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Brinker ruling expands the bag of tricks available to mediators

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The long awaited *Brinker* case finally came down on April 12 and lawyers from all directions are opining about what it means to both sides of wage and hour disputes. The Plaintiff's Bar is claiming victory as the court remanded part of this case for further trial court consideration. Justice Kathryn Wedegar who wrote the opinion *and* the concurring opinion stressed that in "... returning the case for reconsideration, the opinion of the court does not endorse Brinker's argument, accepted by the Court of Appeal, that the question why a meal period was missed renders meal period claims categorically uncertifiable".

The court did, however, also give employers reason to be happy by relieving the employer of the obligation "... to police meal breaks and ensure no work thereafter is performed," if the employees are relieved of all duty, employers relinquish control over employees' activities, permit them a reasonable opportunity to take the 30-minute meal break and do not discourage or impede employees from doing so.

Obviously, the case includes much more than these issues. It is over 50 pages, but from this mediator's viewpoint the case may be valuable in encouraging both sides to agree to settle wage and hour cases.

Here is in part what I will use *Brinker* for to push for settlement:

Employers' Caucuses:

[T]here is still the issue of whether the employer put road blocks or impediments in the path of the employee actually taking the meal break. ... The mediator can still use this as a push to [settle]

* Encourage employers' counsel to be concerned about the lack of proper documentation or record keeping which could have supported that meal breaks and rest breaks were offered by their employer clients. In the mediation context, the employer not having proper records is helpful to the mediator in pushing to settle. After *Brinker*, this issue survives as something the mediator can use to cause concern in the employers' caucuses.

* Encourage employers' counsel to be concerned about whether their employer clients really relinquished control over their employee's meal activities and gave employees a reasonable opportunity to take meal breaks. The B*rinker* case emphasizes the importance of employers not being responsible for ensuring that employees take the meal breaks. However, there is a clear restatement and emphasis on the importance of the employer giving up control over the employee and the employees having a reasonable opportunity to take the meal breaks. This is an issue mediators can still push.

* Encourage employers' counsel to be concerned about whether their employer clients discouraged or impeded employees from taking their meal breaks.

While the court gave employers' counsel reason to celebrate in that employers need not ensure the breaks are actually taken, the employers may still be given cause to settle if the employer failed to relinquish control over the employees during the offered meal breaks. Also there is still the issue of whether the employer put road blocks or impediments in the path of the employee actually taking the meal break or discouraged meal breaks entirely. The mediator can still use this as a push to settlement post *Brinker*.

Employees' Caucuses:

* Encourage employees' counsel to be concerned about whether they can get class certification of wage and hour cases, the opinion and concurring opinion aside. Clearly the court is giving the trial court more discretion by sending part of *Brinker* back to the trial court. However, a mediator can still encourage a case to resolve given the uncertainty of what a trial court will do. This is still part of a mediator's push to settle after *Brinker*.

* I like to say to both sides, if you think the judge is on your side and do not want to settle because you are so sure of favored status in front of this judge, what about when it is counsel's perception that the judge's "wicked twin" appears and rules

against you? All experienced litigators have had this occur and *Brinker* does not remove this tool from the mediator's bag of tricks.

* Encourage employees' counsel to reconsider whether Plaintiff can defeat the employer's facts about offering up the meal breaks without control over employees' activities, etc. These issues of fact will become even more important to the mediation process after *Brinker*. The mediator will surely use this issue to encourage Plaintiff's to settle.

Overall.

So, this mediator sees many nuances and new wrinkles in helping to settle wage and hour matters post *Brinker*.

Brinker has given some new guidelines, but has also opened many new doors for challenging interactions between plaintiffs and defendants counsel and new tools for the mediators' bag of tricks. Also, it will be interesting to see how other cases, currently up on appeal, which were being held pending *Brinker*, will come down.

While the *Brinker* ruling has clarified many issues it has enhanced the mediators' tools in resolving wage and hour matters even though both plaintiff and defense counsel may declare victory. On the one side, the mediator can still worry employers' counsel about lack of documentation and whether they really allowed employees uncontrolled opportunities to take a meal break, among other issues. On the other side, the mediator can still worry plaintiff's counsel about uncertainties about what trial courts may do related to certification. The mediator's bag of tricks is ever expanding to move cases to settlement.