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PERSPECTIVE

The Werdegar Presumption

By Michael D. Singer

On Feb. 25, the California Supreme Court issued *Donohue v AMN Services, LLC*, 2021 DJDAR 1797, completing a job left unfinished nine years ago in *Brinker Restaurant Corporation v Superior Court*, 53 Cal. 4th 1004 (2012). *Brinker* explained employers' obligations to provide compliant 30-minute, off-duty meal periods within the first five hours of a shift or pay an additional hour of pay each day they fail to do so.

The concurring opinion in *Brinker*, somewhat anomalously written by the author of the unanimous opinion, wrote "separately to emphasize what our opinion does not say." Justice Kathryn Werdegar stated: "If 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." She added that employees need not disprove they "waived" the meal period in their case in chief to establish a violation. The assertion an employee chose not to take a meal period — or a short or late meal — is an affirmative defense, with the burden of proof on the employer. This became known colloquially as the "Werdegar Presumption."

The Werdegar Presumption was widely embraced by plaintiff practitioners attempting to prove individual meal period cases or certify class claims based on violation rates shown in corporate records. It bore some logical appeal, particularly as the concomitant to *Brinker*'s statement that time records showing employees not clocked in raise a rebuttable presumption they are doing no work. Courts did not agree. Some courts refused to apply the presumption, while others limited its application to the class certification context.

Both sides likely agree Donohue is a gamechanger. The decision is reverberating throughout wage and hour and workplace communities, impacting the full scope of litigation.

Defendants largely succeeded in convincing courts that the opposite rule applied, that the records an employer is required by law to maintain accurately for payroll, taxes, workers' compensation premiums, and other reporting requirements should be subject to a presumption of inaccuracy when it came to meal periods due to the possibility workers chose to skip a meal period or take a short or late one.

Donohue changes all that. Justice Goodwin Liu, the sole justice to join the *Brinker* concurrence, authored the unanimous *Donohue* opinion adopting the Werdegar Presumption in full as the opinion of the court and procedural law of the land. Time records sufficiently accurate to calculate employees' wages may now equally be utilized to establish prima facie meal period violations for missed, short or late meal periods.

Donohue arose as a rounding case, alleging AMN Services' timekeeping system that rounded employees' logged time, including meal period punches, to the nearest 10 minutes resulted in uncompensated wages and meal period violations. Rounding permits employers to avoid liability for unpaid wages to employees whose pay comes up short compared to their hours worked provided the system operates neutrally as to the aggregate workforce.

After Division 1 of the 4th District Court of Appeal affirmed summary judgment in favor of AMN Services, the Supreme Court granted review. The court noted it had never weighed in on the validity of rounding employees' time, an antiquated timekeeping system of dubious legitimacy considering current technology, nor was it asked to do so in *Donohue*.

Plaintiff raised two issues: the propriety of rounding meal period times, such that short meal periods under the 30-minute minimum were adjusted to 30 minutes and some late meal periods taken after the fifth hour of a shift were rounded back to appear compliant, and whether the Werdegar Presumption should be adopted as law. The California Supreme Court had previously denied review of this issue several times, as well as turning down a request from the 9th U.S. Circuit Court of Appeals. The court decided both issues in favor of employees in *Donohue*.

Donohue holds that employers may not round time punches for meal periods. In short, rounding one employee's short meal period cannot be justified by providing a longer meal period to the same or another employee. This is based on the premise that even relatively minor infringements of meal periods can cause substantial burdens to the health, safety and well-being of employees. It is also consistent with the court's long-held view that laws regulating employee wages and working conditions must are broadly construed to ensure workers' protections. Employers rounding meal periods should now stop.

In addition, *Donohue* holds squarely that records showing noncompliant meal periods

raise a rebuttable presumption of meal period violations, including at the summary judgment and, presumably, trial stages. Employers can rebut the presumption by presenting evidence they compensated employees for noncompliant meal periods or that they in fact provided compliant meal periods during which employees chose to work. *Donohue* disagreed with AMN's contention that applying the presumption would "eviscerate" the rule that employers need not "police" meal periods, terminology from *Brinker* seized upon by defendants and courts as justification for overlooking records of potential violations, sometimes at alarmingly high rates. *Donohue* states the presumption instead requires employers to give employees a mechanism for recording their meal periods and — critical language — "to ensure that employees use the mechanism properly."

Both sides likely agree *Donohue* is a gamechanger. The decision is reverberating throughout wage and hour and workplace communities, impacting the full scope of litigation as to discovery, class certification, civil penalties under the Private Attorneys General Act, summary judgment motions, trial plans, trial, and more importantly — compliance.

Because meal period records may now be offered as prima facie proof, they have particular utility in establishing predominating common questions in class certification proceedings. Pre-certification discovery is impacted, with little argument against production of sampled or full-workforce time records to establish that a multitude of prima facie violations demonstrates common liability questions predominate over individual class-member considerations. No longer will the fiction of a facially compliant policy be sufficient to defeat class certification or to reject trial plans based on corporate records which on their face now establish company-wide violations.

Donohue by no means guarantees class certification in all meal period cases. Justice Werdegar also included a reminder in her *Brinker* concurrence that a court retains "in the fullness of its discretion" the determination as to whether methods of proof exist sufficient to render class treatment manageable. *Donohue* even provides defendants a pathway for shifting the burden back to the employee in individual, class, and PAGA summary judgment motions and trial through the use of "representative testimony, surveys, and statistical analysis," traditionally imposed on plaintiffs as their only recourse to avoid the defense employees voluntarily skipped their meal periods.

Ultimately, *Donohue* is about compliance. After a period of relative laxity following *Brinker* in policing record-keeping, employers need to come up with their own methods to ensure that employees are properly using the timekeeping system accurately to document their meal periods or their choices to waive them. They must truly stop pressuring employees to work through meal periods or sign fictitious attestations they received their meal breaks to receive their paychecks. Finally, they will need to pay better attention to employees not receiving compliant meal periods they want to take and pay premiums when appropriate. As quoted in *Donohue*, "On a 30-minute break time is scarce. Minutes count." ■

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