

Answers to Commonly-Asked Questions Regarding *Brinker v. Superior Court*

Meal Periods

- Q: Do we have to make sure employees take their meal periods?**
A: No. Employers must provide a genuine *opportunity* for employees to take each meal period, but employers are not obligated to ensure that employees take those meal periods.
- Q: How long must the meal period be?**
A: Each meal period must be at least 30 (uninterrupted) minutes long. The meal period is unpaid time. Therefore, employers must keep records regarding the start and end time of all meal periods.
- Q: How many meal periods are employees entitled to take?**
A: The number of meal periods an employee is entitled to take depends on the amount of hours the employee works. Employees who work at least *five hours* but less than *ten hours* are entitled to *one* meal period. Employees who work *ten hours* (or more) are entitled to *two* meal periods.
- Q: Some of our employees like to take one hour for lunch. Is that okay?**
A: Yes, the meal period may be longer than 30 minutes. (Note that if an employer *requires* an employee to take an unpaid meal period that is longer than one hour, the employer may be owe the employee a “split shift” premium, depending the employee’s hourly wage.)
- Q: When do meal periods have to be taken?**
A: The first meal period must start “after no more than five hours” of work. Therefore, if an employee starts work at 9:00 a.m., the employee must start the first meal period by the time the clock strikes 2:00 p.m. If a second meal period is owed, the second meal period must start after no more than 10 hours of work.
- Q: The nature of our business requires that some employees take their meal periods towards the beginning of their shift. Is that okay?**
A: Yes. *Brinker* makes clear that the only timing requirements for meal periods are that the first one take place after no more than five hours of work, and the second one take place after no more than ten hours of work.
- Q: If an employee takes their meal period early in their shift, do we have to provide a *second* meal period five hours after end of that first meal period even though the employee has not yet worked ten hours?**

Brinker: Answers to Commonly-Asked Questions

A: No. The *Brinker* court clearly rejected this so-called “rolling five hour” meal period theory. There is no obligation to provide a second meal period if the employee has worked less than ten hours.

Q: Is there a particular order in which meal and rest periods must be taken? For example, must the first rest period take place before the first meal period?

A: The *Brinker* court made it clear that the Wage Orders only require that a rest period be in the middle of a four-hour work period “insofar as practical.” The Court found employers must make a “good faith effort” to allow rest breaks in the middle of each four-hour work period but noted that employers “may deviate from that preferred course where practical considerations render it infeasible.” The Court noted that length of shifts could be one such practical consideration that could render it infeasible to provide rest breaks at the two-hour mark or rest breaks on either side of the meal period. The Court did note that, for an eight-hour shift, “‘as a general matter,’ one rest break should fall on either side of the meal period.”

Q: When do we have to pay a meal period “premium” (penalty)?

A: Premium payments must be paid if the employer fails to make a timely, uninterrupted 30-minute meal period “available” to the employee – either through scheduling practices or by requesting or “pressuring” the employee to work during that time. If the employer does not request or pressure the employee to work through the meal period, but knows or has reason to know the employee has done so, the employer must pay the employee for the time worked, but the employer is not liable for a meal period penalty. Below are four different scenarios that capture what could happen and how to compensate employees:

	Employee’s Action	Employer’s Conduct	Compensation Due
1	Employee works through some or all of a meal period.	Employer does not know and has no reason to know employee has worked through meal period.	Employer is not obligated to pay anything for the time employee works during the meal period. (Note: employer may not escape liability by taking a head-in-the-sand approach.)
2	Employee works through some or all of a meal period.	Employer knows or has reason to know employee has done so, but employer did not request the work or pressure the employee to work through the	Employer must pay employee for the time employee worked, but employer is not liable for the meal period

Brinker: Answers to Commonly-Asked Questions

		meal period.	penalty. (Note that if the time worked during the meal period puts the employee into daily or weekly overtime, the overtime hours must be compensated at the appropriate overtime rate.)
3	Employee works through some or all of a meal period.	Employer knows or has reason to know employee has done so because employer requested the work or “pressured” the employee into working through the meal period.	Employer must pay employee both for the time the employee worked, PLUS the meal period penalty. (Note that if the time worked during the meal period puts the employee into daily or weekly overtime, the overtime hours must be compensated at the appropriate overtime rate.)
4	Employee works through some or all of a meal period.	Employer has not made it possible for employee to take a timely, uninterrupted meal period.	Employer must pay employee both for the time the employee worked, PLUS the meal period penalty. (Note that if the time worked during the meal period puts the employee into daily or weekly overtime, the overtime hours must be compensated at the appropriate overtime rate.)

Q: Can employees waive their entitlement to a meal period?

A: In very limited circumstances, yes. The *Brinker* decision did not change the rules pertaining to waiver of meal periods. Waiver of the first meal period is allowed if the employee does not work more than six hours, and both the employer and employee expressly agree to waive the meal period. Waiver of the second meal period is allowed only if the employee does not work more than 12 hours, the employer and employee expressly agree to the waiver, and the first meal period has not been waived. Time spent working during a waived meal period must still be compensated.

Brinker: Answers to Commonly-Asked Questions

Rest Periods

Q: Do we have to make sure employees take their rest periods?

A: No. *Brinker* did not change established law on this point. Employers are only obligated to “authorize and permit” rest periods.

Q: How many rest periods are employees entitled to take?

A: The number of rest periods an employee is entitled to take depends on the amount of hours the employee works. Below is the fomula for determining the number of rest breaks owed:

Hours Worked	Rest Periods
0 to less-than-3.5 hours	0
3.5 to 6 hours	1
6+ to 10 hours	2
10+ to 14 hours	3

Q: How long must each rest period be?

A: Each rest period must be ten minutes. *Brinker* did not change this.

Q: Do we have to pay for rest periods?

A: Yes, rest periods are paid breaks. *Brinker* did not change this.

Q: Do we have to keep records regarding the start and end times for rest periods?

A: No. Because rest periods are considered compensable work time, employers do not need to keep records of the time the rest break starts and ends.

Q: We have an employee who spends small amounts of time during the day on personal matters, but none of those activities in-and-of-itself is ten minutes long. When we add that time together, though, it amounts to at least ten minutes. Can we consider those combined activities one 10-minute rest break?

A: No. To count as a genuine rest period, the rest period must be an uninterrupted 10-minute period. *Brinker* did not change this.

Q: Can multiple 10-minute rest periods be combined to create one longer rest period that would still count as separate rest periods? For example, if an employee is entitled to two rest periods, is it okay if we provide one 20-minute rest period instead?

Brinker: Answers to Commonly-Asked Questions

A: Probably not. Although the Court did not weigh in on this issue, it is likely that two back-to-back ten-minute rest periods could be construed as one (long) rest period because, among other reasons, there is no law that precludes an employer from providing rest periods that are longer than ten minutes.

Q: Our written policy regarding meal and rest periods is not entirely consistent with the *Brinker* court’s interpretation of meal and rest period laws. Is this a problem?

A: Yes. The *Brinker* decision makes clear that facially unlawful meal and rest period policies are ripe for class action treatment. To avoid widespread liability, employers should take the time to examine their meal and rest period policies and ensure they are consistent with *Brinker*.

There are a number of other measures employers should have in place to reduce their exposure to meal and rest period claims. For advice on what additional measures should be taken, or to discuss any of the issues raised in this article, please contact Lisa Lawson at Pennington Lawson LLP: lisalawson@penningtonlawson.com.

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