

# The Role of Statistical Analysis in California Meal Break Class Actions After *Brinker*

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## Introduction

With twenty-three words, a California Court of Appeal significantly changed the landscape for class claims of meal period violations with its opinion in *Brinker Restaurant Corporation v. Superior Court of San Diego County*:<sup>1</sup>

[W]hile employers cannot impede, discourage or dissuade employees from taking meal periods, they need only provide them and not ensure they are taken. . . .<sup>2</sup>

This reasoning has led to an interpretation, by some, that there may no longer be a role for class-wide statistics in meal period cases due to individual factors that influence when, and if, a meal break is taken.<sup>3</sup> To the contrary, we argue in this article that the ruling, in fact, suggests a new and greatly increased role for statistics. Because individual *employee* choice and *employer* deterrent effects can exist simultaneously within a potential class, statistical analysis is needed to identify and separate these effects, and to determine whether a common class is supported. This change in the role of statistics means both plaintiff and defense attorneys should consider the benefits of statistical analysis when assessing California claims of class-wide meal break violations.

To prevail in a meal period class action, plaintiffs must show that a common employment practice or policy has led employees to systematically miss, delay or return early from meal breaks on meal-eligible shifts. In statistical terms, this requires, at a minimum, a finding that records of meal activity demonstrate a meaningful, non-zero *measured* rate of exceptions in all areas of employment that are believed to be influenced by the practice or policy at issue.

Beneath any observed (i.e., measured) set of exceptions we can distinguish two factors that determine meal-taking behavior: *employer effects* and *employee*

*effects*. Under the *Brinker* reasoning, liability arises class-wide when exceptions can be systematically explained only by employer effects (that act to “impede, discourage or dissuade”). While measured rates of exceptions can be directly estimated from time-keeping records, the cause for an observed exception (whether arising from employer or employee effects) generally cannot be; these effects must be derived from statistical sources external to traditional employment data, such as representative survey responses.

## The Role of Statistics

In the early years of California meal period cases, all *exceptions* to the Industrial Welfare Commission (“IWC”) Wage Orders and Division of Labor Standards Enforcement (“DLSE”) findings—which determine whether and when a 30-minute uninterrupted meal break is to be taken—constituted violations and, therefore, were subject to penalties wherever the exception occurred in the class. Apart from the analysis of class-wide paper or electronic time records to quantify meal exceptions and estimate damages, the role of statistics was muted.<sup>4</sup>

Part of the California Appellate Court’s reasoning in the *Brinker* decision—that employers need not ensure that meal breaks are observed—suggests a new role for statistical analysis: namely, that for a common class to exist, plaintiffs must demonstrate that exception rates were non-zero and common across the proposed class. In statistical terms, the measured exception rate cannot be explained by random chance, but is statistically similar across the proposed class. This is a necessary statistical condition for a class showing but, following *Brinker*, is not sufficient for proving class-wide violations of meal period rules. Under the appellate court’s criteria in *Brinker*, plaintiffs, presumably,

<sup>1</sup> 165 Cal. App. 4th 25, *review granted*, 2008 Cal. LEXIS 12467 (October 22, 2008).

<sup>2</sup> *Id.* at 31.

<sup>3</sup> *See, e.g.*, *Hernandez v. Chipotle Mexican Grill Inc.*, 189 Cal. App. 4th 751 (2010).

<sup>4</sup> Statistical analysis played a role in defense arguments that measured exceptions were evidence, not of employer policies, but circumstance alone. Examples of these meal break exceptions included borderline late meal break violations, exceptions that occurred during an “implicit” waiver period, or exceptions that were so small in minutes that it was not reasonable to include them as violations of the law (i.e., the violations were *de minimus*).

must also show that significant exception rates remain (class-wide), even after accounting for meal period effects that are attributable to employee choice.<sup>5</sup>

When claims of class-wide meal period violations are made, or even contemplated, it is therefore essential that a clear understanding exists as to how frequently meal period exceptions occur, and how consistently they appear across a proposed class of non-exempt employees. This is equally true for plaintiff and defense attorneys; to misunderstand the pattern of meal period exceptions present in employment time records is to risk bringing an unstable (and ultimately unsupported) case to the court, or failing to attack areas of vulnerability in highly variable areas of the data.<sup>6</sup>

### **Three Steps to Consider When Statistically Assessing Class-wide Data**

In our view, after *Brinker*, plaintiffs seeking to have a class certified, and defendants seeking to defeat class certification, must confront several issues that require statistical analysis of data. We review these issues as they would apply to a proposed class brought statewide across all locations of a hypothetical company.

#### **1. Is the measured exception rate, class-wide, statistically different from zero?**

If analyses of time records show exception rates that are not statistically discernable from zero, it means that the measured exception rate is probably low on average

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<sup>5</sup> Practitioners in wage discrimination class actions may see a parallel between these requirements (showing a statistically significant result, class-wide) and the statistical requirements of race or gender pay claims. The statistician in pay cases investigates whether a statistically significant differential in pay—one that is non-zero and adverse to the proposed class of protected group members—exists. As importantly, courts require a demonstration that the differential cannot be explained by group differences associated with legitimate factors, such as location, education, tenure or other presumably neutral differences. After properly accounting for all legitimate influences on wages, the existence of a statistically significant pay differential between protected and non-protected groups may lead a court to find that the differences are due to discrimination.

<sup>6</sup> We should add that an awareness of workplace meal break exceptions in California timekeeping records is also important to human resource professionals and attorneys working with them. Since meal break exceptions can arise from neutral employment policies or the deliberate actions of managers (both employer effects), it is critical that internal monitoring of meal break exceptions be done in a statistically reliable manner.

and, more importantly from the class certification standpoint, highly variable across different parts of the proposed class. In these circumstances, the class, as proposed, lacks even the most basic data support for certification. With a statistically insignificant overall exception rate, plaintiffs could be expected to return to the drawing board to reconsider what proposed class the data is compatible with. It may be that the policy or practice in question gives rise to differences only when interpreted or acted upon at the sub-population level, for example. Data within a region, district or even common to an occupational group in our statewide company might still support class treatment.

Alternatively, if the analysis of the proposed class reveals an exception rate that is statistically different from zero, further analysis is required to determine whether a common class exists. Commonly, real-world exception rates in a proposed class will pass significance tests, whether they arise from “high-enough” individual exception rates and/or because of a large number of observations. If this is the case, both plaintiffs and defendants can be expected to proceed to the next step for analysis.

#### **2. Is the exception rate, as measured, common across sub-groups?**

If analyses show an exception rate that is different from zero, the next step is to confirm that the exception rate is shared, in common, across the different sub-parts of the proposed class. In our experience, location, department and occupation group are common units of analysis for this stage of analysis.<sup>7</sup> Evidence of a common policy or practice should be found across the locations, departments or occupations which are presumed to be subject to that policy or practice.

Taking location as an example, for a common class-wide pattern to occur we would expect to see the exception rate for a given location to approximate the measured exception rate for another location. If two locations show different exception rates, we need to question how both locations could be subject to a common policy or practice that causes exceptions to occur. Alternatively, if the two locations are not

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<sup>7</sup> Other relevant sub-units should be considered as well. For example, certain supervisors may be a source of variation if they implement a policy differently or operate in disparate ways in the absence of a policy. Similarly, time periods may exhibit different patterns as policies or new software systems are rolled out or updated. The key consideration is that the sub-unit be a logical grouping of employees based upon organizational characteristics and management practices of the company.

statistically different from one another, we cannot reject the possibility that both are subject to an underlying, common policy or practice.

Extending this beyond the two example locations to a proposed class across all locations, if every location was statistically different from every other location, we would again question how a common class could exist. If, on the other hand, no location showed a statistically different pattern in exceptions relative to the others we could not reject the possibility that a class exists across locations.

A more likely finding than either of these two extremes is that some locations are statistically similar to one another and others are not. A court would ultimately judge whether enough locations were similar (or different) to support (or reject) the possibility of class-wide treatment. Crucially, analysis of the data is required to provide the necessary information at this step. Without actually analyzing the exception data, plaintiffs, defendants and courts, do not have adequate information to know the extent to which a class-wide pattern exists in the data.

**2a. If enough locations are dissimilar from one another, and a statewide class is not certified, is there statistical evidence of a common class of a smaller scope?**

Using the example above, if a court finds that enough locations are sufficiently different from one another as to call into question whether a statewide class ought to be certified, it is possible a class of a smaller scope might be appropriate. As an example, we might see that the only locations that do exhibit statistically similar exception rates are organized into the same district and subject to the same district-wide policy. In this case, it becomes important to study whether a smaller class comprised of employees in that district would be appropriate.

It is worth pointing out at this stage that the possibility of seeing evidence of a common policy or practice, underlying highly varying statewide patterns, was not contemplated in the *Brinker* decision. As we understand it, the *Brinker* court viewed variability across the proposed class alone as sufficient to find the case not amenable to class treatment. However, even if the data

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<sup>8</sup> As analysts of data, not attorneys, we are not aware of the particular legal mechanism that plaintiffs might use to redefine their class. We simply point out that an overall finding that no pattern exists to support a statewide class should cause plaintiffs to analyze whether a co-existing pattern of data does support a smaller-scale class.

show substantial variation across a proposed statewide class, the possibility of a pattern of data occurring that nonetheless conforms with class treatment on a smaller scale, may merit further analysis.<sup>8</sup> We come back to this theme in addressing the next analysis question.

**3. If there is evidence of a common pattern across the entire proposed class, or some smaller part of it, what is the cause of the exception rate?**

If the data show a non-zero exception rate (step 1, above) and a common pattern occurs across locations (step 2 or 2a, above), it becomes necessary to understand the cause of the exception rate. In this regard the implications of *Brinker* are clear: since measured exceptions may be caused through employer deterrence or by employee choice, the final question to answer is whether the employer deterrence cause is substantial and systematic enough across the proposed class to merit class-wide treatment. Data from traditional time record sources will not be helpful in addressing this issue, because neither managers nor employees tend to record the reason a given meal break exception occurred. A retrospective survey of employees and managers that is representative of the class liability period, as well as all “corners” of the data at issue,<sup>9</sup> is the recommended approach for addressing these data shortcomings. If, after accounting for employee effects on measured exception rates, a common, statistically meaningful pattern of meal break exceptions is found, the data are consistent with a finding of class-wide violations.

**Implications for Plaintiffs and Defendants**

**Plaintiffs**

Before investing resources to build the case for company liability, it is imperative that plaintiffs know the limitations and strengths arising from a statistical analysis of meal break records. Collecting class-wide data and, subsequently, showing that at least baseline exception rates are statistically significantly different from zero can defeat a claim that individual variation alone explains meal exceptions.

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<sup>9</sup> In order for the survey to be reliable, the sample should be designed explicitly to obtain sufficient observations from all parts of the population under study. Using a stratified sample approach is one way to achieve this goal. By gathering enough information from across all locations, for example, the obtained sample allows for analysis across the different parts of the population to test for the existence of a common pattern. (Of course, the elements to consider as part of a stratified sample will differ according to the facts of the case and the characteristics of the company under study.)

## Defendants

The *Brinker* decision leaves intact the requirement that the challenged policies and/or practices ought to be commonly experienced by employees, class-wide. Defendants must understand where the statistical evidence of differences in exception rates is inconsistent with class treatment. Even though a class-wide measure of exceptions may be non-zero, statistically significant differences by location, supervisor, occupation, work shift, employee type, or some other logical employment division, may signal too much variation to be consistent with a common class effect.

## Both Plaintiffs and Defendants

The *Brinker* decision introduced a defense that no statistically significant employer effects lead to observed patterns of meal exceptions once employee-based choices are accounted for. Plaintiffs and defendants can use statistical data from surveys to demonstrate that, when properly accounted for, employer effects either do or do not explain remaining meal exceptions. The weight and persuasiveness of the data, combined with traditional testimony sources, ultimately should determine the outcome of a class matter.

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