

GOVERNMENT AFFAIRS WATCHDOG

COURT RULES ON MEAL AND REST PERIODS

The State Court of Appeal recently issued its decision regarding the interpretation of California's meal and rest period requirements (*Brinker Restaurant Corp. v. Superior Court of San Diego County*). The court found that the employer must take all steps necessary to make the meal period available, but need not ensure that they are taken. Employers, however, cannot impede, discourage, or dissuade employees from taking meal periods.

Although the decision is favorable for employers, the plaintiffs in the case still have the ability to appeal to the California Supreme Court. If the Supreme Court rejects the appeal it would make this decision final and citable. Until then, business will continue to be exposed to liability and potential litigation. On July 25th, the Labor Commissioner issued a directive to her staff to follow the ruling in the *Brinker* decision for all new and pending complaints only within the department.

The following is an excerpt of the Appeals Court decision:

"...we conclude the class certification order is erroneous and must be vacated because the court failed to properly consider the elements of plaintiffs' claims in determining if they were susceptible to class treatment. **Specifically, we conclude 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

PAID SICK LEAVE

The State Senate Committee on Appropriations killed the proposed sick leave mandate (AB 2716, D-Ma, San Francisco) that had recently passed the Assembly.

Under AB 2716, employers would have been required to provide paid sick time, upon the request of the employee, for diagnosis, care, or treatment of health conditions of the employee or an employee's family member, or for leave related to domestic violence or sexual assault. And the sick leave would accrue from one year to the next. An employer would be prohibited from discriminating or retaliating against an employee who requested paid sick time.

The business community as well as the Schwarzenegger administration opposed the bill. Thomas Sheehy, deputy director of legislation for the California Department of Finance, testified that AB 2716 would cumulatively result in lowering wages, reduce available health insurance, limit job training programs and create job loss and a reduction in work hours for many employees.

"Because this bill would impose a significant burden on California employers at a time when efforts are being made to stimulate job growth and to improve California's business climate, we can't support this measure," Sheehy said.

Sheehy cited the costs of the bill as a strong reason why the Finance Department opposed AB 2716. The General Fund costs would approach \$600,000 in the 2008-09 fiscal year and \$1 million in 2009-10, and it would be ongoing for the Division of Labor Standards and Enforcement at the Department of Industrial Relations, he said.

major fraction thereof and they need not, where impracticable, be in the middle of each work period; (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. We further conclude 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. Finally, we conclude 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, whether Brinker changed time records, and whether Brinker knew or should have known employees were working off the clock. Accordingly, we grant the petition and order the superior court to vacate its order granting class certification and enter a new order denying certification of plaintiffs' proposed class." (emphasis added)

The full decision can be viewed at: <http://www.courtinfo.ca.gov/opinions/documents/D049331A.PDF>



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BOE GOING PAPERLESS

The State Board of Equalization has begun implementation of its Electronic Transition Plan (ETP). Under the plan, sales and use taxpayers will be transitioned from paper to electronic filing (e-filing) via the Internet. You may have already received a letter from the BOE notifying you that you will no longer receive paper returns.

Over the next two years, the majority of sales and use tax accounts will transition from paper to e-filing one group at a time based on their account type and reporting basis.

Taxpayers will be notified well in advance of the effective date of the transition of their account.

The first group to go paperless will be new taxpayers that register for a seller's permit on or after July 1, 2008.

The next group, existing single location quarterly prepayment accounts, will begin their transition to e-filing effective with their third quarter 2008 return, due October 31st.

Where do you begin?

There are three e-filing options available on the BOE website. The BOE offers a free option, BOE-file and two fee-based electronic service providers. They can be seen at <http://www.boe.ca.gov/elecsrv/efiling/sutd.htm>.

Go to <http://www.boe.ca.gov/pdf/pub159.pdf> to download the BOE E-File Guide, Publication 159. The E-File Guide provides detailed information to assist you with e-filing.

You can also find information at Frequently Asked Question section on e-filing at <http://www.boe.ca.gov/elecsrv/efiling/efilefaqtaxp.htm>.

You may qualify for a one year exemption, if you are unable to e-file due to a personal hardship. You can find out more information about this exemption by contacting a BOE Customer Service Representative at 800-400-7115.

WHO PAYS TAXES?

In the August 4, 2008, issue of his electronic newsletter, Board of Equalization member Bill Leonard

STATE SUPREME COURT REJECTS NON-COMPETE CLAUSES

Californians have the right to move from one company to another or start their own business and can't be prohibited by their employer from working for a competitor in their next job, the state Supreme Court recently ruled.

In a unanimous decision, the justices said state law since 1872 has forbidden what are called non-compete clauses that restrict management employees' options after they leave a company. Employers urged the court to follow the lead of the federal appeals court in San Francisco, which has interpreted California's law to allow a company to limit its employees' future job choices as long as it doesn't prohibit the employee from working in the same field.

But the state's high court said any such restriction conflicts with California's long-standing policy of employee mobility.

"An employer cannot by contract restrain a former employee from engaging in his or her profession, trade or business," said Justice Ming Chin in Thursday's ruling. He said the law recognizes only a few limited exceptions, for non-compete agreements that are part of the breakup of a corporation or partnership.

The justices ruled in favor of Raymond Edwards II, a tax manager in the Los Angeles office of the accounting firm Arthur Andersen. When the company ended its U.S. accounting operations after being implicated in the Enron Corp. scandal in 2002, Edwards sought a job with a subsidiary that was taking over the business but was required to drop all future claims against Andersen in order to be released from the non-competition agreement he had signed when he went to work in 1997.

He refused and sued both Andersen and the subsidiary for illegally interfering with his future economic interests. The court said Thursday that the suit could proceed because the original non-competition agreement was illegal.

The case is *Edwards vs. Arthur Andersen*.

dissects the Personal Income Tax data for the state.

For taxable year 2005, 14.1 million California income tax returns were filed with the Franchise Tax Board. Total tax liability was \$43.1 billion.

The top one percent paid 47.5 percent of the income tax; the top five percent paid 67.9 percent; and the top 20 percent paid 88.8 percent. The rest of filers (80 percent) paid 11.3 percent, with the bottom 60 percent paying three percent. (Data is from the Franchise Tax Board's Annual Report for 2006: <http://www.ftb.ca.gov/aboutftb/annrpt/2006/2006AR.pdf>).

There is now discussion on raising rates on the top one percent of earners. To rely on such a small percentage of taxpayers to carry the tax burden, however, is risky business, as liberal George Skelton recently pointed out in the Los Angeles Times. He argues that when you rely

on a relatively small group of people to deliver so much, when something happens to members of this group, the effects are magnified. Skelton's example of this is in 2000, the peak of the dot-com craze, the top one percent of earners paid 49 percent of the California income tax. Two years after that bubble imploded, the top one percent paid only 37 percent, and we have been in deficit ever since because we counted on revenue that never came in.

Today the real estate and financial sectors are mirroring what previously happened in the Internet sector, and this has reduced the income—and taxes—of earners. Raising taxes on this group now isn't going to address the short- or long-term budgetary problems of the state. Either new, broader sources of revenue or reduced government spending are the cure.