Pacific Employers
Management Advisor
48 Years of Excellence!
May 2012

What's News!

State Supreme Court Brinker Decision

The California Supreme Court finally released its long awaited decision in *Brinker Restaurant Corp. v. Superior Court.*

The case, originally filed as *Hohnbaum v. Brinker Restaurant Corporation,* pitted five employees against restaurant giant Brinker International, the parent company of Chili's Restaurants and an empire of more than 1,500 restaurants. The complaint, later certified as a class action suit, potentially included up to 63,000 current and former employees.

At issue in the case was whether state law directing employers to "provide" a meal break meant simply that they must make a break available and give workers the right to pass on it if they chose to. Or, as the plaintiffs contended and the courts supported, did the language mean that employers had to ensure their workers took 30-minute uninterrupted breaks, and face penalties if they didn't? More than a thousand separate class action suits were filed in response to the ambiguous nature of the meal-and-rest break language, representing a dramatic 30 to 40 percent of all class action suits filed.

Employers worried throughout the long course of the litigation that requiring the enforcement of timed rest breaks and meal periods was an impractical burden that many found simply impossible to meet. Many employees found themselves equally concerned, including restaurant workers who faced the prospect of having to abandon tables and forgo tips while their restaurants were at their busiest, or nurses who might have had to leave to take breaks midway into important patient procedures.

The most critical part of the decision is that employers do not have to ensure employees take their meal breaks. The state Supreme Court also provided some additional flexibility to employers regarding timing issues.

The unanimous ruling is largely a win for California employers, but is not without potential pitfalls. Employers with vague policies may expose themselves to increased liability, and the case makes clear that meal and rest break cases are still subject to class action lawsuits.

The *Brinker* decision leaves some meal and rest break questions unresolved. Most important to employers is that there is no change in the difficult area of "on-duty meal periods."

Employers will need to examine their meal and rest policies and strengthen their timekeeping practices. [PE]

Newest Employee Info Poster Enclosed!

President's Report
~Dave Miller~

NLRB Poster Invalidated!

On April 17, 2012, the U.S. Court of Appeals for the District of Columbia issued an injunction preventing the National Labor Relations Board ("NLRB") from enforcing its employee notice posting rule, which had been scheduled to become enforceable on April 30, 2012. *Nat'l Ass'n of Mfrs. v. NLRB*

In issuing the injunction, the Circuit Court noted conflicting lower court decisions and held that "[t]he uncertainty about enforcement counsels further in favor of temporarily preserving the status quo while this court resolves all of the issues on the merits."

"... employers are not required to post an Employee Rights Notice by April 30 ..."

This ruling means that employers are not required to post an employee rights notice by April 30, 2012 informing employees of their rights to, among other things, organize into unions, engage in collective bargaining, discuss wages, benefits, and working conditions or to refrain from any of these activities.

The injunction preventing enforcement of the NLRB's notice posting rule comes just days after a federal district court in South Carolina held the NLRB lacked authority to issue the rule. *Chamber of Commerce v. NLRB*

The South Carolina district court decision, however, was at odds with the underlying decision of the D.C. district court that upheld the NLRB's general authority to require the notice posting at issue, and which is being considered by the Circuit Court in D.C. *Nat'l Ass'n of Mfrs. v. NLRB*

Briefing of the D.C. Circuit appeal is expected to be completed by June 29, 2012 and oral arguments on the NLRB's rule are scheduled for September 2012.

No final decision in the appeal is expected until late in the year. Pacific Employers will keep you informed of all developments. Employers should stay tuned for more developments in the coming months. [PE]

"Good judgment comes from experience, and a lot of that comes from bad judgment" ..... Will Rogers

Recent Developments

DLSE Further Modifies Template!

On April 12, 2012, the Division of Labor Standards Enforcement (DLSE) substantially revised its template notice form ("Notice") and once again amended its FAQs regarding an employer's obligations under California's Wage Theft Prevention Act (WTPA).

Basically, the WTPA requires an employer to provide a Notice to an employee at the time of hire that identifies the employer, the employee's wage rates, the pay day schedule, and workers' compensation coverage information. The rather straightforward requirements of the statute became more complex when the DLSE issued its original template Notice and FAQs. Comments from the employer community have resulted in the FAQs being updated once previously, and have now resulted in a revised template Notice and a second revised set of FAQs.

The amount of information required in the revised template Notice form has been reduced substantially:

- The introductory paragraph and all but one of the concluding paragraphs regarding the scope and timing of the obligation to give the Notice which appeared in the original template Notice have been deleted.
- The description of the employer, now referred to as the "Hiring Employer," has been simplified.
- The prior need to list "any other business or entity [used] to hire employees or administer wages or benefits" has been simplified and reduced in scope by limiting the information to that needed to identify a "staffing agency."
- The obligation to identify whether an employee is employed pursuant to a written or oral agreement has been replaced by simpler inquiries as to whether and to what extent all wage rates are contained in a written agreement.
- The "Acknowledgement of Receipt" section has been made optional and has been simplified. The confusing references to the dates on which the Notice was "provided to employee & signed by employer representative" and was "received by employee & signed by employee" have been replaced with an undifferentiated reference to "date."

The changes in the Notice are reflected in the modification of the responses to FAQs 10, 19-21, and 23, and the addition of five new FAQs and responses, 26 through 30. The FAQ's and new notice can be found at:

http://www.dir.ca.gov/dlse/FAQs-NoticeToEmployee.html [PE]

9th Circuit Limits Computer Fraud

In *United States v. Nosal*, the Ninth Circuit held that the Computer Fraud and Abuse Act does not criminalize the conduct of employees who violate their employer's computer usage restrictions while accessing their employer's computer.

> "... NO LONGER BE SUBJECT TO FEDERAL CRIMINAL PROSECUTION, ..."

This means that employers in the Ninth Circuit will no longer be able to seek federal criminal prosecution of employees who have violated their computer usage policies by misusing company information that the employees were entitled to access.

Instead, according to the Ninth Circuit, the CFAA only prohibits employees from accessing portions of their employer's computer systems that the employee does not have authorization to access. In other words, the CFAA should be read to only govern employee access to their employer's computer information, not employee use of their employer's computer information that they are otherwise entitled to access. In the court's view, broadly speaking, the CFAA should be focused on computer "hacking" violations, not on incidental employee computer usage for non-work purposes.

The *Nosal* decision puts the Ninth Circuit at odds with several other circuits that interpret the CFAA broadly to cover violations of corporate computer use restrictions, including the Eleventh, Fifth, and Seventh. This increases the likelihood that the proper interpretation of the CFAA could eventually be determined by the Supreme Court. [PE]

Attendance Policy Does Not Violate ADA

The Ninth Circuit held that where attendance is an essential function of the job, *Samper v. Providence St. Vincent*, an employer's enforcement of its *"attendance points"* policy as to a disabled employee does not constitute a failure to reasonably accommodate under the ADA.

In this particular case, the employee was a neonatal intensive care nurse who had an abominable attendance record due to a multitude of stated reasons, ranging from fibromyalgia to personal life issues. Even though she worked part-time and only a couple of shifts per week, she was continually absent. She also took a variety of leaves of absence, all accommodated by her employer.

> "THE EMPLOYER QUITE REASONABLY TRIED TO WORK WITH THE EMPLOYEE ..."

The employer had an attendance policy that allowed up to five unplanned absences in a rolling 12 month period. This employee regularly exceeded the limit and had a history of performance discipline for her unexcused absences.

The employer quite reasonably tried to work with the employee to save her, allowed several exceptions from the policy for her, and gave her numerous chances to improve her attendance and escape termination.

> "... EVEN ABSENT FOR A PLANNED MEETING TO DISCUSS HER ATTENDANCE."

The employee nonetheless did not improve her attendance and admittedly continued to exceed the allowed unplanned absences under the attendance policy and was even absent for a planned meeting to discuss her attendance.

She requested that her employer except her from the attendance policy and essentially allow her uncapped unplanned absences, apparently as a "reasonable accommodation" for some sort of disability. The employer did not agree. She was ultimately terminated. Not to be deterred, she filed a lawsuit claiming the employer violated her ADA rights by not excepting her from the attendance policy as a reasonable accommodation under the ADA.

In the lawsuit, the employer did not dispute that the employee was disabled. The dispute focused instead on whether the employer had a duty to except the employee from the attendance policy as a reasonable accommodation. The trial court said no and granted the employer summary judgment. The employee appealed to the Ninth Circuit, which agreed with the trial court. The Ninth Circuit held that the employer had adequately established that regular attendance is an essential function of the position of a neonatal ICU nurse and that an employer is not required by the ADA to relieve a disabled employee from essential functions as an accommodation. [PE]

Human Resources Question with Candice Weaver

The Month's Best Question

Meal Period Policy

Q: ***"In light of the Brinker decision, do you recommend any particular terminology in a written policy?"***

A: The Brinker Decision does not change the law. However, it will change the Labor Commissioner's interpretation of the law in a substantial way.

1. You are required by law to "provide" a meal period and the employee is free to do what they want including ignoring the provided meal period and continue working as long as the employer did not exert "coercion against the taking of, creating incentives to forego, or otherwise encouraging the skipping of legally mandated breaks."

2. You are required by law to "provide" a meal period after no more than 5 hours worked. If a second 5 hour period is worked, you are to provide another opportunity for a meal period. However, if the employee takes their meal period before the first 5 hours is up, the second meal period is not due until a total of 10 hours is worked.

Employers should remind employees that ..

"The Company provides a 30 minute meal period, to begin no later than the end of the fifth hour, for all employees who work more than 5 hours. Employees are free to choose how they spend their meal period. Employees must not perform off-the-clock work and should record their time at work accurately."

and,

"Employees who have voluntarily signed an on duty meal period agreement and are engaged in work that has been determined by the employer or the employee, by its nature, prevents you from being relieved of all duty, an on-the-job paid meal period will be provided to you by The Company. Any such written agreement may be revoked, in writing, at any time."

While *Brinker* is a positive for employers in that it has provided much needed guidance, it has yet to be determined how the Labor Commissioners office will interpret the California Supreme Court's ruling and how they will instruct their staff on enforcement. [PE]

Sexual Harassment Prevention Training

Visalia Chamber of Commerce and Pacific Employers, will jointly host a state mandated Supervisors' Sexual Harassment Prevention Training Seminar & Workshop with a continental breakfast on July 25th, registration at 7:30am — Seminar 8:00 to 10:00am, at the Lamp Liter, Visalia.

Quarterly Seminar also on 10-24-12

RSVP Visalia Chamber - 734-5876

PE & Chamber Members $35 - Non-members $45

Certificate – Forms – Guides – Full Breakfast

No-Cost Employment Seminars

The Tulare-Kings Builders Exchange and Pacific Employers host this Seminar Series at the Builders Exchange at 1223 S. Lover's Lane at Tulare Avenue, Visalia, CA. RSVP to Pacific Employers at 733-4256.

These mid-morning seminars include refreshments and handouts.

2012 Topic Schedule

♦ **Family Leave - Thursday, May 17th, 2012, 10 - 11:30am --** Federal & California Family Medical Leave, California's Pregnancy Leave, Disability Leave, Sick Leave, Workers' Compensation, etc.; Making sense of them.

♦ **Wage & Hour and Exempt Status - Thursday, June 21st, 2012, 10 - 11:30am --** Overtime, wage considerations and exemptions.

♦ **Hiring & Maintaining "At-Will" - Thursday, July 19th, 2012, 10 - 11:30am --** Planning to hire? Putting to work? We discuss maintaining "At-Will" to protect you from the "For-Cause" Trap!

There is No Seminar in August

♦ **Forms & Posters - Thursday, September 20th, 2012, 10 - 11:30am -- A**s well as Contracts, Signs, Handouts, Fliers - Just what paperwork does an Employer need?

♦ **Guest Speaker Seminar - Thursday, October 18th, 2012, 10 - 11:30am --** Annually we bring you a speaker for a timely discussion of labor relations, HR and safety issues of interest to the employer.

♦ **Discipline & Termination - Thursday, November 15th, 2012, 10 - 11:30am --** The steps to take before termination. Managing a progressive correction, punishment and termination program.

There is No Seminar in December

Dinner for 2 at the *Vintage Press!*

That's right! When a business that you recommend joins Pacific Employers, we treat you to dinner for two at the *Vintage Press*.

Call 733-4256 or 1-800-331-2592.

Newest Employee Info Poster Enclosed!

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Taking it to the Streets, DOL Style

Department of Labor Secretary *Hilda Solis* has approved a series of motivational posters for DOL employees that elevate Solis from lifelong do-nothing political appointee to transformational leader in the war to stop the capitalist re-enslavement of all mankind.

The poster is raising more than a few eyebrows in Washington for what seems a fairly inelegant attempt to radicalize a government agency that should at least at times appear even-handed. In a letter to Solis complaining about the posters, **Rep. Joe Walsh, R-IL** said some department employees have complained to him about the posters' bald-faced politicizing of their work and the veiled call to civil disobedience.

The first poster features a backlit close-up of Solis marching arm in arm with **Al Sharpton, Jesse Jackson** and other leftwing luminaries at a demonstration in Atlanta just last month. The poster also carries a personal message from Solis that further confuses the mission of the DOL with that of any one of a hundred other union front organizations.

"Whether we take to the streets or simply do our work with integrity and commitment here at the U.S. Department of Labor . . . we are all marching towards the same goals: safer workplaces, fair pay, dignity on the job, secure retirement and opportunities to make a better life. I believe in the power of collective action." [PE]

Right to Modify Renders It Unenforceable

A California court has held that an employment arbitration agreement was unenforceable based on a provision in the agreement giving the employer the right to modify or revoke the agreement on 30 days' notice to the employee. The court held that the termination right rendered the agreement illusory and lacking sufficient "mutual" agreement to arbitrate. In *Peleg v. Neiman Marcus*, the employer's arbitration agreement provided that Neiman Marcus could modify or revoke the agreement on 30 days' notice to employees and that claims not "filed" with AAA by the end of 30 day period would not be subject to the agreement. Thus, the agreement did place some limit on Neiman Marcus' ability to selectively avoid arbitration of claims.

Nonetheless, the court held that the notice provision was insufficient to save the agreement from being illusory. The court held that a provision allowing the employer to modify/revoke the agreement must make clear that it applies prospectively only, and does not apply to claims that are "accrued" and/or "known" prior to the date of the change. In the case of Neiman Marcus' agreement, the requirement that claims be "filed" within 30 days of notice of the change in order to be covered by the agreement to arbitrate impermissibly shortened the statute of limitations applicable to pursuing claims.

Neiman Marcus' arbitration agreement had a provision in it stating that it was governed by Texas law. The California court applied the choice of law provision (and Texas law) in holding that the modification provision rendered the agreement illusory and unenforceable. However, the court held that application of California law would essentially lead to the same result. The only difference is that under California law, if a modification provision is silent on whether it applies prospectively only, the court could "imply" or read into it that it operates prospectively only and thereby avoid a finding that it renders the agreement illusory.

Many employers' arbitration agreements contain clauses expressly giving the employer the right to make changes to the agreement, or to revoke it entirely. In order to avoid a finding that this clause renders the agreement illusory and unenforceable, employers should review their clauses and revise, as appropriate, to make clear that any changes will be made with reasonable notice to employees, will operate prospectively only, and will not apply to claims arising prior to the date of the change. [PE]