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What Didn't Happen in 2010 for California Wage-and-Hour Laws

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Appellate decisions and legislation in the wage-and-hour field have, in recent years, resulted in significant changes in how wage-and-hour claims would be litigated. 2008, for example, brought the *Brinker Restaurant Corp. v. Superior Court* (4th Dist.) 165 Cal.App.4th 25 decision, which employers saw as a step back from an almost strict liability standard for employees' missed meal and rest periods. In 2009, the federal Lilly Ledbetter Fair Pay Restoration Act revived otherwise time-barred claims by employees seeking to allege discrimination in how their pension or retirement benefits earned decades prior are calculated.

2010, on the other hand, has been fairly quiet. That's not to say there haven't been significant issues raised in the wage-and hour arena; rather, the significant California cases have resulted in insignificant changes to the law or a reaffirmation of established principles. It was also anticipated that *Brinker*, on appeal to the state Supreme Court since 2008, and fully briefed since 2009, would be decided this year. As the year closes, *Brinker* is still awaiting oral argument.

In sum, of significance in 2010, the state Supreme Court found that the Industrial Welfare Commission's (IWC) definition of an employer is the correct one, that there's still no statutory cause of action for an employee seeking to recover tips illegally taken by the employer, and that penalties for unpaid wages are, in fact, penalties and not wages. The Courts of Appeal, meanwhile, found that state employees are still not subject to meal and rest period requirements of the Labor Code and IWC, and a longstanding practice of calculating overtime pay for state correctional officers, based on an expired bargaining agreement, was still lawful. These courts also found that the *Brinker* approach to judging employer liability for missed meal periods was now the correct approach, at least until the state Supreme Court says otherwise.

In May, the state Supreme Court published its decision in *Martinez v. Combs*, 49 Cal.4th 35, where it was asked to determine, among other issues, which definition of "employer" should prevail: IWC's traditional definition or a more narrow federal definition urged by defendants that would deflect liability from third parties. Plaintiffs in *Martinez* were farm workers who sued both their direct employer and the companies from which their employer leased land to grow strawberries. These companies also marketed and sold the employer's harvest. Plaintiffs argued that the landowner companies, who financially benefitted from the work of the employees, should be defined as joint employers of the workers under the IWC's definition. The defendant companies argued that the IWC's definition of employer should instead be construed narrowly to require a direct master-servant relationship, as has been adopted under federal law.

The Supreme Court agreed with the plaintiffs' definition of employer, but found that even under the IWC's definition, plaintiffs in *Martinez* were not employees of the companies. While a third party who "suffered" or "permitted" an employee to work for the third party's benefit could be considered an employer even without a direct master-servant relationship, the necessary amount of control over how the work was performed was not present for employer liability to attach.

In August, the Supreme Court was asked in *Lu v. Hawaiian Gardens*, 50 Cal.4th 592, whether an employer's mandatory tip pooling policy could be challenged under a statutory cause of action based on Labor Code Section 351. The Supreme Court answered "no." While there are many other statutory and common law bases upon which a party might seek to recover for an illegal tip pooling policy, the Legislature expressed no intent to create an independent cause of action under the statute that outlaws the taking of tips by employers.

In November, the Supreme Court readdressed an issue that it has been asked to address in one form or another over the past several years, i.e., how to characterize penalties for unpaid wages. In *Pineda v. Bank of America* (S170158, Nov. 18, 2010) 2010 DJDAR 17449, the issue was whether waiting time penalties themselves could be characterized as unpaid wages for statute of limitations purposes.

Typically, the statute of limitations for recovery of wages is three years. For civil penalties in most circumstances, however, the limitations period is one year. In 2007, the Court found that a three-year limitations period applied to the recovery of wage penalties when those penalties were sought as damages along with unpaid wages. The plaintiff in Pineda, however, had been belatedly paid all wages owed after his termination, and sought to recover only the waiting time penalties themselves. Plaintiff's action was brought more than one year after he was terminated. The Supreme Court found that the waiting time penalty was, in such a circumstance, just a penalty, and the one-year statute applied.

In *California Correctional Peace Officers' Association v. State of California* (1st Dist. 2010) 188 Cal.App.4th 646, the Court of Appeal was asked whether the Labor Code and related IWC orders governing meal and rest period requirements applied to state correctional officers. In an August decision, the court found that unless the Legislature used language intending to apply a particular statute to both the private and public sectors, by default that law does not apply to state employees. The Legislature did not intend to carve out an exception to the Labor Code's general inapplicability to state employees for wage, meal and rest period requirements.

In so finding, the court rejected arguments by the correctional officers that the presence of express language excluding state employees from other sections of the Labor Code meant that absence of such excluding language from the meal and rest period statute - Labor Code Section 226.7 - implied a Legislative intent to bring state workers within the ambit of Section 226.7. The court also rejected the correctional officers' argument that the Legislature's statutory instruction to the IWC, that the IWC had the option of excluding public employees from the ambit of its orders, meant that the IWC was always obligated to put excluding language in orders it intended to not apply to state employees.

In October, the correctional officers were back in front of the 1st District Court of Appeal, this time on the issue of whether the Government Code entitled correctional officers to overtime pay, in *California Correctional Peace Officers' Association v. State of California*, 189 Cal.App.4th 849. The court again found against the correctional officers, holding that the Government Code's general statement of policy, that state employees' workday shall be eight hours a day and 40 hours per week, did not mandate that correctional employees be paid overtime for working hours in excess of the general policy.

The court held that the state was authorized under other sections of the Government Code to use the Federal Labor Standards Act (FLSA) for determining the overtime pay eligibility for law enforcement personnel. Under the FLSA requirements, overtime pay was only required for time worked by correctional officers over 168 hours in a 28-day work period. Here, the correctional officers worked no more than 164 hours in a 28-day period, pursuant to the shifts established in an expired collective bargaining agreement. Because those shifts complied with the FLSA requirements for payments of only a regular wage, the correctional officers were not entitled to any additional pay.

A number of decisions post-*Brinker* came before various Court of Appeals in 2008, 2009 and 2010, all of which adopted the *Brinker* approach to addressing employer liability for missed meal periods. As with the *Brinker* decision, these decisions found that employers must only reasonably provide meal and rest periods. Employers are not obligated to ensure that employees take those periods. While the 2008 and 2009 decisions have been deemed uncitable pending the Supreme Court's decision on *Brinker*, a 2010 case adopting the *Brinker* approach remains good law for now. *Hernandez v. Chipotle Mexican Grill Inc.* (2d. Dist) 189 Cal.App.4th 751 was certified for publication in October, providing good law to cite in memoranda for the principles underlying the *Brinker* decision, even as *Brinker* and other cases await review on those same principles.

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