A Timely Analysis of Legal Developments

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Following a 14-day bench trial, a Santa Clara County Superior Court judge ruled that Granite Rock Company did not violate California law when it allowed concrete mixer drivers to voluntarily waive their 30-minute off-duty meal periods.

Concrete Company Cements Win in Meal Period Class Action Trial

By Laura Hayward

Must an employer pay millions in wages and penalties to employees who choose to skip unpaid meal periods? For one California company, the answer is no. After a 14-day bench trial, Santa Clara County Superior Court Judge James P. Kleinberg issued a 26-page tentative statement of decision ruling that concrete supplier Granite Rock Company ("Graniterock") did not violate California wage and hour law by allowing its concrete mixer drivers to voluntarily waive their 30-minute off-duty meal periods. This decision could influence the California Supreme Court as it decides the issue in *Brinker v. Superior Court*[1] whether employers are obligated to "ensure" workers take meal breaks, or merely make meal periods available. The court in *Driscoll v. Granite Rock Co.*, Case No. 01-08-cv-10342, opined that "litigation is not a game" and that it "declines to adopt a 'gotcha' theory of litigation that imposes liability when the facts and real-world concerns dictate no liability."

Driscoll was filed in the Superior Court of California, County of Santa Clara in January 2008 by a group of former Graniterock mixer drivers seeking compensation for missed meal periods, waiting time penalties based on Labor Code section 203, penalties based on Labor Code section 226.7 for inaccurate pay stubs, and penalties based on Labor Code section 2699, the Private Attorneys' General Act (PAGA), as well as restitution and injunctive relief based on California Business and Professions Code section 17200. Altogether, the plaintiffs sought more than $6 million in restitution and penalties, in addition to attorneys' fees and costs. The class, which was certified in July 2009, included approximately 200 mixer drivers.[2]

In reaching its decision, the court found that, due to the extremely perishable nature of concrete, Graniterock's mixer drivers were often unable to take regularly scheduled 30 minute off-duty meal periods. Nonetheless, according to the court, drivers had substantial opportunities, while waiting to unload, to have an on-duty lunch. For this reason, Graniterock and its drivers entered into on-duty meal period agreements whereby the drivers voluntarily agreed to eat their meals "on duty" during the ample downtime they had during the day in exchange for premium pay and a shorter day. Judge Kleinberg found that the drivers overwhelmingly favored this arrangement because they earned more money, were able to finish their day earlier, and did not have

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to spend time "sitting twiddling their thumbs." The voluntary on-duty meal period agreement could have been revoked at any time, upon one day's notice. The judge also found that only three drivers withdrew their on-duty meal period agreements in a ten-year period, and that they all received off-duty meal periods at the next possible occasion.

Court Adopts the "Make Available" and "Do Not Frustrate" Standard

The law requires employers to "provide" meal periods, but the definition of "provide" has generated substantial litigation and controversy. Judge Kleinberg held that Graniterock needed only to "make available" off-duty meal periods to its employees, and not "ensure" that the drivers actually took them. In this regard, the California Supreme Court's delay in deciding *Brinker* and its related appeals has resulted in much uncertainty in the wage and hour arena. While many federal court decisions and some state appellate decisions have applied the "make available" standard, many of the recent state appellate court decisions have been granted review in light of *Brinker*. The *Driscoll* decision could provide the California Supreme Court added perspective when it ultimately rules in *Brinker*.

Court Holds the Plaintiffs Failed to Meet Their Burden to Show that Graniterock Did Not Make Meal Periods Available

Graniterock argued that it provided meals because drivers knew they were entitled to off-duty meal periods as communicated through the company's policies, postings and other written and oral communications with management. Drivers could get off-duty meals by either revoking their on-duty meal period agreements, *or* by asking a dispatcher on any given day for a meal period that same day. The evidence showed that these requests were overwhelmingly granted, but rarely made because drivers did not want off-duty meals. Approximately 25 current Graniterock drivers testified for the company and explained that if asked by their dispatcher at the beginning of the day if they wanted an off-duty meal they would truthfully say no. Even the named plaintiffs did not testify that they wanted off-duty meal periods.

Court Denies the Plaintiffs' Penalty Claims

Judge Kleinberg also disposed of the plaintiffs' penalty claims one by one, adopting the arguments made by Graniterock. Many of these rulings may be very useful to companies that are facing meal period class actions, which include the "usual" often astronomical penalty claims.

First, Judge Kleinberg held that the plaintiffs could not collect "waiting time" penalties under Labor Code section 203 for former employees because these penalties are not assessed when the employer has a good faith dispute regarding whether meal periods were provided to drivers. The court held that Graniterock's CEO had a good faith belief that the nature of the work justified on-duty meal periods and that its meal period agreement was valid, relying in part upon the result of an action brought by the concrete mixing trade association in 2005, which held that such agreements were appropriate for the industry. Further, the fact that Graniterock had a process in place to pay an extra one hour's wage to those drivers who had not signed an on-duty meal period agreement "demonstrates its good faith attempt to comply with the law."

Second, the plaintiffs were not entitled to recover penalties pursuant to Labor Code section 226(e) for alleged inaccurate pay stubs. The plaintiffs did not contend that Graniterock's pay stubs excluded any of the nine categories of information required by Labor Code section 226(a), but rather that the pay stubs failed to state that the plaintiffs had earned one additional hour of pay for meal periods *not provided*, the amounts being contested in the lawsuit. The court found that the legislative history behind section 226 showed that it was enacted to provide "transparency," *i.e.*, to allow an employee to determine whether he or she has been paid for all hours worked, not to allow double recovery for disputed compensation. As the pay stubs accurately reported what was *paid in the check* and because Graniterock specified when it did pay a meal period penalty, Graniterock had complied with this statute. Finally, the court held that the plaintiffs had not proven "injury," which is a statutory requirement of this cause of action. The plaintiffs' claim that they were unable to tell by looking at their paystubs which meal periods they had missed was not the type of injury contemplated, as wage statements are not required to provide this information. The court also refuted the plaintiffs' experts' penalty calculations on the basis that they assumed a "random"

distribution of violations across drivers, locations and time, even though the evidence showed that in fact the number of missed meals was not the same from driver to driver over time or by location. The court held that this methodology biased the calculations upwards.

Finally, the court denied penalties under PAGA for numerous reasons. First, the plaintiffs failed to show that meal periods were not provided, nor did they establish a valid rate for violations. Second, it held that should PAGA penalties be appropriate, the lower "initial" violation rate of $100 per pay period would apply because no court or commissioner had notified Graniterock of a violation before this suit was filed, such that the "subsequent" violation rate of $200 per pay period would apply. Third, the court found that Dr. Drogin's penalty calculations were biased upwards because they were based on a random distribution of violations that maximized the number of weeks in which there would be violations and thus penalties. In addition, Judge Kleinberg held that evidence which is extrapolated to a class cannot be used to prove PAGA violations because PAGA requires that the plaintiffs offer evidence of injury as to "each aggrieved employee," and show "in which pay periods those injuries occurred." The court ruled that the plaintiffs' statistical evidence was "irrelevant" to their PAGA claims and should be excluded. Finally, the court exercised its discretion under Labor Code section 2699(e)(2) to eliminate PAGA penalties in this instance as "unjust, arbitrary and improper. . . ."

The Court Denied Injunctive Relief Because the Lawsuit Lacked Support from Current Employees

No current driver testified in support of the plaintiffs. As a result, the court refused to grant injunctive relief to the named plaintiffs because they were all former drivers "with no stake in what happens at Graniterock after judgment." Further, the court found that Graniterock's CEO had instructed dispatchers not to enforce the one-day notice provision in the on-duty meal period agreement.

In closing, Judge Kleinberg stated: "This is not a case where class members toil in ignorance and it is only when a lawsuit is brought do they become aware of their possible recovery. . . . This court declines to adopt a 'gotcha' theory of litigation that imposes liability when the facts and real world concerns dictate no liability."

Conclusion

This common sense ruling is encouraging for companies who face wage and hour meal period actions – in which plaintiffs frequently seek to recover astronomical amounts in damages and penalties. While it is still uncertain which way *Brinker* will come out, should the California Supreme Court read this decision they will gain new perspective on the pressures facing California employers and perhaps be inclined to strike a balance between what types of business practices are supported under the law and common sense. Aside from adopting the "make available" standard, Judge Kleinberg's well-reasoned opinion is valuable to employers facing class actions because it shows that California's Labor Code should not be used to get millions of dollars from employers when employees choose not to take meal periods. Finally, it provides substantial guidance when defending against expensive (and usually disproportionate) penalty claims, which accompany most meal period actions.

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[1] *See* Littler ASAP, *California Supreme Court Grants Review to Brinker – Employers Await Answer on Meal Period Obligations* (Oct. 2008).

[2] Graniterock was represented by Garry Mathiason, Alan Levins, Laura Hayward and Alison Hightower of Littler Mendelson P.C.