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Brinker: The "Werdegar Presumption" Five Years Later

By Michael Singer

Five years ago, the California Supreme Court issued its seminal decision in *Brinker v Superior Court*,[1] defining an employer's substantive obligations in providing compliant meal periods. One major takeaway from the opinion is that employees have the option of declining to take a meal period. The consequence of this choice is to render ambiguous an employer's time records showing a missed, late, or short meal period that might give rise to a violation of Labor Code § 226.7, entitling the employee to an hour's premium pay. If the employee waived a compliant meal period, no liability results.

The author of *Brinker*, Associate Justice Kathryn Mickle Werdegar, wrote a separate concurring opinion discussing the procedural aspects of proof associated with meal period time records. Justice Werdegar made it clear at the outset that her concurrence did not constitute precedent: "I write separately to emphasize what our opinion does not say."[2] In the context of employers' reporting obligations with respect to maintenance of accurate records, she wrote: "If an employer's records show no meal period for a given shift over five hours, a rebuttable presumption arises that the employee was not relieved of duty and no meal period was provided."[3] She underscored this point by adding that employees need not disprove they waived the meal period in order to establish a violation.[4]

The unremarkable proposition stated by Justice Werdegar that an employer's records may establish a prima facie basis to show potential violations as to a group of employees for purposes of class action procedure has been subsequently adopted by courts of appeal.[5]

Justice Werdegar's presumption has also been mentioned favorably in numerous other opinions.[6]

Some practitioners are suggesting the language in *Brinker* establishing a presumption of accuracy should be entirely rejected. In so doing, they essentially ask that the records an employer is required by law to maintain accurately be subject to a presumption of *inaccuracy*. They argue that the same records employers use for payroll, taxes, worker's compensation premiums, and other reporting requirements have no bearing whatsoever when it comes to meeting an employee's prima facie burden to establish class certification requirements or labor code violations.

Duran v. U.S. Bank National Assn.,[7] a class case not involving meal and rest period proof issues, is cited to support this movement. *Duran* discussed the federal burden-shifting rules set forth in *Anderson v. Mt. Clemens Pottery Co.*[8] applicable to cases in which an employer fails completely to maintain records of time worked. In that instance, an employee may establish violations as a matter of just and reasonable inference, shifting the burden of proof to the employer to disprove the evidence. *Duran's* citation to *Anderson* for the proposition that an employee must first establish *liability* before the *Anderson* burden-shifting procedure is invoked is now in question, with the issuance of the *Tyson Foods, Inc. v. Bouaphakeo*. The U.S. Supreme Court found in *Tyson Foods* that if the employer's failure to maintain legally-required time records prevents plaintiffs from presenting precise evidence of the fact and amount of each class member's damages, plaintiffs have a reduced burden to establish *liability and damages* through statistical sampling, surveys, representative testimony, and similar evidence—as long as that evidence would be sufficient to establish plaintiffs' claims through just and reasonable inference.[10]

Cases involving employer "rounding" of time entries are also instructive as to the role of an employer's records in proving wage claims. Rounding systems are permitted in California, provided they are neutral on their face and do not result over time in employees failing to be paid for all time actually worked.[11] In *Silva v. See's Candy Shops, Inc.*[12] (*See's Candy II*), the Fourth District Court of Appeal found that mathematical timekeeping data showing the system was neutral over time or favored the employee was sufficient to meet the employer's summary judgment burden of proof. The burden then shifted to the class of employees to produce evidence of non-neutrality. Plaintiffs cited *Safeway v. Superior Court*, which had

quoted the Werdegar presumption, arguing that an employer's records showing time worked were entitled to a presumption of accuracy sufficient to overcome summary judgment. *See's Candy II* distinguished the Werdegar presumption on the basis that it pertained to class certification and not summary judgment. The court noted, however, that *even if there exists a presumption*, the defendant's evidence rebutted the presumption.

At a minimum, an employer's records must at least play a supporting role in aiding parties in meeting their burdens in establishing or refuting the predominance of common questions in class certification motions or liability and damages determinations. It cannot be the case that courts must simply disregard records so extensively relied on by employers for their accuracy in meeting their business reporting obligations. An interpretation of Justice Werdegar's opinion regarding parties' reliance on these records as a basis for establishing a prima facie burden, subject to rebuttal, is a sensible approach to its continued viability.

ENDNOTES

1. 53 Cal. 4th 1004 (2012).
2. *Id.* at 1053.
3. *Id.*
4. *Id.*
5. *Lubin v. The Wackenhut Corp.*, 5 Cal. App. 5th 926, 951 (2017) (citing the concurrence as a basis for finding an ascertainable class shown in meal period records); *Safeway, Inc. v. Superior Court*, 238 Cal. App. 4th 1138, 1159-60 (2015) (plaintiffs could establish that a significant number of employees accrued unpaid meal break premium wages with common proof based on time punch data and the presumption "identified by" Justice Werdegar).
6. *See, e.g., Villalpando v. Exel Direct Inc.*, No. 12-cv-04137-JCS, 2016 U.S. Dist. LEXIS 53773 (N.D. Cal. Apr. 21, 2016); *Brewer v. General Nutrition Corp.*, No. 11-CV-3587 YGR, 2014 U.S. Dist. LEXIS 159380 at *14 (N.D. Cal. Nov. 12, 2014); *Ambriz v. Coca Cola Co.*, No. 13-cv-03539-JST, 2013 U.S. Dist. LEXIS 158513 at *10 (N.D. Cal. 2013); *Medlock v. Host Int'l, Inc.*, No. 1:12-cv-02024 - JLT 2013 U.S. Dist. LEXIS 72740 at *8-9 (E.D. Cal. Nov. 5, 2013); *Alcantar v. Hobart Serv.*, No. ED CV 11-1600 PSG (SPx), 2013 U.S. Dist. LEXIS 6752 at *13-14 (C.D. Cal. Jan. 15, 2013); *Gonzalez v. OfficeMax N. Am.*, No. SACV 07-00452 JVS (MLGx), 2012 U.S. Dist. LEXIS 163853 at *8-9 (C.D. Cal. Nov. 5, 2012); *Ricaldi v. US Investigation Servs., LLC*, 878 F. Supp. 2d 1038, 1042-44 (C.D. Cal. 2012); *Faulkinbury v. Boyd & Assoc., Inc.*, 216 Cal. App. 4th 220, 230-31 (2013); *Bradley v. Networkers Int'l, LLC*, 211 Cal. App. 4th 1129, 1144-45 (2013); *see, also, See's Candy Shops, Inc. v. Superior Court*, 210 Cal. App. 4th 889, 907 (2012) ("an employer has an important obligation to keep accurate time records" [citing *Brinker* concurrence]).
7. 59 Cal. 4th 1 (2014).
8. 328 U.S. 680, 687-88 (1946).
9. 136 S. Ct. 1036 (2016).
10. *Id.* at 1047.
11. *See's Candy Shops, Inc. v. Superior Court*, 210 Cal. App. 4th 889, 907 (2012).
12. 7 Cal. App. 5th 235 (2017).

From the Editors

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