512(a) (second sentence) operated together to expand the waiver right to all covered employees—as AB 60 was intended to do.

Finally, the IWC added a new premium pay provision as paragraph 11(B), (C), or (D) of each 2000 Order (except Order 14). The IWC added this to the rest break provisions as well (¶12(B) of each order). These provisions stated that if an employer "fails to provide" *either* a meal period *or* a rest break "in accordance with the applicable provisions of this Order," the employer shall pay an extra hour of pay. The substantive compliance standards for rest breaks ("authorize and permit"), like those for meal periods ("no employer shall employ"), were unchanged, and the word "provide" was used to refer generically to both. (Later, the Legislature used the same "provide" parlance in Labor Code section 226.7(b).)

The 2000 series of orders confirms that AB 60 did not, as Brinker contends, expand employees' right to waive the day's *first* meal period. As before, the first meal period may be waived only by (a) employees on shifts not exceeding six hours; (b) employees who agree (in writing) to an on-duty meal period; and (c) health care workers on lengthy shifts, who may waive (in writing) one of their two meal periods. *See* Transcript of Public Hearing of the IWC, at 712418218:20-22 (Nov. 8, 1999) (MJN Ex. 347) (for non-health care workers on shifts exceeding six hours, "there's only one way you can still waive that first meal period, and [that's] through an on-duty meal period"). The second meal period may only be waived by (a) health care workers on lengthy shifts who did not waive (in writing) their first meal period or agree (in writing) to an on-duty first meal period; and (b) workers on shifts between 10 and 12 hours who did not agree (in writing) to an on-duty first meal period.

The IWC rejected a proposal to allow workers on 12-hour shifts to waive their second meal period by agreeing to take it on-duty—even if they did not agree to an on-duty first meal period. Minutes of Public Hearing of the IWC (May 26, 2000), at 2 (MJN Ex. 350). Hence, under current law, such workers may waive the second meal period only in one situation—"[if] the nature of the work prevents [them] from being relieved of all duty." *See, e.g.*, Wage Order 5-2001, ¶11(A).

On June 30, 2000, the IWC issued the 2001 series of orders.[35] The only substantive change to the meal period language was in Order 5, which added a subparagraph expanding on-duty meals for certain residential care facility employees. Wage Order 5-2001, ¶11(E) (MJN Ex. 5). In its Statement as to the Basis, the IWC reconfirmed that "*[a]ny* employee who works more than six hours in a workday *must receive* a 30-minute meal period," which "may be waived" *only* for employees working "more than five hours but less than six hours in a day." Statement as to the Basis for 2000 Amendments (Jun. 30, 2000, eff. Oct. 1, 2000) at 20 (MJN Ex. 32) (emphasis added).

In September 2000, the Legislature enacted section 226.7, expressly incorporating the meal and rest period provisions of the 2001 Wage Orders into law.

B. The Meal Period Recording Requirement Confirms The Mandatory Compliance Standard and Allows Violations to be Tabulated from Employers' Records

The Wage Orders' meal period *recording* requirement further confirms that employers have an affirmative obligation to relieve workers

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[35] Wage Orders 1-2001, 2-2001, 3-2001, 4-2001, 5-2001, 6-2001, 7-2001, 8-2001, 9-2001, 10-2001, 11-2001, 12-2001, 13-2001, 14-2001, 15-2001 (MJN Exs. 103, 115, 137, 155, 5, 174, 191, 209, 221, 233, 241, 255, 264, 274, 280).

of duty for meal periods, and that workers may not waive them except in limited, specified circumstances. *See, e.g.*, Wage Order 5-2001, ¶7(A)(3) (MJN Ex. 5). The IWC instituted this requirement precisely because meal periods, unlike rest breaks, are mandatory and unwaivable (except in narrow circumstances and in writing). For enforcement purposes, an employer's violation of the Wage Orders' meal period requirements can be determined from employer's meal period records and no other evidence.

A review of the history of this requirement bears this out.

Until 1942, the IWC required employers to record only "the number of hours worked." *See, e.g.*, Wage Order 11A (Manufacturing Industry) (Jan. 30, 1923, eff. May 8, 1923), ¶7 (MJN Ex. 90); Wage Order 12A (Hotels & Restaurants) (Jun. 8, 1923, eff. Sept. 14, 1923), ¶6 (MJN Ex. 10). Most of the 1942/1943 "NS" orders required employers to keep more precise records, and to capture:

> Hours employed, which shall show *the beginning and ending of hours employed* by the employee each work day, which shall be recorded each day at the time the employee begins and ends employment.

Wage Order 5NS, ¶8(a)(7) (MJN Ex. 12) (emphasis added).[36] In turn, "hours employed" was defined as "all time during which…[a]n employee is suffered or *permitted to work*, whether or not required to do so." *Id.* ¶2(f)(2) (emphasis added). Because employers may not "permit" employees to work during meal periods, "the beginning and ending" of each meal period must be recorded. *See id.* ¶¶2(c), 3(d).

Sitting in executive session, the public housekeeping industry Wage Board acknowledged that the amended language requires employers to record meal periods. The amendment's purpose was to capture hours

[36] Slightly different wording was used in Orders 1NS (¶8(a)(7)) and 2NS (¶9(a)(7)) (MJN Exs. 92, 104).

actually worked (not merely those scheduled), including meal periods during which the employee actually stopped working. *See* Transcript, Executive Session of the Wage Board Appointed by the IWC for the Public Housekeeping Industry (Nov. 16, 1942), at 10:22-12:12, 13:6-17, 14:9-11 (MJN Ex. 305). "[It] is necessary when [the worker] comes to work, *when she leaves at noontime*, if she does, when she comes back to work, or if she is on a split shift, if she has a break, *that that time be recorded.* ....[E]very time the [employees] come to work they can write down in their own handwriting that they came to work at 8:00 or 7:00 or 8:10, *and they left for lunch at 12:10, for example*." *Id.* at 13:14-17, 14:9-11 (emphasis added).

An employer representative's comment that "I, for one, would have to have a policeman to see them do that" (*see id.* at 14:12-15:11) was ultimately rejected, and the language quoted above requiring daily, real-time recording was adopted (*see* Minutes of a Meeting of the IWC and Wage Order 5NS (Apr. 14, 1943) at 703439119 (MJN Ex. 302)).

The canning industry Order included an even more explicit meal period recording requirement:

> All starting and stopping times of hours worked, as defined under Section 2(f),...*including the beginning and ending of meal periods*,...shall be recorded at the time they occur and in the worker's presence....

Wage Order 3NS, ¶8(b) (MJN Ex. 127) (emphasis added).

Over time, the IWC made the requirement more and more definite., and since 1963, all of the Orders have explicitly required that "meal periods...shall also be recorded." *See, e.g.*, Wage Order 5-63, ¶7(a)(3) (MJN Ex. 16).[37]

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[37] The agricultural wage order did not expressly require meal period recording until 1976. *See* Order 14-65, ¶6; Order 14-76, ¶7(A)(3) (MJN Exs. 268, 270); Report of the IWC Wage Board for Order 14– Agricultural

The IWC has repeatedly acknowledged that the meal period recording requirement's prime purpose is to enable easy *enforcement.* This, in turn, shows that meal periods are mandatory, that employers must ensure that workers take them, and that employees may not choose to decline them.

For example, in 1966, the mercantile industry Wage Board refused to eliminate the recording requirement, noting that "without the recording of all in-and-out time, *including meal periods, the enforcement staff would be unable to investigate and enforce the provisions of the order.*" *See* Report of the IWC Wage Board for Order 7 – Mercantile Industry (Dec. 14-15, 1966), at 4-5 (MJN Ex. 330) (emphasis added). In other words, because meal periods are mandatory and may not be declined except by express written waiver, the employer's records will reveal all violations. Any missed (and therefore unrecorded) meal period equals a violation.

The public housekeeping industry Wage Board likewise refused to weaken the recording requirement, noting that "[t]he requirement of accurate records was a protection *for the employee.*" Notes of Secretary for the IWC Wage Board for Order 5 – Public Housekeeping Industry (Jan. 10 and 11, 1967) at 17 (MJN Ex. 333) (emphasis added). It further noted that the burden of keeping accurate records was the employer's, and that "proper supervision" can "eliminate inaccurate recording before the time cards reached the computers. If an employee persisted in inaccurate recording, disciplinary measures should be taken." *Id.* at 16-17.

Finally, in 1979, when the manufacturing industry Wage Board rejected yet another proposal to weaken the recording requirement, one Board member noted that "[i]f the time of that meal period were not recorded, we would have problems enforcing that section. ....Instead of

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Occupations (Dec. 19-20, 1966, Jan. 5, 1967), at 20-21 (MJN Ex. 331).

looking at time cards, we would have to talk to employees and ask them what time they usually got a meal period." Excerpt from Wage Board Report and Recommendations, 1978-1979, at 15 (MJN Ex. 339) (emphasis added). "Recording meal periods makes it possible to enforce meal periods *by looking at records*." *Id.* at 16 (emphasis added).

This is precisely how the DLSE used Brinker's own records when it investigated Brinker. 21PE5770-5910.

In sum, the meal period recording language, which has been unchanged since 1963, shows that meal periods are mandatory, may not be simply offered and declined, and any meal period not reflected in the employer's records is a noncompliant one. An employer's meal period violations therefore can be easily established and tabulated classwide. *See Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th, 1094, 1114 (employers' records contain "the evidence necessary to defend against plaintiffs' claims").

C. Rest Breaks

A closer look at the historical development of the Wage Orders' rest break language shows that: (1) "four hours or major fraction" triggers a rest break at the second, sixth, and so on hours; and (2) a rest break must be "authorized and permitted" in the work period preceding the first meal period. Since the earliest orders, the IWC intended to break up the work day with periodic rest breaks, meal periods, and rest breaks.

1. "Every Four Hours or Major Fraction Thereof" Triggers a Second rest Break After Six Hours Work, and an Additional Rest Break for Each Four Hours Thereafter

The Wage Orders' rest break language originates in Wage Order 18 from 1931: "[W]hen women and minors are required by the nature of their work to stand, a relief period shall be given every two (2) hours of not less

than ten (10) minutes." Wage Order 18, ¶12(a) (MJN Ex. 80).

The 1942 Orders continued this requirement, slightly modified:

> No employee whose work requires that she remain standing shall be required to work more than two and one-half (2½) hours consecutively without a rest period of ten (10) minutes. No wage deduction shall be made for such rest period.

See, e.g., Wage Orders 3NS, 5NS, ¶3(e) (MJN Exs. 127, 12).[38] Order 4NS, governing professional and clerical occupations, required rest periods not just for workers required to stand, but for *all* telephone, telegraph and teletype operators. Wage Order 4NS, ¶4(f) (MJN Ex. 142 at 703423116).

At the same time, the 1942 Orders continued to require compliance with Wage Order 18, which required a rest break "every two hours," not every 2½ hours. *See, e.g.*, Wage Order 4NS, ¶11. As a result, there was no real dispute that the early orders' plain language triggered a rest break "every two hours." *See* 7 Ops.Cal.Atty.Gen. 124, 125-126 (1946) (MJN Exs. 357, 379).

In 1947, the IWC substituted "four hours working time, or *majority fraction* thereof" instead of specifying two hours. *See, e.g.*, Wage Order 5R, ¶11 (MJN Ex. 13). As applied to rest periods, any time over two hours is the "majority fraction" of four. Hence, the change in wording did not substantively alter the language triggering a rest break every two hours.

At the time, the term "majority fraction" was well-established in IWC parlance to mean anything over half. For example, the IWC construed "'any fraction of fifteen minutes' as contained in Section 3(e) of Order No. 1NS...to mean the *majority fraction* thereof, or eight minutes or more." Minutes of a Meeting of the IWC (Jun. 14, 1943), at 703445138 (MJN Ex.

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[38] While some of the 1942 Orders included no explicit rest period requirement, each 1942 Order incorporated the sanitary provisions of Order 18. *See, e.g.*, Wage Orders 1-NS, 2-NS ¶14 (MJN Exs. 92, 104).

303) (emphasis added); *see also* Interpretation of Order No. 1NS (Mar. 11, 1944) ("Section 3(e), 'Any fraction of fifteen minutes' shall be interpreted to mean the majority fraction thereof, or 8 minutes or more.") (MJN Ex. 356); Action taken by IWC (Sept. 11, 1943), at 3 (same) (MJN Ex. 357#6).

The term "majority fraction" had been used since 1931 to fix the number of required toilets and water faucets:

> The number of water-closets to be *provided* shall be not less than one for every twenty (20) women and female minors *or majority fraction thereof*....
>
> At least twenty (20) lineal inches of washing space with one (1) water supplied faucet shall be provided for each thirty (30) women or female minors employed, *or majority fraction thereof*....

Wage Order 18 (1931), ¶¶4(i), 6 (MJN Ex. 80) (emphasis added). [39] A "majority fraction" of 20 employees is any over 10, and of 30 any over 15.

The 1947 orders, which introduced the term "majority fraction" for rest breaks, also used that term to describe the number of toilets. *See, e.g.*, Wage Order 5R, ¶14 (MJN Ex. 13) ("one toilet for every twenty-five (25) female employees or majority fraction thereof"). In 1952, the IWC changed "majority fraction" to "major fraction" for rest periods, but not for toilets. *See, e.g.*, Wage Order 5-52, ¶¶12, 15 (MJN Ex. 14). In 1957, the toilets language was changed to "major fraction" as well. *See, e.g.*, Wage Order 5-57, ¶¶12, 15 (MJN Ex. 15).

The available reports surrounding the 1952 and 1957 amendments do not indicate any substantive reason for this change.[40] As previously

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[39] The word "provided" in the toilets provision is telling. Certainly, the IWC did not intend to allow employers to merely *offer* to install toilets.

[40] *See* Report of Chairman of Wage Board – Manufacturing Industry (Nov. 5, 1951) (MJN Ex. 314); Recommendations of Industry Members of Manufacturing Wage Board (approx. Nov. 1951) (MJN Ex. 315); IWC

discussed, it was merely a grammatical correction. OBM108. Indeed, an IWC document tracking amendments to the rest break language did not even mention the change from "majority" to "major." History of Basic Provisions in a Representative Order of the IWC...Rest Periods, 801426138 (MJN Ex. 377#5). The fact that the toilets language was also changed belies the Court of Appeal's conclusion (and Brinker's argument) that the amendment had something to do with the 3½-hour exception added to the rest break provision in 1952. OBM108 (citing Slip op. 27); ABM94.

The "major fraction" language has not been amended since 1952. For fifty years, it has been consistently interpreted in the same way as "majority fraction": "A *major fraction* of four hours, for purposes of determining whether a rest period is due, is more than half, or anything over two hours." Research: Rest Periods "Major Fraction" (Jan. 1984), 801426144 (MJN Ex. 377#8) (emphasis added); *see also* Research: Rest Periods (July 19, 1990), 801426112 (MJN Ex. 377#2) ("As soon as an employee works two hrs & one min (*major fraction thereof/more than ½*) the [employee] is entitled to 10 net minutes break." (emphasis added)); DLSE Op.Ltr. 1999.02.16 (MJN Ex. 37); DLSE Manual §45.3.1 (June 2002) (MJN Ex. 49).

Accordingly, the rest break language triggers a break at the second, sixth, and tenth hours, and so on, depending on the length of the shift. An eight-hour shift triggers two rest breaks totaling twenty minutes (not one, as

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Summary of Wage Board Recommendations (Dec. 12, 1951) (MJN Ex. 316); IWC Transcript of Proceedings (Feb. 1-2, 1952) (MJN Ex. 317); Minutes of a Meeting of the IWC (Mar. 1, 1952) (MJN Ex. 318); Minutes of a Meeting of the IWC (Apr. 18-19, 1952) (MJN Ex. 319); Summary of Actions Taken by the Wage Board for Order No. 1-52 (Oct. 1956) (MJN Ex. 320); Report of the Wage Board for Order No. 1-52 (Oct. 1956) (MJN Ex. 321); Record of Proceedings – Wage Board for Order 1 (Oct. 4, 1956) (MJN Ex. 322); Summary of Changes in Existing IWC Orders Under Consideration by the Commission (MJN Ex. 323).

the *Brinker* panel effectively held), and a twelve-hour shift triggers three totaling thirty minutes (not two). *See, e.g.*, Meal and Rest Periods: On 12-Hour Shifts, 800410149 (MJN Ex. 376#22) ("three paid rest periods of 10 minutes each are required on a 12-hour shift"); IWC memo, "Exemptions," 800410150 (MJN Ex. 376#23) ("[e]mployees on a 10-hour shift [who] work 1½ or 2 hours overtime" accrue a "third required rest period"); Record of Proceedings – Wage Board for Order 1, Los Angeles, Oct. 1 and 2, 1956 (Oct. 4, 1956) at 2-3 (MJN Ex. 322) ("major fraction" means "a 6½ hour day" triggers "two 10 minute rest periods" (comments of Secretary Braese)); Interpretive Bulletin No. 89-1 (Jun. 13, 1989) at 796410106 (MJN Ex. 373) ("in a 12 hour schedule 3 rest periods must be provided").

2. The First Rest Break Must Be Permitted During the Work Period Preceding the First Meal

"[T]he Commission's intent in establishing these requirements was to give employees periodic breaks in the workday." IWC Letter from Leslie M. McNeil to Cal B. Watkins (Aug. 15, 1983), 801426129 (MJN Ex. 377#4).[41] Accordingly, "whenever possible and practicable, rest periods should be in approximately the middle of the work period." Division of Industrial Welfare Enforcement Manual, 801426101 (April 1959) (MJN Ex. 377#1); Letter from Secretary of the IWC to Ms. Victoria Karnes (Jul. 21, 1978) (MJN Ex. 360) (Order 4-76 "requir[ed] a rest period of ten minutes, *within* every four-hour work period"—not after it); Highlights of Labor Standards in Agriculture from IWC Order 14-80 (MJN Ex. 362) (Order 14-80 required an "(unpaid) meal period *after* 5 hours of work" but "a paid rest period *for every* 4 hours worked" (emphasis added)).

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[41] *Accord*: Meal and Rest Periods: On 12-Hour Shifts, 800410149 (MJN Ex. 376#22) ("It was the intent of the Commission to give employees periodic breaks in the workday, and to permit rest periods in addition to meal periods." (underscore original)).

In particular, rest periods should be spaced around the meal periods—including one during the work period before the first meal period:

> [T]hree paid rest periods of 10 minutes each are required on a 12-hour shift. Rest periods should be scheduled *in the middle of each work period*, that is, *between the beginning of work and the next meal period.*

Meal and Rest Periods: On 12-Hour Shifts, 800410149 (MJN Ex. 376#22) (dated approx. early 1980s) (emphasis added); *see* OBM110-11 (quoting DLSE Op.Ltr. 2001.09.17 (MJN Ex. 40)).[42]

This is because "the general health and welfare of employees requires periods of rest during long stretches of physical and/or mental exertion." Statement of Findings, *supra*, at 42, ¶12 (MJN Ex. 337). To be meaningful, rest periods should be "properly spaced" through the workday. DIW Manual, *supra*, 801426101 (MJN Ex. 377#1).

Brinker may point out language suggesting that "it would be acceptable, if mutually agreed to by the employer and employee," and if "not practical to take them in the middle of each work period," "to combine the two 10 minute rest periods into one rest period of 20 minutes net rest time." IWC Letter, *supra*, 801426120 (MJN Ex. 377#4); Meal and Rest Periods: On 12-Hour Shifts, 800410149 (MJN Ex. 376#22).[43] *Contra* DLSE Op.Ltr 2001.09.17 at 4 (MJN Ex.40) ("A combined 20 minute rest period is never allowed under ordinary circumstances. [T]he first rest break must precede the meal period and the second break must follow the meal

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[42] *See* Transcript of Proceedings of Wage Board in the Canning and Preserving Industries, 703414115:12-14 (Apr. 10, 1942) (MJN Ex. 292) (production improves on shifts of "7½ hours work and a half hour lunch with the rest periods in between").

[43] *Accord*: Record of Proceedings–Wage Board for Order 1, Los Angeles, Oct. 1 and 2, 1956 (Oct. 4, 1956) at 2-3 (MJN Ex. 322); DIW Manual, *supra*, 801426101 (MJN Ex. 377#1) (same).

period."). That is not an issue in this case because Brinker never authorizes 20-minute rest periods if the first one was skipped. All rest periods in Brinker's restaurants are ten minutes.[44]

As discussed in plaintiffs' opening brief, Brinker's "early lunching" schedule does not authorize or permit a rest break in the work period preceding the first meal period. OBM110. Instead, it authorizes and permits, at most, a single ten-minute afternoon rest period—thereby shortening the rest time workers should be getting. Whether this common policy violates the law, as argued above, is a question common to the class.

III. CONCLUSION

Plaintiffs' interpretation of the meal and rest period requirements of the IWC's wage orders is fully consistent with the way in which the IWC itself has historically understood those wage orders to operate. And this is a history going back to the second decade of the 20th century, with all of the current substantive requirements in place for over half a century. Brinker and its *amici* now seek to undo these fundamental protections. The irony is that this employers' crusade to erode these protections was inspired by actions of the IWC and the Legislature to create a new mechanism for workers to enforce these rights. The creation of the extra hour of pay remedy, intended as a means of encouraging employer compliance, has instead spurred non-compliant employers and their allies to launch an all-out attack on the substantive meal and rest period requirements.

But Brinker's claims about the meaning of these requirements are belied by what we have unearthed from the IWC's archives. Brinker's claims fail in the face of the clear and consistent intent of the IWC, and of the Legislature, in enacting a premium pay requirement that is triggered by

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[44] Every mention of Brinker's policy refers to ten-minute breaks, *never* twenty-minute ones. *E.g.*, 19PE5172, 21PE5913:1-11.

non-compliance with the IWC's meal or rest period requirements. For these reasons, the decision below should be reversed.

Dated: August 19, 2009

Respectfully submitted,

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By 
Miles E. Locker

CERTIFICATION OF WORD COUNT
(Cal. Rules of Court, Rule 8.204)

The text of this Amicus Curiae Brief In Support of Real Parties In Interest consists of 14,892 words as counted by the MS Word processing program used to generate this document.

LOCKER FOLBERG LLP

Dated: August 19, 2009

Miles E. Locker

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:

LOCKER FOLBERG LLP, 235 Montgomery Street, Suite 835, San Francisco, CA 94104.

On August 19, 2009, I served the foregoing document(s) described as:

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF; [PROPOSED] AMICUS CURIAE BRIEF IN SUPPORT OF REAL PARTIES IN INTEREST

on the person(s) listed below by placing said copy with postage thereon fully prepaid, in the United States mailbox at San Francisco, California, addressed as follows:

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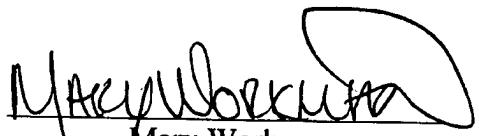
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 19, 2009 at San Francisco, California.



Mary Workman