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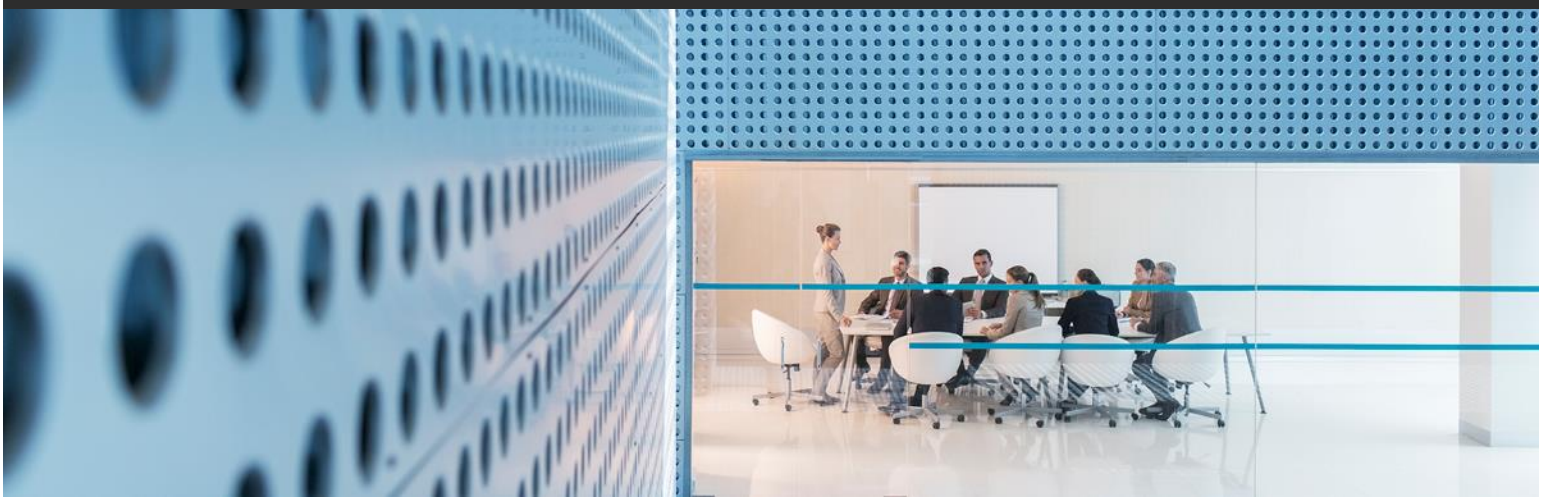

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Donohue – Rethinking California Meal Period Claims

On Feb. 25, 2021, the California Supreme Court issued its much-anticipated decision in *Donohue v. AMN Services, LLC*. The opinion answers two important questions: (1) whether "employers can[] engage in the practice of rounding time punches – that is, adjusting the hours that an employee has actually worked to the nearest preset time increment – in the meal period context," and (2) whether time records that do not show that a facially compliant meal period was taken "raise a rebuttable presumption of meal period violations...."

The Court held rounding is not permissible in the context of recording meal periods. It also held that where time records do not facially show an employee took a compliant meal period, a rebuttable presumption arises that the employer failed to provide it, giving rise to a meal period violation. The Court held that, in such instances, the burden is on the employer to show the employee's failure to take a compliant meal period was the result of the employee's free choice. The decision also identified something of a potential safe harbor – a protocol that, if followed, would shift the burden of proof back to the employee.

Importantly, this decision addresses competing motions for summary judgment based on the claims of a certified class. Although the Court did not resolve those competing motions, throughout its decision it underscored that the question of whether an employee chose not to take a meal period is a "liability" question. Of course, individualized questions relating to liability typically defeat class treatment, regardless of which party is assigned the burden of proof on that question. Here, however, a motion to

decertify the class was not before the Court, and the Court did not discuss the ramifications of its decision in that regard. However, the decision appears to leave open the argument – and arguably enhances the argument – that questions of *why* an employee fails to take a meal period despite compliant written policies authorizing same is an individualized liability question that cannot be adjudicated on a class-wide basis.

As background, Defendant AMN Services, LLC (AMN) used a computer-based timekeeping system, Team Time, on which employees punched in and out to record the time they worked and the breaks they took. Although actual punch times were recorded, for compensation purposes the system reported time punches to the nearest 10-minute increment. Accordingly, if, for example, "an employee clocked out for lunch at 11:02 a.m. and clocked in after lunch at 11:25 a.m., Team Time would have recorded the time punches as 11:00 a.m. and 11:30 a.m. Although the actual meal period was 23 minutes, Team Time would have recorded the meal period as 30 minutes."

Though AMN argued that rounding was generally favorable to the employees, and therefore traditional rounding law would suggest no liability, the Court rejected the application of rounding to meal breaks. The Court reasoned that the California Labor Code and Wage Orders that encompass the meal period provisions are concerned with small amounts of time and thus "are at odds with the imprecise calculations that rounding involves." Citing health and safety concerns and the fact that the law requires premium pay be paid upon even the most minor of violations, the Court went on to reason that regulations "that discourage[] employers from infringing on meal periods by even a few minutes cannot be reconciled with a policy that counts those minutes as negligible rounding errors."

Next, the Court considered which party had the burden of proof on the question of whether a facially non-compliant meal period shown in the employer's time records (short, late, not taken) was the result of an employee's voluntary decision to clock back in prior to the expiration of the 30-minute period (or not take the meal at all, or take it late), or was the result of coercion by the employer. In an apparent retreat from the majority position in *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004 (2012), the Court unanimously adopted Justice Werdegar's concurrence in *Brinker* (not the majority opinion) and assigned the burden of proof to the employer. The Court reasoned that the command to employers found in Cal. Code Regs. tit. 8 § 11050 that "[m]eal periods shall be recorded" also included an obligation to record the reasons why fully compliant meal periods are not recorded (including by employee choice). The Court concluded that, where an employer had not recorded those reasons, the burden of proof would shift to the employer to establish that the non-recording of a meal period was due to the employee's free choice not to take or complete the meal period (or take it late). The Court rejected the assertion that this was a retreat from the majority position previously espoused in *Brinker*, that an "employer satisfies this obligation if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so. . . . [¶] . . . [T]he employer is not obligated to police meal breaks and ensure no work thereafter is performed."

The Court also offered a discussion concerning how an employer could "record" employee decisions to not take fully compliant meal periods, and thereby shift the burden of proof back to the employee. For instance, so long as no rounding is used, the Court implicitly found that an employer may be able to avoid the burden-shifting if, for example, a drop-down menu was presented to employees seeking to clock out at the end of the day, asking the employee to confirm whether a meal break violation actually occurred, or the non-recorded full and timely meal was the result of the employee's own choice(s).

Further, even in the face of a presumption of liability, the Court noted that an employer may rebut it "by presenting evidence that employees were compensated for noncompliant meal[s] … or that they had in

fact been provided compliant meal periods during which they chose to work." The Court declined to articulate the form such evidence might take.

As noted above, this decision is rendered in the context of cross motions for summary judgment on a certified class. Although those motions were not resolved by the Court, and a motion to decertify the class was not before the Court, the Court's decision raises questions concerning whether these claims – or others like it – could be tried on a class basis or certified in the first instance. Employers would argue that the question of why an individual on a particular day did not take a full and timely 30-minute meal period is obviously individualized. Further, the Court made plain that this "why?" question is a *liability* question, and not merely a damages question. As such, notwithstanding to whom the burden is assigned, that fact-intensive liability question should inhibit the ability to certify the claims. See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011) ("a class cannot be certified on the premise that [a defendant] will not be entitled to litigate its statutory defenses to individual claims.").

In sum, the California Supreme Court's decision requires employers to revisit rounding policies and consider drop-down menus or other forms of attestations regarding meal compliance. But it also affirms what the defense bar would argue are obvious class certification issues attendant to meal break claims.

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