Rethinking Meal Break Class Certification After Calif. Ruling

By **Mark Kemple and Ryan Bykerk**

Mark Kemple

Ryan Bykerk

Much has been written cautioning employers **about the twin holdings** of Donohue v. AMN Services LLC, in which the California Supreme Court said on Feb. 25 that (1) employers "cannot engage in the practice of rounding time punches ... in the meal period context," and (2) a "rebuttable presumption of meal period violations" will apply when their time records show noncompliant meal periods.[1]

But Donohue also offers powerful tools to defeat meal period claims outright and combat class certification of meal period claims.

First, Donohue appears to hold that paying a meal premium insulates an employer against liability, including as to Private Attorneys General Act claims.

Second, the opinion specifically declares that the question of whether employee choice or employer interference is the cause for the absence of time punches showing a fully compliant meal period — and the individual inquiries through which that question is answered — is a central liability question, not a mere damage question.

That negates a central premise argued by the plaintiffs bar — that the question of why is a mere damage question that does not frustrate class certification and does not create manageability issues on PAGA claims.

The Brinker Decision, and the Minority Concurrence of Justices Werdegar and Liu

Donohue builds upon and modifies the law expressed in Brinker Restaurants Corp. v. Superior Court,[2] so we begin there.

In Brinker, the California Supreme Court held in 2012 that employers are obligated to provide but not police meal periods.

As the court put it, an employer complies 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," but it "is not obligated to police meal breaks and ensure no work thereafter is performed."[3]

The court explained that when an employer provides a reasonable opportunity to take a meal break, the employee is free to take the break or do anything else, including continue working.

Indeed, Brinker suggests that forcing an employee to not work during a meal period may be inconsistent with the employee's freedom during that time.[4] Simply, why a meal period was not taken is a central inquiry.

Given that necessary inquiry, the majority of the justices in Brinker did not adopt former Justice Kathryn Werdegar's concurrence — joined only by Justice Goodwin Liu — where she

opined that a rebuttable presumption of a meal period violation should arise "[i]f an employer's records show no meal period for a given shift over five hours."[5]

Indeed, that view would also seem to be inconsistent with the majority view in Brinker that an employer need not police meal periods. And, still difficult to understand is Justice Werdegar's logic then — the same logic of all the justices in Donohue now — that in the absence of a time punch one should presume no meal period was authorized by the employer in the first place — rather than assume the employee elected not take a lunch break and instead be paid for the time, or make no assumption at all.

Although the justices point to the employer obligation found in wage orders to record meal periods, that obligation would not seem to include, nor naturally be read to include, an obligation to record the reason why a meal period was not taken — or was short, or was late.

From there, Justice Werdegar downplayed the factual issues attendant to the seemingly central question of why.

She opined that the why question "operates not to extinguish the defendant's liability but only to diminish the amount of a given plaintiff's recovery," arguing that such "individual damages questions will rarely if ever stand as a bar to certification."[6]

Donohue's Silver Linings

At first reading, the Donohue decision appears as a full-throated endorsement of Justice Werdegar's concurrence in Brinker.

The opinion is authored by the only justice to have joined in Justice Werdegar's concurrence, and quotes it at length. However, there is an important distinction.

Although Donohue adopts the presumption Justice Werdegar unsuccessfully argued for in Brinker, it rejects Justice Werdegar's attempt in Brinker to relegate the why question to a mere question of damages.

The Donohue court expressly — and repeatedly — holds that the question of an employee's waiver of a meal period is a question of liability.[7]

This is crucial, as "individual questions about the calculation of damages generally do not defeat certification."[8] Not so with individual questions of liability.

By casting the why question as a question of liability — as Donohue does — the opinion raises the prospect of individual questions that may preclude class treatment of such claims.

Importantly, the assignment of the burden of proof via a rebuttable presumption does not alter the fact that the question itself may defeat class treatment.[9]

The why question is inherently individualized, because an employee authorized to take a meal period may choose to skip it — and thereby get paid for time that otherwise would not be compensated — or shorten or delay it for any number of reasons.

As countless courts have held, in sum or substance, "the reason that any particular employee missed any particular break requires, ineluctably, individualized fact finding."[10]

Tackling the why question from the employer's perspective, the Donohue court suggests two means of proof for an employer assigned the burden, via a rebuttable presumption "by presenting evidence that employees were compensated for noncompliant meal periods or that they had in fact been provided compliant meal periods during which they chose to work."[11]

The first is a significant win for employers. Prior to this decision, it was unclear whether payment of the meal premium eliminates the violation. If it did not, the employer could be argued to owe additional PAGA penalties for the nonprovision of the meal period, even if the employer had paid the premium.

In this regard, plaintiffs often argue that payment of a meal period premium, typically through an automated function, does not eliminate any violation and in fact is an admission that the employee was forced to work through a break. The Donohue decision appears to hold that payment of the premium eliminates the violation.[12]

Thus, it now seems clear that employers may automate payment of meal premiums where a fully compliant meal period is not shown in the time records without risk of conceding further exposure. The proper and cost-efficient means to do this is a different discussion.

As for the second means of carrying an employer's burden to overcome a rebuttable presumption, the Donohue court again turns to the Brinker concurring opinion and notes that an employer may use "'[r]epresentative testimony, surveys, and statistical analysis,'" and other types of evidence that may "'render manageable determinations of the extent of liability.'"[13]

Of course, the defendant does not seek to render manageable the questions of why a meal period is not shown in individual shifts. Instead, the defendant will offer individual employee declarations showing that employees freely chose not to take certain meal breaks and argue that testimony will be required from each employee to determine the liability question.

As noted, a court cannot "deprive defendants of their substantive rights merely because those rights are inconvenient in light of the litigation posture [putative class action] plaintiffs have chosen."[14]

Importantly, the court's suggestion that a defendant conduct a survey, is offered in the context of a decision that did not involve class certification, and is instead an appeal from cross-motions for summary adjudication.

We believe that the Donohue decision strongly counsels the defendant in that action to now move to decertify the meal break claim, as survey evidence, by definition, does not answer the individualized question of each employee's choices in each shift — the central liability question in each instance.

The defendant can point to individual testimony as showing that any survey is wrong as to those declarants and demand the ability to examine each employee to determine the liability question as to each.

Simply, the Donohue decision, on motions concerning summary judgment, shows that the underlying class certification decision — not on appeal — was an error, as the individual liability question cannot be papered over by a mere survey without denying the defendant due process of law.

Donohue is more than another in a long line of employer defeats at the Supreme Court.

It contains tools that employers can use to combat certification of meal period claims, and limit exposure. Certainly, employers should revisit rounding policies and consider drop-down menus or other forms of attestations regarding meal compliance.

But they should also consider how to use the opinion on the procedural question of whether such claims can be adjudicated on a class basis, regardless to whom the burden of proof is assigned, now that the why question plainly has been identified as a liability question, not a mere damage question.

Mark D. Kemple and Ryan C. Bykerk are shareholders at Greenberg Traurig LLP.

Disclosure: Greenberg Traurig attorneys representing the National Association of Theater Owners of California/Nevada Inc. were amicus curiae on behalf of petitioners in Brinker Restaurants v. Superior Court, discussed in this article.

[1] Donohue v. AMN Services LLC, No. S253677, Slip Op. at 1.

[2] Brinker Rest. Corp. v. Superior Court, 53 Cal. 4th 1004, 1040 (2012).

[3] Id. at 1040.

[4] Id. at 1038.

[5] Id. at 1053 (Werdegar, J., concurring).

[6] Id. at 1054 (Werdegar, J., concurring).

[7] Donohue (Slip Op. at 24; see also id. at 2, 27 ["The employer is not liable if the employee chooses to take a short or delayed meal period or no meal period at all"]).

[8] Duran v. U.S. Bank Nat'l Assn., 59 Cal. 4th 1, 30 (2014); In re AutoZone, Inc., Wage & Hour Emp. Practices Litig., 289 F.R.D. 526, 535 (N.D. Cal. 2012), aff'd, 789 F. App'x 9 (9th Cir. 2019) ("That class members will need to individually prove their damages might be daunting, but it is not a bar to certification").

[9] 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"); Duran, 59 Cal. 4th at 34 ("a class action trial management plan may not foreclose the litigation of relevant affirmative defenses, even when these defenses turn on individual questions. . . .[I]t is inappropriate to deprive defendants of their substantive rights merely because those rights are inconvenient in light of the litigation posture plaintiffs have chosen.") (internal quotation and citation omitted).

[10] Gonzalez v. Officemax N.A., 2012 WL 5473764 *1, *5 (C.D. Cal. 2012).

[11] Donohue (Slip Op. at 26-27).

[12] Donohue (Slip Op. at 26, 28 — employer can demonstrate it is not liable where it can show employees received "proper compensation").

[13] Donohue, Slip Op. at 26-27 (quoting Brinker, 53 Cal. 4th at 1054).

[14] Duran, 59 Cal. 4th at 34.