ASAP™ A Littler Mendelson **Time Sensitive** Newsletter

in this issue:

JUNE 2008

In *Kenny v. Supercuts, Inc.*, a third U.S. District Court in California rules that employers need not "ensure" that employees take state-mandated meal periods, so long as meal periods are made available for employees. This case is the latest battleground over one of the most significant unsettled issues in California wage and hour law - whether employers must "provide" or "ensure" that their employees take meal periods.

California Edition

A Littler Mendelson California-specific Newsletter

Another Federal District Court Weighs in on the Unsettled Question of Whether California Employers Need Only "Provide" Employees with Meal Periods or Must "Ensure" Meal Breaks Are Taken

By Jon G. Miller and AnnaMary E. Gannon

It is hardly news that class actions over missed or untimely meal breaks are pandemic in California. Employers are anxiously awaiting a conclusive judicial determination of the meaning of Labor Code section 512's mandate that California employers "provide" a 30-minute meal period to employees who work more than five hours in a day. Does it mean that the employer need only provide the employee with the opportunity to take a meal break, or must an employer ensure that the meal break is actually taken. In an unpublished October 2007 opinion in *Brinker Restaurant Corp. v. Superior Court (Hohnbaum)*, a California Court of Appeal reversed a trial court class certification order, stating the class certification order was erroneous and had to be vacated because, among other reasons, "the class certification order rest[ed] on an incorrect assumption with respect to the meal period claims to the extent those claims are based on the theory that [the employer] had a duty to ensure that its hourly employees took the meal periods it provided to them, and thus the court abused its discretion in finding that these claims are amenable to class treatment."

When the *Brinker* appellate opinion was issued, the court of appeal certified it as immediately final, a procedural step that expedites the case to the California Supreme Court for further review. In an unusual move, the court of appeal also requested that the Supreme Court return the case to the court of appeal for further consideration, which it did. The court of appeal allowed additional briefing and heard arguments in May of this year. A further appellate court opinion is expected by the end of August, but no matter the outcome, it will undoubtedly be appealed to the California Supreme Court. So a definitive answer is some time away.

That has not stopped the federal courts located in California from expressing their views of the likely outcome. For the third time, a federal district court has indicated that the statutory language that an employer not permit an employee to work more than five hours "without providing" a meal break means only that the opportunity to take a meal period must be provided; the employer is not required to ensure that it is taken. In *Kenny v. Supercuts, Inc.*, No. C 06-07521 CRB (N.D. Cal. June 2, 2008), the U.S. District Court for the Northern District of California denied a motion for class certification, finding that California employers are only required to provide the opportunity to take 30-minute meal periods. If an employee on occasion did not take a 30-minute meal period, the court would have to individually determine the reason why not, making class treatment inappropriate.

Background Facts

Supercuts operates a chain of retail hair salons. It has long had a policy that

facially complies with California's meal period requirements. The company's new employee orientation handbook advises employees that they should follow the meal period policy that is posted in each salon. As required by law, Supercuts also posts California's Industrial Welfare Commission (IWC) Wage Orders, which specify California's meal period requirements.

The representative plaintiff, Michelle Kenny, worked as a store manager for part of the class period. She understood that she was responsible for ensuring that employees clock out for lunch. As manager, she advised new employees that they are entitled to take lunch breaks and must clock out for lunch.

Kenny conceded that Supercuts had a proper meal break policy. However, she claimed that, despite the official policy, Supercuts had an ongoing practice of not providing meal periods. Time records revealed that she did not clock out for a full 30-minute meal period about 40 percent of the time.

Kenny filed a complaint against Supercuts for failure to provide meal periods and pay the additional one hour of pay per day required by Labor Code 226.7, "waiting time" penalties under Labor Code section 203, failure to provide accurate itemized wage statements, and restitution pursuant to Business and Professions Code section 17200. Kenny sought to certify the lawsuit as a class action, with classes of employees who worked more than five hours in a work day and did not have a minimum 30-minute uninterrupted meal period.

In opposing Kenny's class certification motion, Supercuts offered numerous sworn statements from salon employees who declared that they were provided meal breaks; many of those employees said that meal breaks were always taken. These employees' time records demonstrated that, on average, the employees did not clock out for a full 30-minute meal break about 40 percent of the time, though the percentage varied dramatically by employee. The evidence before the court was that some of the employees clocked out for the full 30-minute meal period nearly all of the time, some none of the time, and some part of the time.

Issue Before the Court

To obtain class certification, a plaintiff must show that common questions of law and fact predominate over questions requiring individualized class member determinations. Kenny argued that, as the company's own time records commonly showed, employees regularly did not clock out for full 30-minute meal periods. However, for that common fact to be deemed predominate, the court would have to agree with the plaintiff that California law requires employers to "ensure" that employees actually take full 30-minute meal periods.

Finding that the Law Does Not Require Employers to Ensure that Employees Take Their Meal Periods, the Court Denies Class Certification

The court rejected the plaintiff's position and found that California employers are only required to provide employees with the opportunity to take a meal break. Under that reading of the law, the threshold issue became whether there was any evidence of a formal or informal employer policy of denying or discouraging employees from taking a full 30-minute meal break. The court found there was none. Therefore, the court concluded, there was no common question of fact. Instead, to decide whether there was a violation, the court would have to know why each employee did not clock in and out for a meal break or for the full 30 minutes.

In analyzing California meal period law, Judge Breyer reviewed two recent federal district court decisions. In *White v. Starbucks Cor*p.,[1] the court held that California law only requires employers to offer meal breaks, without forcing employers to actively ensure that workers are taking these breaks. The *White* court commented that, under the plaintiff's interpretation, an employer would have to pay an additional hour of pay every time an employee voluntarily chose to forego a break. This would allow employees to manipulate the process and manufacture claims by skipping breaks or purposely taking breaks of fewer than 30 minutes, entitling them to an hour of pay for each violation. The court added that such a rule would create "perverse and incoherent incentives." Lacking evidence that the defendant had pressured the plaintiff to forego meal breaks, the White court granted summary judgment.

Judge Breyer also considered *Brown v. Federal Express Corp.*,[2] which followed the reasoning in White. The *Brown* court looked at the language of Labor Code sections 226.7 and 512 and concluded that those statutes simply require an employer to provide employees with meal periods, and not to ensure that the employees take them.

In *Kenny*, Kenny's attorney asserted in oral argument that *White* and *Brown* were wrongly decided because Section 512 and the IWC Wage Orders include language that an employee who works less than 6 hours in a workday can voluntarily waive his or her meal period. Thus, the plaintiff's attorney argued, no meal period could be waived once an employee worked over six hours. Judge Breyer rejected that assertion. While the obligation to provide the meal period cannot be waived when an employee works more than six hours in a workday, that does not mean that an employer must ensure that employee takes a meal period if he or she works more then six hours - so long as the company provides the employee with the opportunity to take the meal period.

Judge Breyer also rejected Kenny's reliance upon a California Court of Appeal decision in *Cicairos v. Summit Logistics, Inc.*[3] The court distinguished *Cicairos* because, in that case, the employer instituted policies that prevented employees from taking meal periods. Although the court in *Cicairos* stated that employers have an affirmative obligation to ensure that workers are relieved of all duty during a meal period, Judge Breyer found the court's opinion was not persuasive authority. In *Cicairos*, the court relied solely on an opinion letter from the Division of Labor Standards Enforcement, which does not have the force of law.[4]

Implications of the Decision

This case is the latest battleground over one of the most significant unsettled issues in California wage and hour law - whether employers must "provide" meal periods or "ensure" that their employees take meal periods. While California employers can be encouraged by this string of favorable federal district court rulings, employers should still tread cautiously as this area of law is still unsettled and will remain so until the California Supreme Court weighs in. But for employers who are able to remove a case to federal court, the *Kenny*, *White*, and *Brown* cases are powerful challenges to class certification. And, hopefully, the California Supreme Court will follow the well-reasoned approach taken by these federal courts.

Should the California Supreme Court agree that an employer need only provide employees with an opportunity to take meal periods, the *Kenny* decision also provides a useful checklist for the type of evidence an employer should develop in order to try to successfully defeat class certification. Employers can attempt to protect themselves even before a lawsuit is filed. Written policies that comply with California meal and break requirements are a must. Documents that demonstrate that management schedules meal and rest periods, reminds employees that these breaks must be taken, and/or evidence of disciplinary actions for failure to take meal and break periods are also useful. Finally, time records that accurately record what time off is (or is not) taken are vital.

Jon G. Miller is a Shareholder in Littler Mendelson's Orange County office. AnnaMary E. Gannon is a Shareholder in Littler's San Francisco office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Mr. Miller at jmiller@littler.com, or Ms. Gannon at agannon@littler.com.

1 497 F. Supp. 2d 1080 (N.D. Cal. 2007).
2 2008 W L 906517 (C.D. Cal. 2008).
3 133 Cal. App. 4th 949 (2006).
4 Moreover, due to Executive Order S-2-03, all of the DLSE's opinion letters are currently under review.