

ALERT

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EMPLOYMENT UPDATE - MEAL BREAKS AN EASIER ROW, BUT NON-COMPETES REMAIN A NO-GO

The California courts have recently made the employee meal break obligation easier for employers, but have effectively slammed the door on non-compete agreements with employees. Other tools, however, remain viable for protecting hard-fought confidential information and trade secrets.

I. Meal Breaks Now Must Be Provided, Not Ensured.

For many years, employers have been burdened with ensuring their employees take meal breaks (as opposed to rest breaks that an employer need only provide an opportunity). Specifically, California law has required employers to ensure that employees who work more than five hours in a day actually take a duty-free, 30-minute meal break. A second meal break has been required when employees work more than ten hours in a work day.

In wage claims, often brought by disgruntled former employees, employers have been required to *prove* the meal breaks were *actually taken*. Typically, this has required timecards or written acknowledgement by the employee. The penalty for failing to prove this is one additional hour per day of wages due to the employee for each day the employer could not prove a required meal break was taken, as well as potentially a waiting time penalty for failing

to pay all wages due when employment ends. With a three-year statute of limitations on these claims, this can amount to a sizeable figure.

The Court of Appeal has now placed this standard in doubt. In a recent ruling in the case of *Brinker Restaurant Corp. v. Superior Court* (2008) 165 Cal.App.4th 25, the Court of Appeal held as follows:

1. As has been the rule for rest breaks, employers are now required to only “provide” meal breaks (i.e., be “made available”), not “ensure they are taken.”
2. Meal breaks do not have to start at a particular time, and are limited to one meal break in a work day.

While it is probable this decision will be appealed to the California Supreme Court, in the meantime, the California Division of Labor Standards Enforcement has adopted the *Brinker* rulings. Caution is therefore recommended, as this may or may not be a long-term change. But for now, at least, employers can rely on the new standard, understanding it is subject to change. In any case, this is a good time to review policies and practices to determine whether meal and rest breaks are being provided, and your ability as an employer to prove it.

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II. Non-Competes are Out, But Other Tools for Protecting Your Business Still Exist.

The California Supreme Court has once again slammed the door on non-competition agreements and clauses (or “non-competes”) in employment-related agreements in all but a very limited range of exceptions. While non-competes are relatively standard in a number of states and enforceable so long as they are reasonably imposed, California’s Business & Professions Code section 16600 deems void all contracts¹ by which anyone is restrained from engaging in a lawful profession, trade, or business. California has an extremely long, strong, and oft-stated public policy in favor of open competition and employee mobility—and against non-competes.

In recent years, the federal courts have attempted to gain a foothold with a so-called “narrow restraints” exception to this rule. In *Edwards v. Arthur Andersen* (2008) 44 Cal.4th 937, the California Supreme Court soundly rejected this notion and reiterated the policy against non-competes that has existed in this state since the late 1800’s.

However, while non-competes are out, employers are not without options for protecting their businesses from departing employees. Confidential information and trade secrets, that *may* include customer lists (depending on a number of variables), can be shielded. But a business owner shouldn’t wait to close the barn door after the horses have left. An employer’s best weapon for safeguarding its confidential information and trade secrets from being raided by departing employees is to have in place strong policies and procedures for treating information as confidential *before* the

employees depart.

Specifically, employers should have in place employment agreements, and employee manuals that set forth explicitly which types of information are considered confidential. But this is not enough. Employers must act consistently in treating that information as confidential. Some examples could include limited access to certain information by key employees, restrictions on downloads to laptop computers, requirements that certain documents and all copies be returned at the end of employment, computer security, periodic confidentiality audits, and disciplinary action for breaches of confidentiality requirements.

The California Supreme Court has made it clear that employees are entitled to “compete” against their former employers. However, business owners have other tools available to level the playing field and prevent those former employees from using the hard-earned fruits of years of labor. Former employees get to “compete,” but they’ll have to start from scratch—just like you did.

For further information please feel free to contact rshelton@sblp.com.

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¹ *Unless you are an owner of a business selling a substantial ownership interest, and includes partnerships, limited liability companies and corporations.*

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