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California Supreme Court Issues Important Decision Regarding an Employer's Obligation to Provide and Record Meal Periods

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The California Supreme Court's February 25, 2021 opinion in *Donohue v. AMN Services, LLC* is the most significant decision construing an employer's duty to provide and record meal periods in nearly a decade. California employers may wish to assess their meal period policies and practices, including relating to the recordation of meal periods, in light of the Court's guidance in *Donohue*.

Donohue reaffirmed the key holding of *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004 (2012), as the Court once again made clear that employers need not force employees to take full meal periods, so long as such meal periods are provided. But at the same time, the Court held that whenever timekeeping records show that an employee failed to take a compliant meal period, a rebuttable presumption arises under which it is presumed that the employer failed to provide a proper meal period. This means that employers will have the burden to prove they provided compliant meal periods for any shifts in which timekeeping records show that a meal period was short, late, or not recorded at all.

After *Donohue*, employers seeking to minimize potential litigation may wish to consider, among other options, ensuring that they have robust timekeeping systems that track the amount of time employees spend taking meal periods and automatically prompt employees to confirm they voluntarily chose to take a short or late meal period, or to skip the meal period entirely.

***Donohue*'s Key Holdings**

- Reaffirming the core teachings of *Brinker*, the Court in *Donohue* explained that "[a]n employer is liable [for failing to provide meal periods] only if it does not provide an employee with the opportunity to take a compliant meal period," that an "employer is not liable if the employee chooses to take a short or delayed meal period or no meal period at all," that an "employer is not required to police meal periods to make sure no work is performed," and that "the employer's duty is to ensure that it provides the employee with bona fide relief from duty and that this is accurately reflected in the employer's time records." *Donohue* slip op. at 27–28.
- With respect to recordation of meal periods, the Court held that "employers cannot 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." *Id.* at 1.
- The Court expressly did not address the use of time rounding policies outside the context of meal periods, but suggested that "the practical advantages of rounding polices may diminish further" as "technology continues to evolve" and "technological advances may help employers to track time more precisely." *Id.* at 19, 21.

Related People

Bradley J. Hamburger

Tiffany Phan

Emily Sauer

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- The Court adopted the rebuttable presumption discussed by Justice Werdegar in her concurring opinion in *Brinker*. Under this presumption, "[i]f an employer's records show no meal period for a given shift over five hours, a rebuttable presumption arises that the employee was not relieved of duty and no meal period was provided." *Id.* at 21–22.
- The Court further explained that this presumption applies not only to records showing "missed meal periods" but also when records show "short and delayed meal periods." *Id.* at 24. And "the presumption goes to the question of liability and applies at the summary judgment stage, not just at the class certification stage." *Id.*
- Significantly, "[a]pplying the presumption does not mean that time records showing missed, short, or delayed meal periods result in 'automatic liability' for employers." *Id.* at 26. To the contrary, employers "can rebut the 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." *Id.* at 26–27.
- And the Court specifically held that "[e]mployers may use a timekeeping system like" the electronic timekeeping system used by the employer in *Donohue*—which "included a dropdown menu for employees to indicate whether they were provided a compliant meal period but chose to work" and "triggered premium pay for any missed, short, or delayed meal periods"—without rounding time punches for meal periods. *Id.* at 28.

Key Takeaways

Donohue makes clear that even where an employer's records are imperfect, there is no automatic liability. Rather, employers may rebut the presumption that they did not provide compliant meal periods with evidence showing employees were provided proper meal periods. But to avoid unnecessary litigation, among other options, employers might consider adopting timekeeping systems that adequately track meal periods and do not engage in any rounding of time employees spend taking meal periods.

Employers may also want to consider, as one option, implementing timekeeping systems that can flag when meal periods are recorded as short, late, or missed, and create a follow-up process to determine and document whether employees voluntarily chose not to take a full meal period. In fact, the California Supreme Court indicated that the electronic timekeeping system used by the employer in *Donohue*, which "included a dropdown menu for employees to indicate whether they were provided a compliant meal period but chose to work, and the system triggered premium pay for any missed, short, or delayed meal periods due to the employer's noncompliance," would suffice under the law so long "as the system does not round time punches." *Donohue* slip op. at 28.

Finally, while *Donohue* did not address rounding policies outside the context of meal periods, the Court suggested that technological advances may render such policies obsolete. Given that observation, employers may wish to explore recording work time to the minute without any rounding.

Gibson Dunn lawyers are available to assist in addressing any questions you may have about these developments. Please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Labor and Employment practice group, or the following:

Catherine A. Conway – Co-Chair, Los Angeles (+1 213-229-7822, cconway@gibsondunn.com)
Jason C. Schwartz – Co-Chair, Washington, D.C. (+1 202-955-8242, jschwartz@gibsondunn.com)
Michele L. Maryott – Orange County (+1 949-451-3945, mmaryott@gibsondunn.com)
Jesse A. Cripps – Los Angeles (+1 213-229-7792, jcripps@gibsondunn.com)
Katherine V.A. Smith – Los Angeles (+1 213-229-7107, ksmith@gibsondunn.com)
Bradley J. Hamburger – Los Angeles (+1 213-229-7658, bhamburger@gibsondunn.com)

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Tiffany Phan – Los Angeles (+1 213-229-7522, tphan@gibsondunn.com)
Emily Sauer – Los Angeles (+1 213-229-7704, esauer@gibsondunn.com)

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