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COURT OF APPEAL - FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

BRINKER RESTAURANT CORPORATION et al., Petitioners, v. THE SUPERIOR COURT OF SAN DIEGO COUNTY, Respondent; ADAM HOHNBAUM et al., Real Parties in Interest.	D049331 (San Diego County Super. Ct. No. GIC834348)

Petition for writ of mandate after the superior court issued an order certifying a class. Patricia A.Y. Cowett, Judge. Petition granted with directions.

Plaintiffs and real parties in interest Adam Hohnbaum, Illya Haase, Romeo Osorio, Amanda June Rader and Santana Alvarado (collectively plaintiffs) sued defendants Brinker Restaurant Corporation, Brinker International, Inc., and Brinker

International Payroll Company, L.P. (collectively Brinker) on behalf of themselves and similarly situated current and former California hourly restaurant employees of Brinker (the proposed class), alleging that Brinker had violated numerous California wage and hour laws and California's unfair competition law (Bus. & Prof. Code, § 17200 et seq.). Specifically, plaintiffs alleged that Brinker failed to provide certain rest breaks or meal periods, or compensation in lieu thereof, to members of the proposed class as required by the California Labor Code[1] and implementing regulations of the Industrial Welfare Commission (IWC),[2] and also required them to "work off the clock" during meal periods**.**

Brinker petitions for a peremptory writ of mandate directing the trial court to vacate an order certifying the proposed class. The principal question presented in this mandamus proceeding is whether the trial court abused its discretion in certifying the class based on its determination that common questions regarding meal periods and rest

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1 All further statutory references are to the Labor Code unless otherwise specified.

2 The IWC is the state agency in the Department of Industrial Relations "'empowered to formulate regulations (known as wage orders) governing employment in the State of California.'" (*Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 581.) "It is the continuing duty of the [IWC] . . . to ascertain the wages paid to all employees in this state, to ascertain the hours and conditions of labor and employment in the various occupations, trades, and industries in which employees are employed in this state, and to investigate the health, safety, and welfare of those employees." (§ 1173.) The IWC is comprised of five members appointed by the Governor. (§ 70.) "Although the IWC was defunded by the Legislature effective July 1, 2004, its wage orders remain in effect. [Citation.]" (*Bearden v. U.S. Borax, Inc.* (2006) 138 Cal.App.4th 429, 434, fn. 2.)

breaks—specifically, the "common legal issue" of "what [Brinker] must do to comply with the Labor Code"—predominate over individual issues.

We conclude that the class certification order is erroneous and must be vacated because (1) the order rests on improper criteria and incorrect assumptions with respect to the rest break claims, and the court abused its discretion in finding that those claims are amenable to class treatment; (2) the court's "rolling five-hour" meal period ruling in its July 2005 order was erroneous, and thus the class certification order rests on improper criteria with respect to the rolling five-hour meal period claims; (3) the class certification order rests on an incorrect assumption with respect to the meal period claims to the extent those claims are based on the theory that Brinker 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; and (4) the court incorrectly assumed it did not have to examine the elements of plaintiffs' "off-the-clock" claims, and thus abused its discretion by finding without such an examination that those claims are amenable to class treatment. Accordingly, we order that a peremptory writ shall issue with directions that the superior court vacate its order granting class certification.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Brinker and Its Written Policies*

Brinker operates 137 restaurants in California, including Chili's Grill & Bar, Romano's Macaroni Grill, and Maggiano's Little Italy. Brinker previously owned the

Cozymel's and Corner Bakery Café chains, but sold the former in late 2003 and the latter in early 2006.

1. *Rest break and meal period policy*

Brinker's written policy regarding unpaid meal periods and paid rest breaks, titled "Break and Meal Period Policy for Employees in the State of California," provides that employees are "entitled to a 30-minute meal period" when they "work a shift that is over five hours." It also provides that employees who clock out for a meal period "must clock out for a minimum of 30 minutes." It also states that employees who work "over 3.5 hours" during a shift are "eligible for one [10-]minute rest break for each 4 hours that [they] work." The policy also provides that an employee's failure to follow the foregoing policies "may result in disciplinary action up to and including termination."

2. *Working off the clock policy*

With respect to the issue of working off the clock, Brinker's "Hourly Employee Handbook" states in part: "It is your responsibility to clock in and clock out for every shift you work. . . . [Y]ou may not begin working until you have clocked in. Working 'off the clock' for any reason is considered a violation of Company policy."

B. *2002 Settlement of Regulatory Action Against Brinker Restaurant Corporation*

The California Division of Labor Standards Enforcement (DLSE)[3] investigated Brinker Restaurant Corporation's compensation practices from October 1, 1999 to

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3 "The DLSE 'is the state agency empowered to enforce California's labor laws, including IWC wage orders.' [Citation.]" (*Morillion v. Royal Packing Co., supra,* 22 Cal.4th at p. 581.)

December 31, 2001, regarding its hourly restaurant employees in California. Among other things, the DLSE investigated Brinker Restaurant Corporation's alleged failure to (1) provide unpaid *meal periods* as required by law, and, starting on October 1, 2000, pay premium wages to employees who were not provided with meal periods as required under section 226.7 and a specified IWC wage order; and (2) provide paid 10-minute *rest breaks* as required by law, and, starting on October 1, 2000, pay premium wages to employees who were not provided with such rest breaks as required under section 226.7 and the specified IWC wage order.

In 2002, after DLSE filed suit against Brinker Restaurant Corporation in the Los Angeles County Superior Court (the DLSE lawsuit),[4] but before DLSE completed its investigation and thus before it reached any final conclusions as to liability and damages, Brinker Restaurant Corporation and DLSE entered into a settlement and release agreement (the DLSE settlement) under which Brinker Restaurant Corporation (1) paid $10 million to settle the DLSE lawsuit, and (2) agreed to a court-ordered injunction to ensure its compliance with California meal period and rest break laws until September 2006.

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4 *Division of Labor Standards Enforcement v. Brinker Restaurant Corporation* (Super. Ct. Los Angeles County, 2002, No. BC279138).

C. *Operative First Amended Complaint*

Plaintiffs' operative March 2006 first amended complaint (hereafter the complaint) alleges three types of wage and hour violations that are pertinent to the issues raised in this appeal:

1. *Alleged rest break violations*

In their first cause of action, plaintiffs allege Brinker willfully violated section 226.7 and IWC Wage Orders Nos. 5-1998, 5-2000 and 5-2001 (hereafter collectively referred to as IWC Wage Order No. 5) by "fail[ing] to provide rest periods for every four hours or major fraction thereof worked per day to non-exempt employees, and failing to provide compensation for such unprovided rest periods." Plaintiffs also allege that as a result of these alleged unlawful acts, they and the members of the proposed class are entitled to recover premium wages and other relief under sections 226, 226.7 and IWC Wage Order No. 5.

In a related claim, plaintiffs also allege in their first cause of action that Brinker violated IWC Wage Order No. 5 and sections 226, subdivision (a), and 1174 by knowingly and intentionally failing to "itemize in wage statements and to accurately report total hours worked by Plaintiffs and the members of the proposed Class."

2. *Alleged meal period and "early lunching" violations*

In their second cause of action, plaintiffs allege Brinker violated sections 226.7 and 512, and IWC Wage Order No. 5, by failing to "provide meal periods for days on which non-exempt employees work(ed) in excess of five hours, or by failing to provide meal periods [altogether], or to provide second meal periods for days employees worked

in excess of [10] hours, and failing to provide compensation for such unprovided or improperly provided meal periods." Plaintiffs claim that Brinker engages in unlawful early lunching by requiring its employees to take their meal periods soon after they arrive for their shifts, usually within the first hour, and then requiring them to work in excess of five hours, and sometimes more than nine hours straight, without an additional meal period. Plaintiffs also allege that as a result of these alleged unlawful acts, they and the members of the proposed class are entitled to recover premium wages and other relief under sections 226 and 226.7, and IWC Wage Order No. 5.

Plaintiffs also claim in their second cause of action that Brinker violated IWC Wage Order No. 5 and sections 226, subdivision (a), and 1174 by knowingly and intentionally failing to "itemize in wage statements and to accurately report total hours worked by Plaintiffs and the members of the proposed Class."

3. *Alleged off-the-clock/time shaving violations*

In their third claim, plaintiffs allege Brinker unlawfully required its employees to work off the clock during meal periods. Although this claim is not expressly set forth in the complaint, the court approved a stipulated amendment to the complaint under which (1) that pleading "include[s] allegations that employees worked 'off the clock' without setting forth those allegations with specificity"; and (2) plaintiffs' allegations with respect to off-the-clock work "shall be limited to: (a) time worked during a meal period when an individual was clocked out; and (b) time 'shaving,' which is defined as an unlawful

alteration of an employee's time record to reduce the time logged so as to not accurately reflect time worked."[5]

D. *Cross-Motions on Plaintiffs' Rolling Five-Hour Meal Period Claim*

In May 2005, pursuant to a court-approved stipulation in anticipation of mediation that ultimately failed, the parties submitted briefing to the court in the form of cross-motions on plaintiffs' rolling five-hour meal period claim. Specifically, the parties briefed the legal issue of "whether [Brinker] was required to provide a meal period for each five-hour block of time worked by an hourly employee."[6] In their motion, plaintiffs asserted that "Brinker's policy of requiring their employees to work for periods of over [five] continuous hours without a meal break violates [IWC Wage Order No. 5], as well as [sections] 512 and 226.7."

In its motion, Brinker argued it was only required to "provide a first meal period to its hourly, non-exempt employees when such employees worked more than five hours and that [it] was required to provide a second meal period to [those] employees only after [they] worked more than [10] hours in a workday."

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5 In their subsequent motion for class certification (discussed, *post*), plaintiffs defined "time shaving" as "Brinker['s] practice of shaving time from employee payroll records to reflect less than a five (5) hour shift."

6 The parties' briefing also addressed two other legal issues not pertinent to this writ proceeding: (1) what is the effect of Brinker's previous settlement of the DLSE lawsuit; and (2) "whether the applicable statute of limitations for claims for rest and meal period violations [of section 226.7] is [one] year or [four] years."

Plaintiffs asserted in their written opposition to Brinker's motion that while rest breaks "need only be 'authorized and permitted,' . . . *the employer must 'ensure' that the employee takes meal periods*." (Italics added.) Acknowledging that the 10-hour second meal period provision in section 512 was not at issue in this case, plaintiffs also addressed their early lunching claim, asserting that Brinker's payroll records showed that Brinker was "forcing employees to take their meal period right after they report to work," and thus it was "impossible for [Brinker] to comply with the applicable wage orders as [it was] *not providing morning rest periods to* [*its*] *employees which precede the meal period*. Instead, they [were] *giving employees their meal periods as soon as they arrive*[*d*] *to work and then working them up to* [*10*] *additional hours without an additional meal break*." (Italics added.) Plaintiffs asked the court to find that "by failing to provide second meal periods to employees required to work in excess of five hours before or after a meal," Brinker was violating IWC Wage Order No. 5, and plaintiffs and the members of the proposed class were entitled to compensation under section 226.7.

1. *July 2005 meal period "advisory opinion" and order*

On July 1, 2005, the court issued a written tentative advisory opinion on the issue of when an employer must provide a meal period to an hourly employee under section 512. The court found that, under that section, a meal period "must be given *before* [*an*] *employee's work period exceeds five hours*." (Italics added.) The court stated that "the DLSE wants employers to provide employees with break periods and meal periods toward the middle of an employee[']s work period in order to break up that employee's 'shift.'" Thereafter, on July 15 of that year, the court issued a minute order (hereafter the

July 2005 order) stating the "advisory ruling" was "*confirmed* by the court *as an order*."[7] (Italics added.)

E. *Brinker's First Writ Petition* (*Challenging the July 2005 Meal Period Order*)

In November 2005 Brinker filed its first petition for writ of mandate (D047509) in this matter. In the petition, Brinker challenged the court's July 2005 meal period order. Specifically, Brinker requested a writ directing the trial court to "vacate its earlier *order* holding that: (1) a non-exempt employee is entitled to a meal period for each five-hour block of time worked[; and] (2) the premium pay owed for a violation of [section 226.7] is a wage." (Italics added.)

In support of its petition, Brinker argued the trial court erred by interpreting section 512 to mean that an hourly employee's entitlement to a meal period is "rolling," such that "a separate meal period must be provided for each *five-hour block of time* worked . . . regardless of the total hours worked in the day. In other words, the [court] interpreted the law to be that . . . [o]nce a meal period concludes, the proverbial clock starts ticking again, and if the employee works five hours more, a second meal period must be provided."

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7 In mid-October 2006, during a hearing concerning discovery after this court denied Brinker's first writ petition (discussed, *post*) in January of that year, and after the trial court granted plaintiffs' class certification motion in July of that year, plaintiffs' counsel argued that the trial court, at an ex parte hearing on July 15, 2005, had confirmed the advisory opinions it had previously issued on July 1 of that year, and Brinker "understood them perfectly well to be *orders* because they took a writ on them." (Italics added.) As we shall explain, *post*, we conclude upon further review that plaintiffs' counsel was correct.

Brinker also argued that although an employee working more than five hours and less than 10 hours is entitled under section 512 to a 30-minute meal period at some point during the workday, "nothing in [s]ection 512 . . . requires a second meal period be provided solely because [the] employee works five hours after the end of the first meal period, where the total time worked is less than [10] hours." Brinker further asserted that IWC Wage Order No. 5 also "does not dictate the anomalous result that meal periods must be provided every five hours" because, like section 512, it requires only that an employee working more than five hours "gets a meal period *at some point* during the workday." [Fn. omitted.] Brinker complained that the court's meal period ruling "requires servers to sit down, unpaid, during the most lucrative part of their working day."

By order dated January 20, 2006, this court denied Brinker's first petition on the ground writ relief was not available to challenge an advisory opinion.

F. *Plaintiffs' Motion for, and the Court's Order Granting, Class Certification*

1. *Class certification motion*

In April 2006 plaintiffs moved to certify a class of "[a]ll present and former employees of [Brinker] who worked at a Brinker[-]owned restaurant in California, holding a non-exempt position, from and after August 16, 2000 ('Class Members')." In their moving papers, plaintiffs alternatively defined the class as "all hourly employees of restaurants owned by [Brinker] in California who have not been provided with meal and rest breaks in accordance with California law and who have not been compensated for those missed meal and rest breaks." In a footnote, plaintiffs stated that the compensation

they had not received for the "missed meal and rest breaks" included "'off-the-clock' work as [Brinker] engage[s] in several practices to avoid providing meal breaks known as, 'time shaving;' inserting meal periods into payroll records when they were not provided; and forcing employees to work 'off-the-clock' during meal breaks." The class in question is estimated to consist of more than 59,000 Brinker employees.

Plaintiffs' motion also sought certification of six subclasses, three of which are pertinent to this appeal: (1) a "Rest Period Subclass," consisting of "Class Members who worked one or more work periods in excess of three and a half (3.5) hours without receiving a paid 10 minute break during which the Class Member was relieved of all duties, from and after October 1, 2000"; (2) a "Meal Period Subclass," consisting of "Class Members who worked one or more work periods in excess of five (5) consecutive hours, without receiving a thirty (30) minute meal period during which the Class Member was relieved of all duties, from and after October 1, 2000"; and (3) an "Off-The-Clock Subclass," consisting of "Class Members who worked 'off-the-clock' or without pay from and after August 16, 2000."

Plaintiffs asserted that "[Brinker's] corporate policies of improper early meals, time shaving, failure to provide meal periods altogether or for less than [30] minutes, failure to provide rest periods, and forcing 'off-the-clock' work, are centralized and common to the Class." They stated that "[u]tilization of the class action vehicle is the superior method of trying this case, due to the fact that [Brinker] maintain[s] data and reports in 'searchable' format . . . that specifically identify the number of employees who are not receiving meal breaks for every [five] hours worked, not receiving meal periods at

all, and the instances where time cards have been manipulated, known at Brinker as 'time-shaving.'" Plaintiff further stated that "[t]his case can be easily tried as a class action with the use of statistical evidence to prove the effects of company-wide policies and practices on the Class Members."

In support of their contentions that class-wide proof exists and common questions predominate, plaintiffs submitted several attorney declarations, 26 declarations of current and former Brinker employees, and other documentary evidence. In this writ proceeding, plaintiffs represent that the employee declarations they submitted presented evidence that "they were *routinely precluded from taking meals for every five hours of work or rest breaks for every three and a half hours of work*"; "they were *required to work 'off-the-clock' during their meal periods*"; and "they did not 'waive' their meal period or rest breaks, but . . . rather, they were not relieved of work duties so that they could take them." (Italics added.)

2. *Brinker's opposition*

In its written opposition to the class certification motion, Brinker argued that a *rest break* class should not be certified because (1) under IWC Wage Order No. 5, paid rest breaks need only be permitted, not necessarily taken; (2) Brinker permitted its employees to take rest breaks; (3) whether individual employees took the rest breaks that Brinker provided required a "hopelessly individualized" inquiry; and (4) individual issues thus predominated.

Brinker next argued that a *meal period* class should not be certified because (1) under sections 512 and 226.7, unpaid meal periods need only be provided, not necessarily

taken; (2) plaintiffs' "rolling, five-hour approach to meal periods," which "would call for a second meal period for work days with *fewer than* 10 hours unless the first meal is taken exactly mid-shift" (original italics), was wrong because "[u]nder the plain language of [s]ection 512, an employee working more than five hours, but fewer than 10, is entitled to one 30-minute meal period at some point during the work day," and "[s]ection 512 on its face calls for a second meal period only when more than 10 hours are worked"; (3) Brinker provided all required meal periods to its employees; (4) whether each employee was provided with meal periods as required by law "var[ied] person-by-person, shift-by-shift, and day-by-day," and "involve[d] hundreds of individualized inquiries"; and (5) individual issues thus predominated.

Brinker also argued that plaintiffs' off-the-clock claim should not be certified as a class action claim because (1) plaintiffs had not cited any Brinker policy to alter time records or permit off-the-clock work, and Brinker has a policy expressly prohibiting such work; (2) plaintiffs had no proof of "class-wide off-the-clock work"; (3) even if off-the-clock work occurred, Brinker could not be held liable unless it "suffered or permitted the work"; and (4) any off-the-clock work would have to be individually proven.

In support of its opposition to the class certification motion, Brinker submitted more than 600 declarations from hourly workers, and almost 30 declarations from managers.

3. *Plaintiffs' reply*

Plaintiffs submitted a reply brief and supplemental evidence. They asserted that "[f]ive class-wide issues of law and fact can be tried jointly in this case: [¶] 1. Whether

Brinker's hourly employees receive a meal period for every [five] hours worked in compliance with [section] 512; [¶] 2. Whether Brinker fails to provide uninterrupted [30]-minute meal periods; [¶] 3. Whether Brinker fails to permit rest periods, i.e., discourages rest periods; [¶] 4. Whether Brinker's practice of 'time-shaving' and its insertion of meal periods that did not occur violates [IWC Wage Order No. 5] and [section] 226.7; and, [¶] 5. The amount or formula for compensation owed for these violations."

Plaintiffs elaborated on their meal period, rest break, and off-the-clock claims:

a. *Meal period claims*

With respect to their meal period claims, plaintiffs asserted in their reply papers that under the court's July 2005 order, Brinker was required to provide its employees with a meal period for every five hours worked, and common issues predominated on plaintiffs' rolling five-hour meal period claim.

Plaintiffs maintained that common issues predominate on their claims for "missed or inadequate meal periods." Citing *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949, 962-963, plaintiffs asserted that employers have an affirmative duty to ensure employees receive meal periods, and the waiver provisions of section 512 "cannot rationally be interpreted to mean the 'mutual consent' of employer and employee required to waive meal periods is relaxed to a *lesser* standard permitting employees to 'informally decline' (without obtaining the employer's consent)" because such an interpretation "flies in the face of the affirmative obligation placed upon the employer to relieve employees for meal periods enunciated in *Cicairos*."

Plaintiffs also stated that "[Brinker's claims that] it can meet its legal obligation to 'provide' meal periods by 'making them available,' and that employees may 'informally decline' them" was erroneous, because *Cicairos* [*v. Summit Logistics, Inc., supra,* 133 Cal.App.4th 949] "confirm[s] that *meal periods may not be waived* (*or 'informally declined'*)." (Italics added.) Section 512, plaintiffs argued, "permits a waiver in just two scenarios: for shifts between five and six hours upon mutual consent and for second meal periods where the first has not been waived." Thus, plaintiffs stated, "Brinker stretches the language of [s]ection 512 beyond logic to argue the statute permits employees to 'informally decline' meal periods." In a footnote, plaintiffs stated that Brinker had implemented a corporate policy that "discourages servers from taking their breaks. The uniform policy is that if you take a break you must transfer your tables and give up your tips."

b. *Rest break claims*

Claiming that common issues predominate on their rest break claims, plaintiffs asserted they "presented corporate policy evidence of a pattern and practice by Brinker of failing to provide a rest period prior to employees' meal period as a result of its practice of scheduling meals early." Specifically, plaintiffs argued that "Brinker maintains company-wide policies discouraging rest periods, including requiring servers to give up tables and tips if they want a break and failing to provide rest periods prior to scheduled early meals."

c. *Off-the-clock meal period claims, including their claim for time-shaving*

Last, claiming that common issues also predominate on their "off-the-clock" meal period claims, plaintiffs stated, "Plaintiffs' submissions . . . provide evidence employees were asked to work while clocked out for meals." Noting they had limited their off-the-clock claims "to those relating to meal periods," plaintiffs also asserted that "Brinker's corporate records prove their 'time-shaving' claim. When entries are manipulated to delete time from an employee's shift to bring it under five hours, records reflect that change."

4. *Order granting class certification*

Following issuance of a tentative ruling on plaintiffs' class certification motion, and after a hearing thereon, the court took the matter under submission. On July 6, 2006, the court issued its order granting the motion and certifying the proposed class (class certification order), finding that "common issues predominate over individual issues." The court specifically found that "*common questions regarding the meal and rest period breaks* are sufficiently pervasive to permit adjudication in this one class action. [¶] [Brinker's] arguments regarding the necessity of making employees take meal and rest periods actually points to a *common legal issue* of *what* [*Brinker*] *must do to comply with the Labor Code*. Although a determination that [Brinker] need not force employees to take breaks may require some individualized discovery, the common alleged issues of meal and rest violations predominate." (Italics added.) Brinker's writ petition followed.

DISCUSSION

In this purported class action, plaintiffs have asserted three pertinent categories of wage and hour claims against Brinker, alleging various violations of sections 512 and 226.7, IWC Wage Order No. 5, and California's unfair competition law (Bus. & Prof. Code, § 17200 et seq.): (1) rest break claims; (2) meal period claims; and (3) off-the-clock claims.

In certifying the proposed class and subclasses of Brinker employees, the court generally found that "[c]ommon issues predominate over individual issues" and stated that "common questions regarding the meal and rest period breaks are sufficiently pervasive to permit adjudication in this one class action." However, the court identified only one specific common issue, which it characterized as a "common legal issue": "[W]hat [Brinker] must do to comply with the Labor Code."

For reasons we shall explain, we conclude the court abused its discretion by (1) determining that common issues, rather than questions affecting the individual class members, would predominate at trial; and (2) certifying the proposed class and subclasses without first determining as to each type of claim both the theory of liability and the elements that must be proven to hold Brinker liable. We also conclude that the court's class certification order was based upon improper criteria and incorrect assumptions.

A. *Applicable Legal Principles*

The California Supreme Court has explained that "[t]he decision to certify a class rests squarely within the discretion of the trial court, and we afford that decision great deference on appeal, reversing only for a manifest abuse of discretion: 'Because trial

courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification.' [Citation.] A certification order generally will not be disturbed unless (1) it is unsupported by substantial evidence, (2) it rests on *improper criteria*, or (3) it rests on *erroneous legal assumptions*. [Citations.]" (*Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1089 (*Fireside Bank*), italics added.) A class certification order "based upon *improper criteria or incorrect assumptions* calls for reversal '"even though there may be substantial evidence to support the court's order."' [Citations.]" (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 436 (*Linder*), italics added.)

The standards for class certification in California are well established. "Code of Civil Procedure section 382 authorizes class actions 'when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court.'" (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326 (*Sav-On*).) The party seeking class certification has the burden to establish "(1) . . . a sufficiently numerous, ascertainable class, (2) . . . a well-defined community of interest, and (3) that certification will provide substantial benefits to litigants and the courts, i.e., that proceeding as a class is superior to other methods." (*Fireside Bank, supra,* 40 Cal.4th at p. 1089; *Sav-On, supra,* 34 Cal.4th at p. 326.) In turn, "the 'community of interest requirement embodies three factors: (1) *predominant common questions of law or fact*; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.' [Citation.]" (*Fireside Bank, supra,* 40 Cal.4th at p. 1089, italics added; *Sav-On, supra,*

34 Cal.4th at p. 326.) Here, the parties to this writ proceeding contest only the first factor of predominance.

Whether certification of a class is appropriate is "essentially a procedural [question] that does not ask whether an action is legally or factually meritorious." (*Linder, supra,* 23 Cal.4th at pp. 439-440.) "A trial court ruling on a certification motion determines 'whether . . . the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be *advantageous to the judicial process and to the litigants*.' [Citations.]" (*Sav-On*, *supra*, 34 Cal.4th at p. 326, italics added.)

However, the trial court's determination of whether it should certify a class will often involve some inquiry, although perhaps a general one, into the factual and legal issues comprising the plaintiff's causes of action. (*Caro v. Proctor & Gamble Co.* (1993) 18 Cal.App.4th 644, 656.) The critical inquiry on a class certification motion is whether "the *theory of recovery* advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment." (*Sav-On*, *supra*, 34 Cal.4th at p. 327, italics added.) In order to determine whether common questions of law or fact predominate, "the trial court *must* examine the issues framed by the pleadings and the law applicable to the causes of action alleged." (*Hicks v. Kaufman and Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916 (*Hicks*), italics added, fn. omitted, citing *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 810-811.)

B. *Analysis*

1. *Rest Break Claims*

In their complaint, plaintiffs allege that Brinker willfully violated section 226.7 and IWC Wage Order No. 5 by "fail[ing] to provide rest periods for every four hours or major fraction thereof worked per day to non-exempt employees, and failing to provide compensation for such unprovided rest periods." However, in their return to Brinker's writ petition, plaintiffs cite DLSE's opinion letter dated September 17, 2001 (2001 DLSE opinion letter) for the proposition that section 512 and IWC Wage Order No. 5 require a 10-minute rest break "for every *three and a half hours of work*" (italics added) and a first rest break before the first meal period. Plaintiffs also contend that Brinker's "uniform rest break policy"[8] violates section 512 and IWC Wage Order No. 5 because (1) the policy "does not make a rest break available to employees until *after* they have *worked at least four hours*" (italics added), and (2) it does not provide for a rest break *before* the first meal period.

Brinker argues that if the court had correctly determined the underlying elements of plaintiffs' rest break claims, it "could only have concluded that individual issues predominate." Brinker also argues that by "presum[ing] that the underlying elements of plaintiffs' claims were common questions that justified class certification, rather than preliminary issues that it was required to resolve in order to render an informed

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8 Brinker's uniform written policy regarding paid rest breaks states that employees who work "over 3.5 hours" during a shift are "eligible for one [10-]minute rest break for each 4 hours that [they] work."

certification decision," the court conducted its predominance analysis under an incorrect assumption that warrants reversal of the certification order regarding plaintiffs' rest break claims. We conclude that Brinker's arguments are well taken.

Plaintiffs' contention that Brinker's rest break policy violates section 512 is unavailing. As we shall discuss, *post*, section 512 governs the scope of an employer's obligation to provide meal periods, *not* rest breaks.

Plaintiffs' contention that IWC Wage Order No. 5 requires (1) a 10-minute rest break for every three and a half hours of work, and (2) a rest break before the first meal period, is also unavailing. Section 226.7, subdivision (a) provides: "No employer shall require any employee to work during any meal or *rest period mandated by an applicable order of the* [*IWC*]." (Italics added.) For purposes of section 226.7, IWC Wage Order No. 5-2001, which became operative on January 1, 2001, and governs an employer's obligations with respect to rest breaks, is the current IWC wage order at issue in this writ proceeding.[9] The pertinent provisions of IWC Wage Order No. 5-2001 are codified in California Code of Regulations, title 8, section 11050, subdivision 12(A), which

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9 With exceptions not applicable here, IWC Wage Order No. 5-2001 applies to "all persons employed in the public housekeeping industry, whether paid on a time, piece rate, commission, or other basis." (Cal. Code Regs., tit. 8, § 11050, subd. 1.) It defines "public housekeeping industry" to mean "*any industry, business, or establishment which provides meals*, housing, or maintenance services whether operated as a primary business or when incidental to other operations in an establishment not covered by an industry order of the [IWC], *and includes*, but is not limited to the following: [¶] (1) *Restaurants*, night clubs, taverns, bars, cocktail lounges, lunch counters, cafeterias, boarding houses, clubs, *and all similar establishments where food in either solid or liquid form is prepared and served to be consumed on the premises*." (*Id.*, § 11050, subd. 2(P)(1), italics added.)

provides: "Every employer shall authorize and permit all employees to take rest periods, which *insofar as practicable shall be in the middle of each work period*. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time *per four* (*4*) *hours or major fraction thereof*. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages." (Italics added.)

The foregoing language of IWC Wage Order No. 5-2001 plainly provides that employers "shall authorize and permit" a 10-minute rest break "per four (4) hours or major fraction thereof," *not* a 10-minute rest break for every three and a half hours of work, as plaintiffs contend. (Cal. Code Regs., tit. 8, § 11050, subd. 12(A).)

Furthermore, contrary to plaintiffs' assertion, the provisions of IWC Wage Order No. 5-2001 do not require employers to authorize and permit a first rest break *before* the first scheduled meal period. Rather, the applicable language of IWC Wage Order No. 5-2001 states only that rest breaks "insofar as *practicable* shall be in the middle of each work period." (Cal. Code Regs., tit. 8, § 11050, subd. 12(A), italics added.) IWC Wage Order No. 5-2001, like section 226.7, is silent on the question of whether an employer must permit an hourly employee to take a 10-minute rest break before the first meal period is provided. As Brinker points out, an employee who takes a meal period one hour into an eight-hour shift could still take a post-meal period rest break "in the middle" of the first four-hour work period, in full compliance with the applicable provisions of IWC Wage Order No. 5-2001.

Brinker also asserts the court failed to address the issue of whether employers must "force" employees to take rest breaks and, had it correctly ascertained that Brinker was not responsible for requiring its employees to take rest breaks, "it necessarily would have concluded that liability could only be established on an individual basis and that plaintiffs' claims were not amenable to class treatment." In their return to the petition, plaintiffs respond they never disputed that rest breaks can be waived, and thus the court did not have to consider or decide that legal question.

Although plaintiffs acknowledge that employees can waive their right to take rest breaks that their employers authorize and permit as required by law, the court's class certification order is silent with respect to both the elements plaintiffs must prove to establish their rest break claims, and the critical legal issue of whether employees may waive their right to take such breaks. In basing its predominance finding on the "common legal issue" of "what [Brinker] must do to comply with the Labor Code," the court assumed it was not required to determine the elements of plaintiffs' rest break claims before it certified the proposed class of Brinker's hourly employees. However, on the alleged facts of this purported class action, the court's assumption was incorrect, thus requiring reversal of the class certification order. (See *Linder*, *supra*, 23 Cal.4th at p. 436). Because the applicable provisions of IWC Wage Order No. 5-2001 provide only that rest periods should be scheduled in the middle of each work period "insofar as practicable," the propriety of permitting a rest break near the end of a typical four-hour work period depends on whether the scheduling of such a rest break was practicable in a given instance, and thus cannot be litigated on a class basis.

Furthermore, because (as the parties acknowledge) Brinker's hourly employees may waive their rest breaks, and thus Brinker is not obligated to ensure that its employees take those breaks, any showing on a class basis that plaintiffs or other members of the proposed class missed rest breaks or took shortened rest breaks would not necessarily establish, without further individualized proof, that Brinker violated the provisions of section 226.7, subdivision (a) and IWC Wage Order No. 5 as plaintiffs allege in their complaint.

Plaintiffs' reliance on the 2001 DLSE opinion letter for the propositions that a rest period is required before the first meal period and that Brinker's uniform rest break policy violates IWC Wage Order No. 5, is misplaced. The 2001 DLSE opinion letter, which interpreted IWC Wage Order No. 16-2001 governing rest periods for "persons employed in the on-site occupations of construction, drilling, logging, and mining," stated that "[i]f an employer *regularly requires employees to work five hours prior to their 30*[-]*minute lunch break*" (italics added) as a general matter under IWC Wage Order No. 16-2001 "the first rest period should come sometime before the meal break." Here, however, plaintiffs do not contend that Brinker "regularly requires employees to work five hours prior to their 30[-]minute lunch break." On the contrary, plaintiffs complain that Brinker regularly engages in unlawful early lunching by requiring its employees to take their meal periods soon after they arrive for their shifts, usually within the first hour.

Had the court properly determined that (1) employees need be afforded only one 10-minute rest break every four hours "or major fraction thereof" (Cal. Code Regs., tit. 8, § 11050, subd. 12(A)), (2) rest breaks need be afforded in the middle of that four-hour

period only when "practicable," and (3) employers are not required to ensure that employees take the rest breaks properly provided to them in accordance with the provisions of IWC Wage Order No. 5, only individual questions would have remained, and the court in the proper exercise of its legal discretion would have denied class certification, with respect to plaintiffs' rest break claims because the trier of fact cannot determine on a class-wide basis whether members of the proposed class of Brinker employees missed rest breaks as a result of a supervisor's coercion or the employee's uncoerced choice to waive such breaks and continue working.

For all of the foregoing reasons, we conclude that the class certification order rests on improper criteria and incorrect assumptions with respect to the rest break claims, and thus the court abused its discretion in finding that those claims are amenable to class treatment. Accordingly, the portion of the class certification order certifying the rest break subclass must be vacated. (*Fireside Bank, supra,* 40 Cal.4th at p. 1089.)

2. *Meal Period Claims*

Plaintiffs also assert two principal claims regarding missed or inadequate meal periods. First, plaintiffs assert a rolling five-hour meal period claim, alleging Brinker's uniform meal period policy violates sections 512 and 226.7, and IWC Wage Order No. 5, by failing to provide or make available to Brinker's hourly employees a 30-minute uninterrupted meal period for every five *consecutive* hours of work. Related to this claim is plaintiffs' assertion that Brinker's "most egregious meal period violations" stem from its practice of early lunching, under which Brinker allegedly requires its hourly employees to take their meal periods soon after they arrive for their shifts, usually within

the first hour, and then requires them to work in excess of five hours, and sometimes more than nine hours straight, without an additional meal period.

Second, plaintiffs claim that employers have an affirmative duty under IWC Wage Order No. 5 to ensure that hourly employees are relieved of all duty during meal periods, and Brinker's uniform meal period policy violates sections 512 and 226.7, and IWC Wage Order No. 5, by failing to ensure that its hourly employees "receive" or "take" their meal periods.

We conclude the court (1) abused its discretion in concluding that plaintiffs' rolling five-hour and early lunching meal period claims are amenable to class treatment; and (2) incorrectly assumed that, in order to render an informed certification decision, it did not have to resolve the issue of whether Brinker had a duty to ensure that its employees take their meal periods.

a. *Rolling five-hour meal period claim*

Brinker contends the court's predominance analysis regarding both of plaintiffs' meal period claims was "flawed" because it failed to determine the elements of those claims before it granted plaintiffs' class certification motion, and if it had done so, the court "could only have concluded that individual issues predominate."

While we agree with Brinker's argument as it relates to plaintiffs' claim that Brinker was required to ensure that its hourly employees take meal periods, the record shows the court did decide the legal issue of whether Brinker was required to provide a rolling meal period for every five consecutive hours of work. Specifically, the record shows that on July 1, 2005, the court issued a written tentative ruling on the issue of *when*

an employer must provide a meal period under section 512 to an hourly employee. Following the heading "THESE ARE ADVISORY OPINIONS ONLY," the court found that, under that section, a meal period "must be given *before* [*an*] *employee's work period exceeds five hours*." (Italics added.) The court also stated that "the DLSE wants employers to provide employees with break periods and *meal periods toward the middle of an employee*[*'*]*s work period* in order to break up that employee's 'shift.'" (Italics added.) The court further stated that Brinker "appears to be in violation of [section] 512 by not providing a 'meal period' *per every five hours of work*." (Italics added.) Two weeks later, at an ex parte hearing, the court issued a minute order (the July 2005 order) stating the "advisory ruling" was "*confirmed* by the court *as an order*." (Italics added.)

In November 2005 Brinker challenged the July 2005 order by filing its first petition for writ of mandate. By order dated January 20, 2006, this court denied Brinker's petition on the ground writ relief was not available to challenge an "advisory opinion."[10]

In the instant writ proceeding, Brinker now asserts that this court's "determination that the trial court's July 2005 opinion was *purely advisory* destroys [p]laintiffs' argument that the law applicable to their claims has already been decided." (Italics added.) We reject this assertion. Upon further review, we conclude the trial court's July 2005 order was not an advisory opinion; it was a final order determining that Brinker was statutorily required to provide a meal period for every five consecutive hours of work. Brinker

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10 This court's order denying Brinker's first writ petition stated in part: "The review of an advisory opinion would result in an advisory opinion. California courts generally have no power to render an advisory opinion. [Citation.] The petition is denied."

implicitly acknowledged in its first writ petition that the court's ruling was *not* "purely advisory," stating: "On July 1, 2005, the Trial Court issued a *preliminary opinion* finding against Brinker . . . . The Trial Court held that a meal period must be provided for each five-hour block of time worked by a non-exempt employee . . . . *The Trial Court converted its opinion to a final order . . . on July 15, 2005* . . . ." (Italics added, fn. omitted.) In its reply to the plaintiffs' return in the instant writ proceeding, Brinker again acknowledges that "the trial court *'confirmed'* its 'advisory opinions' . . . ." (Italics added.)

We conclude that the court's rolling five-hour meal period ruling in its July 2005 order was erroneous, and thus the class certification order rests on improper criteria with respect to the plaintiffs' rolling five-hour meal period claim and cannot stand to the extent it was based on that ruling. (See *Fireside Bank, supra,* 40 Cal.4th at p. 1089.) The question of *when* an employer must provide a meal period to its hourly employees is both a question of law governed by section 512, subdivision (a) (hereafter section 512(a)) and IWC Wage Order No. 5, and an issue of statutory interpretation governed by well-established principles. "The objective of statutory construction is to determine the intent of the enacting body so that the law may receive the interpretation that best effectuates that intent. [Citation.] 'We first examine the words themselves because the statutory language is generally the most reliable indicator of legislative intent. [Citation.] The words of the statute should be given their ordinary and usual meaning and should be construed in their statutory context.' [Citation.] *If the plain, commonsense meaning of a statute's words is unambiguous, the plain meaning controls*. [Citation.]" (*Fitch v. Select Products Co.* (2005) 36 Cal.4th 812, 818, italics added.) The interpretation of a statute

presents a question of law subject to de novo appellate review. (*CBS Broadcasting, Inc. v. Superior Court* (2001) 91 Cal.App.4th 892, 906.)

Section 512(a), which governs an employer's obligations with respect to the "providing" of meal periods to its hourly employees, provides:

> "An employer may not *employ* an employee for a work period of more than five hours *per day* without *providing* the employee with a meal period of not less than 30 minutes, except that if the *total work period per day* of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. An employer may not *employ* an employee for a work period of more than 10 hours *per day* without *providing* the employee with a second meal period of not less than 30 minutes, except that if the *total hours worked* is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived." (Italics added.)

The term "employ" is defined in IWC Wage Order No. 5-2001 to mean "to engage, suffer, or permit to work." (Cal. Code Regs., tit. 8, § 11050, subd. 2(E).) The term "provide" is defined in Merriam-Webster's Collegiate Dictionary (11th ed. 2006) at page 1001 as "to supply or *make available*." (Italics added.)

Section 512(a) thus plainly provides that an employer in California has a statutory duty to make a *first 30-minute meal period* available to an hourly employee who is permitted to work more than five hours *per day*, unless (1) the employee is permitted to work a "total work period per day" that is six hours or less, and (2) both the employee and the employer agree by "mutual consent" to waive the meal period.

This interpretation of section 512(a), regarding an employer's duty to provide a first meal period, is consistent with the plain language set forth in IWC Wage Order No.

5-2001, which provides in part: "No employer shall employ any person for a *work period of more than five* (*5*) *hours* without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee." (Cal. Code Regs., tit. 8, § 11050, subd. 11(A), italics added.) Although that subdivision of the wage order refers to "work period of more than five (5) hours" rather than to "work period of more than five (5) hours *per day*," the Legislature used the term "work period of more than five hours *per day*" (italics added) in section 512(a), and we presume the Legislature intended the provisions of IWC Wage Order No. 5-2001 and section 512(a) to be given a consistent interpretation.

With respect to the issue of *when* an employer must make a first 30-minute meal period available to an hourly employee, Brinker's uniform meal period policy (titled "Break and Meal Period Policy for Employees in the State of California") comports with the foregoing interpretation of section 512(a) and IWC Wage Order No. 5-2001. It provides that employees are "entitled to a 30-minute meal period" when they "work a shift that is over five hours."

Section 512(a) also plainly provides that an employer in California has a statutory duty to make a *second 30-minute meal period* available to an hourly employee who is permitted to work a "work period of more than 10 hours *per day*" (italics added) unless (1) the "total hours" the employee is permitted to work per day is 12 hours or less, (2) both the employee and the employer agree by "mutual consent" to waive the second meal period, and (3) the first meal period "was not waived."

Plaintiffs contend, and the trial court implicitly ruled in its July 2005 order, that Brinker's written meal policy violates section 512(a) and IWC Wage Order No. 5 (specifically, Cal. Code Regs., tit. 8, § 11050, subd. 11(A)) because it allows the practice of early lunching (discussed, *ante*) and fails to make a 30-minute meal period available to an hourly employee for every five *consecutive* hours of work. Plaintiffs implicitly contend, without any analysis of section 512(a) or IWC Wage Order No. 5-2001, that hourly employees are entitled to a second meal period five hours after they return to work from the first meal period.

Plaintiffs' contentions are unavailing, and the court's ruling was erroneous. Under plaintiffs' and the court's interpretation of section 512(a), an employer, in determining whether one of its hourly employees is entitled to a second meal period, would never have to consider whether it has permitted the employee to work for a "work period of more than 10 hours per day" (§ 512(a)), because it would simply reset the clock upon the employee's return from a meal period. This interpretation of section 512(a) effectively ignores and renders surplusage about half of the governing language set forth in that subdivision, as shown by the strikethroughs in the following excerpt: "An employer may not employ an employee for a work period of more than five hours without providing the employee with a meal period of not less than 30 minutes . . . . Under this interpretation, the term "per day" in the first sentence of section 512(a) would be rendered surplusage, as would the phrase "An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes" in the second sentence of that subdivision.

"It is a well established principle of statutory construction that '[t]he courts presume that every word, phrase, and provision of a statute was intended to have some meaning and perform some useful function . . . .' [Citation.]" (*Twain Harte Homeowners Assn. v. County of Tuolumne* (1982) 138 Cal.App.3d 664, 698-699.) "Interpretations that lead to absurd results or render words surplusage are to be avoided. [Citation.]" (*Woods v. Young* (1991) 53 Cal.3d 315, 323 (*Woods*).)

Here, the interpretation of section 512(a) given by plaintiffs and the court is erroneous as a matter of law, and thus must be avoided because it renders surplusage the provisions of that subdivision governing the question of when an employer must provide meal periods to an hourly employee. (See *Woods, supra,* 53 Cal.3d at p. 323.)

Citing *California Hotel & Motel Assn. v. Industrial Welfare Com.* (1979) 25 Cal.3d 200, the court stated in its order that "[t]he California Supreme Court has interpreted wage orders to require a meal period for each five-hour period an employee works," and "[a] meal period of [30] minutes per five hours of work is generally required." That case, however, is distinguishable as it involved an IWC wage order (No. 5-76) that is not involved in the present case. (*California Hotel & Motel Assn., supra,* 25 Cal.3d at p. 205, fn. 7.) As summarized by the Court of Appeal, the pertinent provision of that wage order provided that "[a] meal period of 30 minutes per *5 hours of work* is generally required." (*Ibid.*, italics added.) As already discussed, however, section 512(a), which governs here, provides in part: "An employer may not employ an employee for a *work period of more than five hours per day* without providing the employee with a meal period of not less than 30 minutes." (Italics added.) The

distinction between the two provisions is of critical importance. Whereas IWC wage order No. 5-76 generally required a meal period for every "5 hours of work," section 512(a) generally requires a first meal period for every "work period of more than five hours *per day*" (italics added). The court thus erred by relying on *California Hotel & Motel Assn., supra,* 25 Cal.3d 200.

We conclude the court abused its discretion in certifying the class in this matter to the extent it relied on an erroneous interpretation of section 512(a). As already discussed, a class certification order based upon improper criteria or incorrect assumptions must be reversed, even though there may be substantial evidence to support it. (*Linder*, *supra*, 23 Cal.4th at p. 436.) Here, the court's order certifying the meal period subclass class was based upon both improper criteria regarding the elements of the rolling five-hour meal period claim and an incorrect assumption about when an employer must provide a meal period under the provisions of section 512(a). Without a proper interpretation of section 512(a), the court could not correctly ascertain the legal elements that members of the proposed class would have to prove in order to establish their meal period claims, and thus could not properly determine whether common issues predominate over issues that affect individual members of the class.

b. *Claim of failure to ensure employees take meal periods*

Plaintiffs also claim that Brinker's uniform meal period policy violates sections 512 and 226.7, as well as IWC Wage Order No. 5, by failing to ensure that its hourly employees take their meal periods. In challenging the court's class certification order, Brinker's writ petition presents a question of first impression: Does an employer have an

affirmative duty under section 512(a) and IWC Wage Order No. 5-2001 to not only provide uninterrupted 30-minute meal periods to its hourly employees as mandated therein, but also to ensure the employees actually take the meal periods?[11]

For reasons we shall explain, we conclude that the court abused its discretion by granting plaintiffs' class certification motion without first resolving this issue and determining the elements of this meal period claim, and thus the certification order must be vacated and the matter remanded with directions to the court to decide this issue.

As a preliminary matter, plaintiffs contend the court's July 2005 order decided the "central legal question" in Brinker's current writ petition of "whether meal periods must be 'ensured' or merely 'made available.'" We reject this contention.

The record shows that the July 2005 order was based on briefing submitted by the parties, pursuant to a written stipulation, on the issue of "whether [Brinker] was required to provide a meal period for each five-hour block of time worked by an hourly employee." This statement of the issue followed the stipulation subheading: "When Must A Meal Period Be Provided?"

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11 Amici curiae Employers Group, California Restaurant Association, National Council of Chain Restaurants, National Retail Federation, California Hospital Association, and The California Retailers Association frame the issue as follows: "Whether California's Labor Code imposes on employers a duty to not only *provide* uninterrupted meal periods, but to further *force* employees to take their meal periods and to *police* their compliance—regardless of the reason proffered by the employee for not wanting a meal period and even against the employee's will." Amici curiae California Employment Law Council and National Association of Theatre Owners of California/Nevada, Inc. raise a similar issue: "[W]hether employers must force their employees to take meal . . . breaks or whether they must simply provide the opportunity for such breaks."

In their written opposition to Brinker's brief, plaintiffs did raise the issue of whether employers must ensure that employees take meal periods. Specifically, citing the 2001 DLSE opinion letter (discussed *ante*), plaintiffs asserted that while rest periods "need only be 'authorized and permitted,' . . . *the employer must 'ensure' that the employee takes meal periods*." (Italics added.)

In its written tentative ruling, which it later confirmed as the July 2005 order, the court ruled on the meal period issue that was the subject of the parties' stipulation. As already discussed, the court determined that, under section 512, a meal period "must be given before [an] employee's work period exceeds five hours," and stated that "[Brinker] appears to be in violation of [section] 512 by not *providing* a 'meal period' per *every* five hours of work." (Italics added.)

Although the court also stated that the "spirit of [section] 512" is to "protect employees and ensure they *have* a [30]-minute meal break every five hours of work" (italics added), the court did not rule that employers must ensure that employees *take* the meal periods provided to them and, even if it had, such ruling would have been outside the scope of the legal issue the parties stipulated to present to the court for its determination. As already discussed, the parties by stipulation asked the court to decide whether Brinker was required to provide a meal period for each five-hour block of time worked by an hourly employee.

That the court did not decide the issue of whether an employer in California has a duty under section 512(a) and IWC Wage Order No. 5 to ensure that its hourly employees actually take the meal periods provided to them is further demonstrated by the court's

remarks during an October 13, 2006 post-class certification hearing held in this case after Brinker filed the writ petition at issue in this writ proceeding. At that hearing, plaintiffs' counsel informed the court that the parties had retained statisticians, and Brinker's counsel expressed concern that the experts, in order to form their opinions, "need[ed] to know what theory of liability is going to apply; for example, with the meal and rest periods, is the theory of liability that [Brinker's] obligation was just to provide the opportunity or to *ensure that it happened*. [T]heir answers and analysis will be different depending on which . . . theory of liability applies." (Italics added.)

Acknowledging that hourly employees can waive *rest* periods, plaintiffs' counsel cited *Cicairos v. Summit Logistics, Inc., supra,* 133 Cal.App.4th 949, for the proposition that employers must "ensure" their employees "receive" or "get" an uninterrupted 30-minute *meal* period. Brinker's counsel responded that the issue of whether employers must "ensure" their employees receive the meal periods was not before the court when it issued its July 2005 order.

Acknowledging it needed to be "clearer" regarding the "basis of liabilities," the court initially suggested that meal periods need to be "ensured," stating: "[*T*]*he ruling that . . . meal periods need to be given every five hours is akin to saying that it needs to be ensured* because if it's only needed to be provided, then there certainly wouldn't have been enough before the court to figure out if they were asked and refused or what. And so I think that's an assumption that can be made from the orders that are outstanding." (Italics added.)

The court, however, then immediately retreated from that suggestion, stating: "But frankly the question of the break periods [is] going to require the *opposite assumptions*; that is, that because plaintiffs aren't even contending that it's a requirement to *ensure*—that it's merely to *provide*—that that will require the opposite conclusion." Stating "I don't think it makes any difference whether they are talking about meal periods or rest periods," the court directed the parties' expert witnesses to make "both assumptions:" "So it seems to me that both sides, frankly, need to have their experts make *both assumptions*, and I'm not sure it needs to be connected with one or the other[,] rest period or meal period." (Italics added.)

The court then directed the parties to submit briefing on their theories of liability, stating: "All right. I think the only way to proceed is this. If what we do is plaintiff[s] in their methodology opening brief set[] out the *theories of liability* that they intend to pursue at trial . . . and then their proposed methodology to prove those *theories of liability*. [¶] Then the defense can respond by saying both things. That these are the improper theories as well as -- but assuming they are, here is what our experts are saying is the proper methodology. And then if instead the *theory of liability* is 'X,' the methodology should be 'Y.' I don't know of any other way to proceed." (Italics added.) The court also told counsel, "I do think you need to set out . . . what theories you intend to pursue; in other words, that it is the requirement to ensure a lunch meal period, to only provide rest period, and then what methodology your experts are saying are needed to prove those theories in your opening briefs."

Based upon the language set forth in the July 2005 order and the foregoing excerpts from the October 2006 post-certification hearing, we conclude that although the July 2005 order decided the issue of *when* an employer must *provide* a meal period under section 512(a), the court did not determine whether an employer in California has a duty under section 512(a) and IWC Wage Order No. 5 to *ensure* that its hourly employees actually *take* the meal periods the employer provides.

As already discussed, the critical inquiry on a class certification motion is whether the theory of recovery advanced by the certification proponents is likely to prove amenable to class treatment (*Sav-On*, *supra*, 34 Cal.4th at p. 326), and in order to determine whether common questions of law or fact predominate, the trial court must examine the issues framed by the pleadings and the law applicable to the alleged causes of action (*Hicks, supra,* 89 Cal.App.4th at p. 916).

Here, however, the court failed to examine a key issue framed by the pleadings, the parties' briefing, and the law applicable to the alleged causes of action; and it incorrectly assumed it could grant plaintiffs' class certification motion without deciding whether an employer has a duty under section 512(a) and IWC Wage Order No. 5 to ensure that its hourly employees actually take the meal periods provided. Without deciding this issue, the court could not adequately evaluate whether common questions regarding plaintiffs' meal period claim predominate over individual issues.

In *White v. Starbucks Corp.* (N.D.Cal. July 2, 2007) 497 F.Supp.2d 1080 (*Starbucks*), the United States District Court for the Northern District of California recently concluded that, under sections 512(a) and 226.7, "the California Supreme

Court . . . would require only that an employer *offer* meal breaks, without forcing employers actively to ensure that workers are taking these breaks," and stated that "the employee must show that he was forced to forego his meal breaks as opposed to merely showing that he did not take them regardless of the reason."[12] (*Starbucks, supra,* 497 F.Supp.2d at pp. 1088-1089.)

Here, a decision by the court on the issue of whether Brinker has a duty under section 512(a) and IWC Wage Order No. 5 to ensure that its hourly employees actually take meal periods would affect the court's predominance analysis. For example, should it determine that an employer has no such duty, the court would have to decide, in performing its predominance analysis, whether common issues would be substantially outweighed by the individual inquiries that would be required at trial to determine whether each alleged instance of a missed or shortened meal period was the result of an employee's personal choice or a manager's coercion.

We thus conclude that the class certification order rests on an incorrect assumption with respect to plaintiffs' meal period claims to the extent those claims are based on plaintiffs' theory of liability that Brinker 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. Accordingly, the portion of the

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12 *Starbucks* involved IWC Wage Order No. 7-2001 (Cal. Code Regs., tit. 8, § 11070), the pertinent meal period provisions of which are virtually identical to those set forth in IWC Wage Order No. 5-2001, which is at issue here. (See *Starbucks, supra,* 497 F.Supp.2d at pp. 1085, 1087-1088; compare Cal. Code Regs., tit. 8, § 11070, subds. 11(A), (C) with Cal. Code Regs., tit. 8, § 11050, subd. 11(A).)

class certification order implicitly certifying the meal period subclass based on this theory of liability must be vacated. (See *Fireside Bank, supra,* 40 Cal.4th at p. 1089.) The court is directed to decide on remand whether Brinker had a duty under section 512(a) and IWC Wage Order No. 5 to ensure that its hourly employees actually took the meal periods provided to them.

3. *Off-The-Clock Claims*

In their third category of claims, plaintiffs allege Brinker unlawfully required its employees to work off-the-clock during meal periods. In a related claim, plaintiffs have also asserted a time shaving claim, alleging Brinker has engaged in a practice of "shaving time from employee payroll records to reflect less than a five (5) hour shift."

With respect to this claim, Brinker argued in opposition to plaintiffs' class certification motion that plaintiffs' off-the-clock claim should not be certified as a class action claim because plaintiffs had not cited any Brinker policy to alter time records or permit off-the-clock work, Brinker in fact had a policy expressly prohibiting such work; and plaintiffs had no proof of "class-wide off-the-clock work." Citing *Morillion v. Royal Packing Co., supra,* 22 Cal.4th 575 for the proposition that no employer liability exists when employees work off-the-clock if the work occurs without their managers' knowledge, Brinker also argued that even if off-the-clock work occurred, it could not be held liable unless it "suffered or permitted the work," and thus any off-the-clock work would have to be individually proven.

In this writ proceeding, Brinker argues the court erred by certifying plaintiffs' off-the-clock claims for class treatment "without identifying any common questions or

common proof with respect to those claims or, for that matter, even mentioning them." Brinker again relies on *Morillion v. Royal Packing Co., supra,* 22 Cal.4th 575, for the proposition that the resolution of plaintiffs' off the clock claims would require individual inquiries into whether a given employee actually performed off-the-clock work, and whether the employee's manager had actual or constructive knowledge of such work. Citing the declarations of two class members (Jerry Gallon and Will Gordon) who stated that they often performed job duties while clocked out for meal periods or for the day, Brinker argues the declarations failed to indicate whether these employees were required to work "off the clock" or did so by their own choice, and failed to indicate whether their supervisors knew they were performing off the clock work in violation of Brinker policy. Had the court examined the elements of plaintiffs' "off the clock" claims, Brinker asserts, the court "never could have certified them."

The class certification order is devoid of any indication that the court examined the elements that members of the proposed class would have to prove to prevail on their off the clock claims. The court was required to perform such an examination before certifying these claims for class treatment. (*Hicks, supra,* 89 Cal.App.4th at p. 916.) The only common issue that the court cited in its order was the overly broad issue of "what [Brinker] must do to comply with the Labor Code," and the court failed to even mention plaintiffs' off the clock claims.

We conclude the court incorrectly assumed it did not have to examine the elements of plaintiffs' off-the-clock claims and abused its discretion by finding without such an examination that those claims are amenable to class treatment. Accordingly, the

portion of the class certification order implicitly certifying the off-the-clock subclass must be vacated (see *Fireside Bank, supra,* 40 Cal.4th at p. 1089), and the court is directed to examine and consider on remand the elements of plaintiffs' off the clock claims.

DISPOSITION

Let a peremptory writ of mandate issue directing the superior court to vacate its July 6, 2006 class certification order, enter a new order denying with prejudice certification of the proposed rest break subclass, and denying without prejudice certification of the proposed meal period and off the clock subclasses. The matter is remanded with directions that the court examine and consider the elements of plaintiffs' meal period and off the clock claims, including the issue of whether Brinker had a duty under section 512(a) and IWC Wage Order No. 5 to ensure that its hourly employees actually took the meal periods it provided to them.

The stay issued on December 7, 2006, is vacated. Brinker is entitled to its own costs in this writ proceeding. This opinion is made final immediately as to this court. (Cal. Rules of Court, rule 8.264(b)(3).)

NARES, Acting P. J.

WE CONCUR:

HALLER, J.

O'ROURKE, J.