SUMMER BLOCKBUSTERS!

California Court Decisions on NON-COMPETE AGREEMENTS & MEAL AND REST PERIODS

Los Angeles and Webinar – September 24, 2008
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SUMMER BLOCKBUSTERS! California Court Decisions on NON-COMPETE AGREEMENTS & MEAL AND REST PERIODS

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TODAY’S TOPICS

- Edwards v. Arthur Andersen, August 7, 2008
  - California Supreme Court decision on post-employment non-compete agreements

- Brinker Restaurant Corp. v. Superior Court (Hohnbaum), July 22, 2008
  - California Court of Appeal decision on meal and rest period requirements
Edwards v. Arthur Andersen

- California Supreme Court interprets what constitutes a “restraint of trade” under Business and Professions Code § 16600 and rejects the “narrow restraint” doctrine that had been adopted by the federal courts in the 9th Circuit.

CA Business & Professions Code § 16600

- “Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.”
- Strong public policy protecting employee freedom to compete with the employer. Long standing policy allowing employee mobility – statute dates back to late 1800’s.
California Policy is Different than other States

- CA strictly prohibits employee “non-compete” agreements (other than statutory exceptions)
  - Such agreements are “void” and against public policy
- California does not use “rule of reason” or “reasonableness” test adopted by most other states
  - Balancing of legitimate employer’s interests with the scope of the restriction on the employee, based on length of time and geographic area (reasonable time and territory limitations), and provided restriction does not cause undue hardship on employee (i.e., can still be gainfully employed)

California Statutory Exceptions – B&P Code

- Sale of Business – sale of employee’s entire ownership interest in a business entity, or sale of substantially all of the assets, including goodwill value. B&P Code §16601
  - Employee must have a legitimate ownership interest for exception to apply (“significant” but not necessarily “substantial”)
  - Restriction limited to scope of the business sold, in the same geographical territory as conducted, and for so long as buyer conducts a like business
- Employee/officer with 3% ownership interest, who received $500,000 in connection with sale, bound to terms of non-compete (Vacco Industries v. Van Den Berg, 5 Cal.App. 4th 34 (1992))
Other Statutory Exceptions under B&P Code

- Dissolution of, or withdrawal/termination from, a Partnership or LLC (§§ 16602 and 16602.5)
  - Must be legitimate partnership/LLC interest and restriction limited to same geographic area
- Telephone answering service – Customer list is Trade Secret belonging to owner. (§ 16606)
- Employment agency – Customer list (active during past 180 days) is protected Trade Secret, but may be used by former employee one year after termination. (§ 16607); *ReadyLink Healthcare v. Cotton*, 126 Cal. App. 4th 1006 (2005).

Judicially Created “Trade Secret” Exception

- Courts in California have upheld post-termination employee restrictions narrowly limited to protecting legitimate trade secret information of the employer as an exception to 16600
  - *Gordon v. Landau*, 49 Cal.2nd 690 (1958) (agreement not to use employer’s confidential lists to solicit customers for a period of one year following termination of employment was valid and enforceable and did not violate § 16600)
  - *Thompson v. Impaxx*, 113 Cal.App.4th 1425 (2003) (nonsolicitation covenants are enforceable only to extent necessary to protect former employer’s legitimate trade secrets
Federal Narrow Restraint Doctrine in CA

- Over the years, Federal court decisions had adopted a “narrow restraint” doctrine that was more favorable for the employer – Employee restriction as to only a small or limited part of the business, trade or profession would not violate § 16600
  - *General Commercial Packaging v. TPS Package Engineering*, 126 F. 3d 1131 (9th Cir. 1997) (restriction as to working for only one particular customer upheld)
  - *IBM v. Bjorek*, 191 F. 3d 1033 (9th Cir. 1999) (contract prohibiting employee from going to work for a competitor within six months after exercising stock options was enforced by the court)
  - *Campbell v. Stanford*, 817 F. 2d 499 (9th Cir. 1987) (doctrine upheld by the court, but application rejected based on the facts)
- However, narrow restraint doctrine is **no longer valid** . . .

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*Edwards v. Arthur Andersen* – Decided by CA

Supreme Court August 7, 2008

- As an employee of Arthur Andersen, Edwards was required to sign agreement that said employee would not compete as follows:
  - For 18 months post-employment, agreed not to perform professional services of the type he provided for any client on which he worked during the 18 months prior to his termination (but was not prohibited from accepting employment with a client)
  - For 12 months post-employment, agreed not to solicit (to perform professional services of the type he provided) any client of the office to which he was assigned during the 18 months preceding his termination
  - For 18 months post-employment, agreed not to solicit away from the Firm any of its professional personnel
Edwards Case (cont.)

- In 2002, Arthur Andersen negotiated sale of division of business in which Edwards worked to HSBC
- Edwards was offered employment with HSBC on condition, among others, that he obtain a release from the post-employment restrictions he had with Arthur Andersen

Edwards Case (cont.)

- Arthur Andersen offered to release Edwards from post-employment restrictions and provide him with severance, but conditioned on Edwards signing an agreement that imposed the following obligations:
  - He would agree to a general release of all claims relating to his employment at Arthur Andersen
  - He would agree to cooperate with Arthur Andersen in connection with any investigations and litigation arising from the Enron debacle
Edwards Case (cont.)

- Edwards refused to sign the release agreement required by Arthur Andersen, but signed the offer letter with HSBC.
- HSBC revoked its offer based on Edwards’ failure to obtain the required release of post-employment restrictions.
- Arthur Andersen terminated Edwards’ employment and refused to pay him any severance.

Edwards Case (cont.)

- Edwards sued, claiming, among other things, that post-employment restrictions contained in his Arthur Andersen contract were void and unenforceable under CA law.
- Edwards reasoned that Arthur Andersen could not require him to agree to additional obligations (general release, cooperation in Enron debacle) as condition of releasing him from invalid post-employment restrictions.
Edwards Case (cont.)

- Arthur Andersen argued that the post-employment restrictions were valid under the Ninth Circuit’s “narrow restraint” doctrine.
- Narrow restraint doctrine was judicially created rationale providing that restrictions which are narrowly tailored to protect a legitimate business interest and which do not prohibit a former employee from practicing his/her profession, were enforceable under California law.

CA Supreme Court’s Ruling

- Court in Edwards rejected any post-employment non-compete restrictions, except those that fall within the express statutory exceptions (e.g., “sale of business” exception, or dissolution or withdrawal from partnership or LLC).
- Court expressly rejected federal judiciary’s “narrow restraint” doctrine, holding the doctrine relied on faulty reasoning and inapposite authority.
**Edwards Held:**

- “The Agreement restricted Edwards from performing work for Andersen’s Los Angeles clients and therefore restricted his ability to practice his accounting profession... [Citation omitted.] The noncompetition agreement that Edwards was required to sign before commencing employment with Andersen was therefore invalid because it restrained his ability to practice his profession.”

- Accordingly, *Edwards* holds that a restriction that prohibits an employee from performing work even for just some clients or customers, is a sufficient “restraint” under § 16600 and is therefore void.

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**What The Court in Edwards Did Not Address**

- It did not directly address the “trade secrets” exception to Business & Professions Code section 16600.
- It did not address post-employment non-solicitation of employees, because Edwards had not raised that issue.
- Footnote 4: “We do not here address the applicability of the so-called trade secret exception to section 16600, as Edwards does not dispute that portion of his agreement or contend that the provision of the noncompetition agreement prohibiting him from recruiting Andersen’s employees violated section 16600.”
However, Court did Cite to *Thompson v. Impaxx*

- In holding that the Agreement restricted Edwards from performing work for Andersen’s Los Angeles clients and therefore restricted his ability to practice his profession, the Court stated: “(See *Thompson v. Impaxx, Inc.* (2003) 113 Cal.App.4th 1425, 1429 [distinguishing “trade route” and solicitation cases that protect trade secrets or confidential proprietary information].)”
- Although the Court focused on the “performing work for” language (rather than the “not to solicit” part), by citing to *Thompson*, may infer that a “no solicit” clause that does not protect trade secrets would be invalid.

Conclusions Drawn from *Edwards*

- If an agreement contains any type of post-employment restriction on an employee’s ability to practice his or her profession, trade or business, such as a prohibition on performing work for a competitor or doing work for a particular customer (regardless of the length of time of such restriction), the provision will be void under B&P Code § 16600, and therefore unlawful and against public policy.
What About Non-Solicitation of Customers?

- A broad non-solicitation clause with respect to customers would be unlawful, unless specifically limited to protecting confidential, trade secret information. E.g., Thompson v. Impaxx, 113 Cal. App. 4th 1425 (2003).
- Restriction limiting use of confidential information to solicit customers should be permissible, but merely labeling something “confidential” does not make it so.
- Prohibition on “soliciting” would not prohibit former employee from servicing or doing business with customer if contacted by customer.

What About Non-Solicitation of Employees?

- Strategix v. Infocrossing West, 142 Cal. App. 4th 1068 (2006) (applying sale of business exception to 16600, Court held invalid an employee non-solicitation clause on seller that applied to all of the buyer’s business, rather than just with respect to former employees of portion of the business that was sold).
- VL Systems v. Unisen, Inc., 152 Cal. App. 4th 708 (2007) (broad “no-hire” provision held unenforceable, but indication that narrowly tailored non-solicitation provision that does not impinge on policy favoring employee freedom of mobility may be enforceable).
Employee Raiding

- *Loral Corp. v. Moyes*, 174 Cal. App. 3d 268 (1985) (court distinguished “do not hire” and “non-solicitation” clauses in upholding action by former employer for damages for employee raiding where former employee targeted and recruited numerous employees of former employer; former employer showed it spent $400,000 in recruiting and training replacements; and agreement provided that former employee would not “disrupt, damage, impair or interfere with the business… by raiding its employees…”)

Valid Non-Compete under the Law of Another State; Extra-territorial Application of California Law

- Application of California law to employees located in other states. E.g., *Applications Group v. Hunter Group*, 61 Cal. App. 4th 881 (1998) (Maryland company violated CA law by seeking to enforce MD non-compete against MD resident servicing customers in CA for CA company)
- Pre-emptive strike litigation. *Advanced Bionics Corp. v. Medtronic*, 29 Cal. 4th 697 (2002)(action first filed in CA by former employee would protect employee by allowing employee to work for competitor, but CA court could not enjoin litigation in other state.)
Landmines for Employers


Landmines for Employers (Cont.)


- Preparation to enter into competition is generally allowed. See, e.g., *Bancroft Whitney v. Glen*, 64 Cal. 2d 327 (1966); *Fowler v. Varian Assoc.*, 196 Cal. App. 3d 34 (1988) - However, some limits based on duty of loyalty
Landmines for Employers (Cont.)

- Labor Code § 432.5 (misdemeanor to require applicant or employee to agree in writing to illegal term or condition of employment)
- CA Labor Code Private Attorneys General Act of 2004 (PAGA) providing right of action for persons aggrieved by violation of any provision of the Labor Code and imposing substantial penalties for the violation (e.g., $100 per employee per pay period for first violation)

Available Means of Protection for the Employer

- Non-solicitation clauses – vendors (interference in business relationship is possible claim)
- Non-solicitation clause – employees: not clear they are enforceable, and must be careful re scope (do not hire provisions generally are not valid)
Helpful Hints When Non-Compete is Enforceable (Sale of Substantial Interest in Business)

- Include non-compete provisions in contract in which shareholder/owner-employee is selling shares and cross-reference to that document in employment agreement
- Include recitation that:
  - Buyer would not have entered into agreement to acquire interest without covenant
  - Covenant is essential to preserve the business and goodwill being acquired
  - Covenant is fair under circumstances and in light of transactions contemplated
  - Covenants bargained for and parties had assistance of competent counsel in negotiating and advising

Helpful Hints When Non-Compete is Enforceable (Sale of Substantial Interest in Business), cont.

- Foregoing recitations not bullet proof
- Indicate that parties considered issues, not “pro-forma”
- Courts may view representations as persuasive in determining enforceability
Hints to Assist in Preserving Interests When Non-Compete is Not Enforceable (typical situations)

- The mere fact an employee engages in competitive activity does not render such activity unlawful.
- Generally, focus on what information is being used in conducting activities, and not activities themselves.
- Sample of instances in which activities can be unlawful:
  - Employee raiding (rare, requires showing of intent from significant facts and circumstances)
  - Interference with economic advantage (business tort)
  - Misappropriation of trade secrets

Last Note on Edwards re Release of Claims

- *Edwards v. Arthur Andersen* also addressed an entirely separate issue relating to the release of claims.
- Edwards argued that the broad language in the release regarding “any and all claims” meant that he would be forced to release rights that cannot be waived as a matter of law, such as claims for indemnity under L.C. § 2802.
- However, *Edwards* held that a contract provision whereby an employee releases “any and all” claims does not encompass nonwaivable statutory protections, such as the employee indemnity protection of Labor Code § 2802.
- Employers, therefore, need not “carve out” all possible nonwaivable rights from standard employee release agreements.
Brinker Restaurant v Superior Court; CA Court of Appeal Decision Issued July 22, 2008

- Rest Periods
- Meal Periods
- Class Action status for such claims

Labor Code § 512 – Meal Periods (Excerpt)

- 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. (Emphasis added.)
Wage Order § 11 -- Meal Periods (Excerpt)

- 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. Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an “on duty” meal period and counted as time worked. (Emphasis added.)

Wage Order § 12 -- Rest Periods (Excerpt)

- 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 (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 ½ ) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages. (Emphasis added.)
Labor Commissioner Interpretation

- The State Labor Commissioner (Division of Labor Standards Enforcement or “DLSE”) had interpreted the language “No employer shall employ” of the Meal Period to mean that the employer must ensure that each non-exempt employee takes a meal period
  - Employee required to “clock out” for 30 minute period
- However, the “authorize and permit” language of the Rest Period was interpreted to mean that the employer need only provide the opportunity for the employee to take the rest break, with no violation if employee voluntarily choose not to take the break

Labor Commissioner Interpretation (Cont.)

- The DLSE had also interpreted the language “for a work period of more than five (5) hours without a meal period” to mean that a meal period must be taken by no later than the end of the 5th hour of work, and that an employee could not work more than 5 hours without taking a meal period
  - For example, if an employee took a meal period after two hours of work, then the employee would also have to take a second meal period by no later than the 7th hour of work, unless waived by the employee
MEAL AND REST PERIOD “PENALTIES”

- Labor Code § 226.7
- One additional hour of pay at the employee’s regular rate for each work day that the meal or rest period is not provided
- One hour of a pay is a “premium wage.” (Murphy v. Kenneth Cole, 40 Cal.4th 1094 (2007)
  - 3 year statute of limitations; 4 if B&P Code claims
  - Waiting time penalties available under L.C. 203

Claims Asserted in Brinker

- Brinker operates various restaurant chains with over 130 restaurants in California and thousands of ee’s
- Plaintiffs filed a class action alleging 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
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."

- Plaintiffs asserted that while rest breaks "need only be 'authorized and permitted,' . . . the employer must 'ensure' that the employee takes meal periods."
- Plaintiffs' also asserted that Brinker was forcing them to take the meal period prior to the first rest break, and was also requiring them to “work off the clock.”

The trial court issued an “advisory” order, ruling that under L.C. § 512, a meal period “must be given before [an] employee’s work period exceeds five hours.”

The trial court then certified the proposed class, finding that “common issues predominate over individual issues” and specifically that “common questions regarding the meal and rest period breaks are sufficiently pervasive to permit adjudication in this one class action.”
- The proposed class was over 59,000 employees.
The Court of Appeal rejected the trial court’s rulings and held that:

- (1) while employers cannot impede, discourage or dissuade employees from taking rest periods, they need only provide, not ensure, rest periods are taken;
- (2) employers need only authorize and permit rest periods every four hours or major fraction thereof and they need not, where impracticable, be in the middle of each work period;

Court of Appeal Decision in Brinker (Cont.)

- (3) employers are not required to provide a meal period for every five consecutive hours worked;
- (4) while employers cannot impede, discourage or dissuade employees from taking meal periods, they need only provide them and not ensure they are taken; and
- (5) while employers cannot coerce, require or compel employees to work off the clock, they can only be held liable for employees working off the clock if they knew or should have known they were doing so. (Emphasis added.)
Court of Appeal Decision in *Brinker* (Cont.)

- The Court also concluded that because the rest and meal breaks need only be "made available" and not "ensured," individual issues predominate and, based upon the evidence presented to the trial court, they are not amenable to class treatment.
- The Court further concluded the “off-the-clock” claims are also not amenable to class treatment as individual issues predominate on the issue of whether Brinker forced employees to work off the clock.

Court of Appeal Decision in *Brinker* (Cont.)

- With respect to Rest Periods, *Brinker* concluded that employees need be afforded only one 10-minute rest break every four hours "or major fraction thereof" (and not every 2 hours);
- Rest breaks need be afforded in the middle of that four-hour period only when "practicable";
- Employers are not required to ensure that employees take the rest breaks, which may be waived; and
- Employees may be required to take the Meal Period before they take their first Rest Period.
Court of Appeal Decision in *Brinker* (Cont.)

- With respect to **Meal Periods**, *Brinker* concluded that an employer is not required to provide or make available a 30-minute uninterrupted meal period for every five *consecutive* hours of work or rolling 5-hour period;
- A meal period can be scheduled at any time during the eight hour day and does not need to be taken in the middle of the shift (such that a scheduled “early lunch” is permissible; and
- The term "provide" means "to supply or make available." Thus, from the plain language of section 512(a), meal periods need only be **made available, and not ensured**.

Court of Appeal Decision in *Brinker* (Cont.)

- The *Brinker* Court relied on two recent federal district court decisions in support of its analysis
  - In *White v. Starbucks Corp.* (N.D.Cal. 2007) 497 F.Supp.2d 1080, the federal District Court rejected the notion that employers must ensure their employees take meal breaks: "The interpretation that White advances--making employers ensurers of meal breaks--would be impossible to implement…"
  - In *Brown v. Federal Express Corp.* (C.D.Cal. 2008) ____ F.R.D. ____ [2008 WL 906517] The court explained that section 512’s statement that employers must "provide" meal periods "does not suggest any obligation to ensure that employees take advantage of what is made available to them."
Aftermath of Brinker Decision

- Three days after Brinker was issued, the DLSE issued a Memo changing its enforcement policies to be consistent with Brinker, and also referencing the two Federal District Court decisions.
- The Memo states that “All staff must follow the rulings in the Brinker decision effective immediately and the decision shall be applied to pending matters.”

Aftermath of Brinker Decision (Cont.)

- On August 29, 2008, the Plaintiffs in Brinker filed a Petition for Review with the California Supreme Court.
- Review not granted yet – but many commentators believe that Review will be granted.
- Employer’s should be cautious with respect to changing their meal and rest period policies to the more favorable Brinker standards, as Brinker and its holdings could not be cited if review is granted.
- But, DLSE Memo provides some interim protection.
Aftermath of *Brinker* Decision (Cont.)

- *Brinker* represents a major change in the interpretation and enforcement of the meal period requirements and may ultimately lead to much needed relief for employers who have been hit with substantial class action lawsuits for mere technical violations of the meal period rules that had previously been strictly enforced by the DLSE and the courts
  - E.g., Wal-Mart class action – Jury in Oakland awarded employee class over **$160 million** for alleged meal and rest period violations and work time “off the clock”

Conclusion

- Questions and Answers
TO: DLSE Staff

FROM: Angela Bradstreet, Labor Commissioner
Denise Padres, Deputy Chief
Robert Roginson, Chief Counsel

DATE: July 25, 2008

SUBJECT: Binding Court Ruling on Meal and Rest Period Requirements

On July 22, 2008, the California Court of Appeal issued its decision in *Brinker Restaurant Corp. v. Superior Court of San Diego County (Hohnbaum)*, (2008) ___ Cal.App.4th ___, 2008 WL 2806613. The court in *Brinker* decided several significant issues regarding the interpretation of California’s meal and rest period requirements. The decision is a published decision, and its rulings are therefore binding upon the Division of Labor Standards Enforcement (DLSE).

The decision in *Brinker* included the following rulings regarding the interpretation of California’s meal and rest period requirements:

**Meal Periods**

- The court held that Labor Code § 512 and the meal period requirements set forth in the applicable wage order mean that employers must provide meal periods by making them available, but need not ensure that they are taken. Employers, however, cannot impede, discourage or dissuade employees from taking meal periods.¹

- The court rejected the so-called “rolling five-hour” requirement as being inconsistent with the plain meaning of Labor Code § 512 and the applicable wage order.² An employer must make a first 30-minute meal period available to an

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¹ Slip Op. at pp. 4, 34 and 41-47.
² Slip Op. at pp. 4 and 34-41.
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.3 The court also found section 512 to plainly provide that an employer must make a second 30-minute meal period available to an hourly employee who has a “work period of more than 10 hours per day” 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.”4 Employers are not required to provide a meal period for every five consecutive hours worked.5 The court held that the employer’s practice of providing employees with an “early lunch” within the first few hours of an employee’s arrival at work did not violate California law, even though that would mean that the employee might then work in excess of five hours without an additional meal period.6

Rest Periods

- The court held that the rest period requirements set forth in the applicable wage order mean that employers must provide rest periods, but need not ensure that they are taken. Employers, however, cannot impede, discourage or dissuade employees from taking rest periods.7

- The court held that employers need only authorize and permit rest periods every four hours or major fraction thereof and they need not, where impracticable, be in the middle of each work period.8 The court interpreted the phrase “major fraction thereof” to mean the time period between three and one-half hours and four hours and not to mean that a rest period must be given every three and one-half hours.9 In so doing, the court rejected as incorrect a 1999 interpretation by the Labor Commissioner that the term “major fraction thereof” means an employer must provide its employees with a 10-minute rest period when the employees work any

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3 Slip Op. at p. 36.
7 Slip Op. at pp. 4 and 31.
8 Slip Op. at pp. 4 and 28-29.
time over the midpoint of each four hour block of time.\textsuperscript{10} The court ruled that the rest periods must be given if an employee works between three and one-half hour and four hours, but if four or more hours are worked, it need be given only every four hours, not every three and one-half hours.\textsuperscript{11}

The court also ruled that the applicable wage order rest period provisions do not require employers to authorize and permit a first rest period before the first scheduled meal period. Rather, the applicable language of the wage order states only that rest periods “insofar as practicable shall be in the middle of each work period.” Accordingly, the court concluded, as long as employers make rest periods available to employees, and strive, where practicable, to schedule them in the middle of the first four-hour work period, employers are in compliance with that portion of the applicable wage order.\textsuperscript{12}

The court relied upon the plain meaning of the Labor Code and applicable wage order provisions in making its determinations. The court found persuasive the reasoning in the federal district court decisions in \textit{White v. Starbucks} (ND Cal. July 2, 2007) 497 F.Supp.2d 1080 and \textit{Brown v. Federal Express Corp.} (CD Cal. Feb. 26, 2008) 2008 WL 906517, and concluded that employers need not ensure meal periods are actually taken, but need only make them available.\textsuperscript{13} The court distinguished the decision in \textit{Cicairos v. Summit Logistics, Inc.} (2006) 133 Cal.App.4th 949, concluding that the facts in \textit{Cicairos} established that the employer failed to make meal periods available to employees and that the court there only decided meal periods must be provided, not ensured.\textsuperscript{14}

All staff must follow the rulings in the \textit{Brinker} decision effective immediately and the decision shall be applied to pending matters. Please ensure that any wage claim filed with DLSE that has a meal or rest period issue is reviewed by your Senior Deputy prior to making any final determination on its merits.

\textsuperscript{10} Slip Op. at p. 25.
\textsuperscript{11} Slip Op. at pp. 27-28.
\textsuperscript{12} Slip Op. at pp. 28-29.
\textsuperscript{13} Slip Op. at p. 44.
\textsuperscript{14} Slip Op. at pp. 44-47.
Thomas H. Petrides

AREA OF PRACTICE
Mr. Petrides is the head of the Southern California Employment and Labor practice group and is a member of the Firm’s Litigation group. He represents management in all aspects of labor and employment law, including employment related litigation and traditional labor law proceedings. Mr. Petrides regularly counsels a broad spectrum of clients on issues such as terminations, employment discrimination, wage and hour, FMLA, ADA, employment policies, trade secrets, and union avoidance.

He has extensive litigation experience at all procedural levels, including successful trials and appeals, on issues covering virtually every area of employment law. He also has handled numerous administrative proceedings before various state and federal agencies, as well as arbitrations before private tribunals.

His traditional labor experience includes the representation of management on scores of negotiations, arbitrations and organizing campaigns. He has also represented employers in numerous proceedings before the NLRB, including bargaining unit determinations, election objections, and unfair labor practice charges. Additionally, Mr. Petrides has served as ERISA counsel for various Taft-Hartley, multi-employer trust funds.

Mr. Petrides has represented clients from a wide variety of industries and trades, including banking and financial services, telecommunications, manufacturing, transportation, hospitality, health care, high tech, retail, and service industries.

PROFESSIONAL BACKGROUND
Mr. Petrides has practiced exclusively in the area of labor and employment law on behalf of management for nearly 20 years.

PROFESSIONAL/CIVIC ACTIVITIES
- State Bar of California (Labor and Employment Law Section)
- American Bar Association, Section of Labor and Employment Law (Committee on the Development of the Law Under the National Labor Relations Act, 1992 to present)

PRESENTATIONS
Mr. Petrides has been a frequent lecturer to a variety of employer groups, on issues such as wage and hour, sexual harassment, employee discipline and termination, and reductions in force.
Thomas H. Petrides

COURT ADMISSIONS
- California state courts
- United States District Court for the Central, Northern, Southern and Eastern Districts of California
- United States Court of Appeals for the Ninth Circuit

BAR MEMBERSHIP
California

EDUCATION
J.D., University of Southern California, 1984 (Hale Moot Court Honors Program: Participant, 1982-83; Editor, 1983-84. President, USC Student Bar Association, 1983-84.)
A.B., Boston College, 1981 (cum laude)
Kathleen O. Peterson

AREAS OF PRACTICE
Ms. Peterson’s practice emphasizes the representation of management in employment matters, including advice on workplace policies, employment contracts, wage and hour issues, trade secret protection, non-competition issues, and reductions in force. Ms. Peterson also provides advice on avoiding and resolving claims of race, gender and age discrimination, sexual harassment, whistle-blowing, and wrongful termination, through state and federal court litigation, pre-litigation investigations, mediations, and administrative proceedings.

PUBLICATIONS
- “Wage and hour suits are no game for fast-growing industry,” Silicon Valley/San Jose Business Journal, July 8, 2005

PRESENTATIONS
- Spring Labor and Employment Symposium – speaker on unfair competition issues in employment (Orange County Bar Association, Spring 2000)

PROFESSIONAL/CIVIC ACTIVITIES
- Program Co-chair, IP Litigation Committee, American Bar Association
- Member, Orange County Bar Association
- Member, American Bar Association
- Board Member, Association of Business Trial Lawyers, Orange County
- Board Member and Past President, Orange County Bar Foundation
- Board of Directors, Pacific Symphony Youth Orchestra
- Trustee, Newport Beach Public Library
- Major Gifts Committee for Stanford University Reunion Campaign
- Former Member, National Association of Women Business Owners
- Subdeacon, St. Michael and All Angels Episcopal Church
- Moot Court Coach, Sage Hill School
- Former Advisor, Performing Arts Juniors Program, Orange County Performing Arts Center

COURT ADMISSIONS
- U.S. Court of Appeals for the Ninth Circuit
- U.S. District Court for the Central District of California
- U.S. District Court for the Eastern District of California
- U.S. District Court for the Northern District of California
- U.S. District Court for the Southern District of California

BAR MEMBERSHIPS
California

EDUCATION
J.D., University of California at Los Angeles, 1986
A.B., English, Stanford University, 1982
Kathleen O. Peterson

REPRESENTATIVE/SIGNIFICANT MATTERS

REPRESENTATIVE MATTERS

- Representation of airline employees in California Court of Appeal case which resulted in published opinion holding that employment plaintiffs cannot bring common law claims against co-workers under state law
- Revision of employment agreements, independent contractor agreements and codes of conduct for California law compliance for large multi-national company
- Advice on executive contracts in acquisition of software companies
- Advice on California workers’ compensation and leave policies for major national airline
- Trade secret, non-competition and hiring advice to start-up publishing company
- Representation of airline in gender and marital discrimination case
- Plant closure and lay-off advice to defense industry manufacturer
- Representation of software company executive in inevitable disclosure trade secrets case
- Representation of restaurant chain in sexual harassment case
- Training of managers of Fortune 100 company on prevention of employment claims
- Representation of retail store chain in class action involving wage and hour and unfair competition claims

REPRESENTATIVE CASES

- *Fennessy v. Southwest Airlines*, 91 F.3d 1359 (9th Cir. 1996)
California Employment Law Practice

INTRODUCTION
California employment law is significantly different from federal employment law and provides California employees with substantially broader protections in the areas of discrimination, wage and hour, family care and medical leave, disability protection and trade secrets. For example, California requires payment of overtime after eight hours worked in a day and double-time after 12 hours. Additionally, the overtime exemptions under California law are much harder to establish than the federal exemptions, and non-exempt employees must be given a minimum half-hour “non-working” unpaid meal period each day and two 10-minute paid rest breaks.

California also provides the right to take up to four months of unpaid disability leave in addition to twelve weeks of family care leave for pregnancy-related disabilities and child birth, so that eligible employees can take up to nearly seven months of unpaid leave and still be guaranteed reinstatement. Out-of-state employers are also sometimes surprised to learn that covenants not to compete are generally unenforceable in California.

California also is consistently on the cutting edge of extending employee rights. In recent years, California has enacted legislation that:

- Significantly broadened the state definition of “disability” under California discrimination law so that it is much broader than the federal definition under the ADA.
- Enacted the nation’s first “paid” family leave statute.
- Created a “Private Attorneys General Act” that permits an aggrieved employee to seek civil penalties on behalf of all aggrieved employees for almost any violation of the Labor Code.
- Allowed employees to use one-half of their accrued sick leave to care for ill family members.
- Provided premium wages and penalties to employees who do not take a half-hour uninterrupted lunch break.
- Included sexual orientation as a protected class under the state’s employment discrimination law, and expanded the definition of “gender” to include “gender identity” (i.e., “transsexual”).
- Required employers with 50 or more employees to provide two hours of mandatory sexual harassment training to all supervisors and managers at least once every two years.
- Provided a new cause of action under state discrimination law against employers who fail to engage in an “interactive process” with respect to disabilities.
- Enacted legislation to protect employees who are victims of domestic violence or who are witnesses in criminal or civil actions.

The significant differences between California and federal employment law mean that even California employers who fully comply with federal employment law may still be violating California law. The differences also mean that national companies with California sites who are unfamiliar with California law may find themselves as defendants in employment-related litigation, including class action litigation. That is
why employers with California operations need employment lawyers who understand and are experienced in California employment law.

CALIFORNIA LAWYERS WITH NATIONAL RESOURCES

K&L Gates’ California offices in San Francisco, Palo Alto, Los Angeles and Orange County combine experience in the California market with the skills, resources and reputation of one of the nation’s largest and most well-respected law firms. Our California employment lawyers understand California employment law and have the experience and skill to guide employers through the sometimes bewildering maze of employment regulations and laws. We provide clients with state-wide coverage in all areas of labor and employment law, from advice and counseling to litigation defense in state and federal courts.

CALIFORNIA EMPLOYMENT LAW SERVICES

In addition to providing all of the labor and employment services as described in the firm’s national Labor & Employment Law practice materials, K&L Gates’ employment law services in California also include and focus on:

- **Wage and Hour Law and Class Action Defense.** Litigation, particularly class and collective action litigation, has exploded in this area, and California employers face substantial potential liability for misclassifying nonexempt employees and failing to comply with the California Wage Order requirements. We advise employers on how to comply with state and federal wage and hour obligations and defend employers from wage and hour claims in both administrative and judicial forums, including class action defense.

- **Defense of Discrimination and Wrongful Termination Claims.** We represent employers in connection with EEOC, DFEH and other administrative agency investigations and proceedings, as well as litigation in state and federal courts. We have a proven track record of successfully defending employers by obtaining summary judgments and defense verdicts in front of California juries.

- **Family Care and Medical Leave/ADA Compliance.** Our attorneys assist clients in navigating the overlapping and sometimes competing obligations under state and federal law in the areas of family care and medical leave, disability law, workers’ compensation leave, pregnancy disability leave and the newly enacted Paid Family Leave, including issues such as leaves of absence and reasonable accommodation.

- **Harassment Prevention and Other Training.** Our attorneys provide a wide range of employment-related training geared towards in-house counsel, HR personnel, supervisors and managers, or employees, depending on the needs of the client. Training topics include the mandatory sexual harassment prevention training required by AB 1825, documenting performance issues, conducting workplace investigations, wage and hour compliance, and union avoidance.
Independent Contractor Issues. Our attorneys assist clients in navigating the complex laws governing appropriate classification of workers as independent contractors to minimize risks of claims from the contractors (such as claims for employee benefits) and from various government agencies (such as the California Employment Development Department and the state Labor Commissioner) and defend employers in such proceedings, as well as any proceedings in state and federal courts.

Client Counseling. We counsel employers in all areas of California and federal employment law to make sure our clients understand the differences between the laws and know how to comply with both, including: hiring, discipline and discharge; privacy rights; drug and alcohol testing; employment agreements; and employee handbooks. Our attorneys assist clients in discipline, termination and other actions to minimize the risks of discrimination and wrongful termination claims.

Employment Practices Audits. We offer employment practices audits to help clients identify areas of vulnerability and engage in preventive maintenance with a special emphasis on California law. Clients find our audits to be particularly helpful in the areas of employment policies and wage and hour practices.

K&L GATES’ CALIFORNIA EMPLOYMENT LAWYERS
We have a diversified and experienced team of employment lawyers in both Northern and Southern California:

Christopher J. Kondon. Mr. Kondon is a partner in the Los Angeles office and represents employers in administrative and judicial forums in all areas of employment litigation. He also counsels employers in day-to-day employment issues such as discipline, termination, employee privacy and harassment issues. Education: Loyola Law School (J.D.); Univ. of Colorado (B.A.).

Jon Michaelson. Mr. Michaelson is a partner in the Palo Alto office. He counsels clients in all areas of employment law and has represented employers in federal and state courts throughout California in wrongful termination, discrimination, harassment, trade secret and unfair competition cases. Mr. Michaelson has particular experience assisting California technology start-up companies with their employment and related legal needs. Education: University of California at Berkeley, Boalt Hall School of Law (J.D.); University of Texas at Austin (M.A.); Pomona College (B.A.).

Kathleen O. Peterson. Ms. Peterson is a partner in the Orange County office. Her practice emphasizes the representation of management in employment matters, including advice on workplace policies, employment contracts, wage and hour issues, trade secret protection, non-competition issues and reductions in force. Ms. Peterson also provides advice on avoiding and resolving claims of race, gender and age discrimination, sexual harassment, whistle-blowing and wrongful termination through state and federal court litigation, pre-litigation investigations, mediations and administrative proceedings. Education: University of California at Los Angeles (J.D.); Stanford University (B.A.).

Thomas H. Petrides. Mr. Petrides is a partner in the Los Angeles office and practices exclusively in the area of employment and labor law. Mr. Petrides has broad litigation experience on issues covering virtually every area of employment law. He also has extensive traditional labor law experience and has represented management in collective bargaining negotiations, arbitrations, organizing campaigns, and NLRB proceedings.
is a frequent lecturer to employer groups on issues such as wage and hour law, sexual harassment, employee discipline and termination, and work force reductions. Education: University of Southern California (J.D.); Boston College (A.B.).

Paul W. Sweeney, Jr.  Mr. Sweeney is Administrative Partner of the Los Angeles office. Mr. Sweeney has been lead counsel in all major areas of employment law, including harassment, discrimination and wrongful termination suits. His practice also includes advising employers on such diverse employment topics as discipline, termination, trade secrets and unfair competition, and employee handbooks. He is a frequent speaker on employment topics and is an instructor for the Continuing Education of the Bar on employment law. Education: Columbia University (J.D.); University of Southern California (B.S.). Community Service: Board of Directors, Prevent Child Abuse America; Chairman of the Board of Directors, Hollywood Wilshire YMCA; Board of Directors, Public Counsel.

Linda L. Usoz.  Ms. Usoz is counsel in the Palo Alto office and practices almost exclusively in the area of employment and labor law. Ms. Usoz has broad experience in litigating numerous issues covering all aspects of employment law, including trade secret misappropriation, sexual harassment, discrimination, wage and hour, payroll tax assessments, employment and related contracts, discipline, termination and other issues. She regularly counsels and advises employers on human resources administration matters, including employee handbooks, employment contracts, preservation of intellectual property, payroll audits and all other aspects of the employment relationship. She is a frequent speaker at various seminars, covering topics on wage and hour, sexual harassment, hiring, discipline, termination, independent contractor status and other topics. Education: University of Minnesota (J.D.); Carleton College (B.A.); University of Lancaster, Lancashire, England (business law and economics studies). Community Service: Board of Directors, Santa Cruz Mountains Summit West, Inc., dba Summit West Mutual Water Company.

Myra B. Villamor.  Ms. Villamor practices in the area of civil litigation and employment-related disputes. Education: University of California, Davis School of Law (J.D.), University of California Los Angeles (B.A.).

Jennifer L. Wayne.  Ms. Wayne practices in the area of litigation, including employment issues, NASD arbitrations and appellate matters. Education: University of Southern California (J.D.); University of Arizona (B.A.).

KEEPING CLIENTS UP TO DATE

K&L Gates periodically publishes K&L Gates Alerts and California Employment Law Alerts to keep employers up to date on employment law issues and to provide practical advice on how to handle workplace situations. We also offer breakfast briefings and half-day or all-day workshops to keep clients aware of emerging employment and labor law issues and the potential impact on their businesses.
REPRESENTATIVE CLIENTS
Our clients range in size from Fortune 100 corporations to mid-sized companies and small family-owned businesses. We represent both private and public employers, and profit and nonprofit entities. Industries in which we represent clients include manufacturing, communications, financial services, retail, transportation, food services, entertainment, consumer products, engineering, technology and e-commerce.

CONTACT INFORMATION
For more information about K&L Gates’ California employment law services, please contact any of the attorneys listed below:

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1700 Lawyers, 28 Offices, Three Continents

K&L Gates’ labor and employment practice includes more than 100 lawyers in locations around the world. With experience ranging from advice and counsel, employment related dispute resolution, labor negotiations and transactional support, our lawyers provide solutions to the many employment challenges faced by private and public entities alike. To learn more about K&L Gates’ labor and employment capability, please contact one of the lawyers listed on the contact sheet in this binder.
Red colored state denotes employment litigation experience in the federal and/or state courts or administrative agencies in that jurisdiction.