THE RECORDER

134RD YEAR NO. 46 www.therecorder.com WEDNESDAY, NOVEMBER 30 2011

Employers, Sit Tight and Wait for 'Brinker'

The California Supreme Court finally heard oral argument this month in *Brinker v. Superior Court*, nearly three years after the court granted the petition for review. One of the main issues on appeal concerns the scope of an employer's meal period and rest break obligations to employees. Unsurprisingly, the bulk of the argument before the Supreme Court addressed an employer's obligation to "provide" meal periods to employees under the California Labor Code and the associated IWC Wage Orders. The justices' questions during oral argument with respect to "providing" meal periods are sure to give California employers a better understanding of the court's likely outcome, and potentially, an insight into the future of the trending "suitable seating" class actions in California.

Gregg Fisch, Sheppard, Mullin, Richter & Hampton partner

Patricia DeSantis, Sheppard, Mullin, Richter & Hampton associate

Danielle Levine, Sheppard, Mullin, Richter & Hampton associate

These "suitable seating" claims are based upon California's state Private Attorneys General Act, which was passed in 2004. PAGA enables "aggrieved employees" to file representative actions to enforce various provisions of the Labor Code that previously had not provided for the recovery of monetary penalties by private litigants. "Suitable seating" issues have been frequently asserted in California since the decision in Bright v. 99 Cents Only Stores, in which the California court of appeal held that aggrieved employees potentially could recover PAGA civil penalties for violations of a wage order pursuant to Labor Code §1198. A subsequent court of appeal decision, *Home Depot USA v. Superior Court*, reached the same conclusion.

These two court decisions paved the way for the recent trend of class actions that allege companies have failed to properly provide suitable seats to their employees. While the employees in *Bright* and *Home Depot* alleged violations of the "suitable seating" rule, neither decision provided guidance as to what California courts will find is proper compliance with the wage orders' various directives in the seating provisions. Accordingly, the current ambiguities in the law create a potentially lucrative area of recovery for plaintiffs and their counsel.

As employers and plaintiffs seek to navigate the waters of the newest frontier of California class actions, the ease with which plaintiffs may find fortune in claims based on alleged violations of the "suitable seating" rule — contained in most of the wage orders — likely will be impacted by the *Brinker* holding. The Supreme Court's interpretation of the word "provide" and associated obligations of the employer in *Brinker* will represent one of the only sources of authority for employers to reference in their efforts to comply with the "suitable seating" rule and to defend against employees' claims in related litigation matters.

The arguments made by the parties in *Brinker* illuminate the issues. Kimberly Kralowec, arguing on behalf of the *Brinker* plaintiffs, insisted that the word "provide," with respect to meal period standards, includes an implicit responsibility for employers to ensure that employees are not working. In their opening brief, the plaintiffs contended that "the definition of 'provide' that the court of appeal pulled from a dictionary is inconsistent with how 'provide' is used in §226.7(b) and wage orders." However, Justices Goodwin Liu, Marvin Baxter and Joyce Kennard appeared to be dissatisfied with Kralowec's definition of "provide," and pushed back during oral argument. Notably, Liu specifically asked, "Isn't that kind of coercive, counsel?" Later in the debate, Justice Carol Corrigan asked whether it was really plaintiffs' position that an employer's only recourse is to discipline (and possibly even fire) an employee who freely and voluntarily chooses to work through a meal period, even though the employer told the employee to take the break. After several attempts to dodge these questions, Kralowec finally admitted that it was, and that such willful disobedience would constitute insubordination, just like a failure to comply with any other company policy.

Meanwhile, Rex Heinke, on behalf of defendant Brinker Restaurants, argued that "provide" does impose an affirmative obligation, but the obligation extends to require that employers only make meal periods available, not that employers ensure they are always taken. Similarly, in the reply brief, the defendant outlined the core of its argument, that "[n]oticably absent [in §226.7] is any language compelling an employer to ensure that an employee takes every meal period notwithstanding the employee's desire to skip or shorten it." Throughout the oral argument, in response to the justices' questions, Heinke reiterated the employer's argument that "provide" imposes an obligation to make meal periods available.

Based on the questions asked and comments made by the justices during oral argument, it appears that the *Brinker* court will likely rule that employers are not obligated to ensure that meal and rest breaks are taken. The court seems to be leaning toward the idea that such an obligation is impractical and presumably will adopt a "make available" standard instead.

Assuming the court does issue the expected ruling and upholds the court of appeal's decision as it relates to "provide," plaintiffs may very well face an uphill battle to succeed in the trending seating litigation. As a result, an employee likely will struggle against dismissal at the pleading and class certification stages in cases where he, and the employees he seeks to represent, cannot demonstrate that they have affirmatively requested to be given a seat to use during working hours.

Alternatively, if the court finds that "provide" does create an affirmative obligation for employers to ensure meal and rest breaks are taken, employers should expect a flood of seating lawsuits. Accordingly, employers should be prepared for a long and contentious road as the future of seating litigation shifts to interpreting employer obligations under other undefined phrases in the wage orders' "suitable seating" provisions. Future clarification might be needed with regard to such phrases as "when the nature of the work reasonably permits the use of seats," "nature of the work requires standing," "suitable seats shall be placed in reasonable proximity to the work area," and "interfere with the performance of their duties."

The court's expected interpretation of "provide" in *Brinker* likely will arm employers with a compelling defense in seating cases that "provide" does not create an obligation for them to ensure that all employees are able to use seats throughout their employment. Nevertheless, employers should remain vigilant because the application of the word "provide" to the "suitable seating" rule remains largely uncharted territory. For now, employers must await the court's final ruling, which is expected to be issued within 90 days of the Nov. 8 hearing, i.e., on or before Feb. 6, and simply "sit tight."

Gregg Fisch is a partner in the labor and employment practice group in Sheppard, Mullin, Richter & Hampton's Los Angeles/Century City office. Patricia DeSantis is an associate in the labor and employment practice group in the firm's Santa Barbara office. Danielle Levine is an associate in the Century City office.