August 22, 2019

Jorge E. Navarrete
Clerk of the Court
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Cole v. CRST Van Expedited*, No. S257220

Dear Mr. Navarrete:

Plaintiff-appellant James Cole submits this letter under California Rule of Court 8.548(e)(1) in support of the request of the U.S. Court of Appeals for the Ninth Circuit to decide certified questions of state law in *Cole v. CRST Van Expedited, Inc.* (9th Cir. Aug. 1, 2019, No. 17-55606).

This Court should accept the Ninth Circuit's request because the Court's guidance is badly needed to resolve a longstanding and deepening split between state and federal courts on a question that is critical to effective enforcement of California's worker-protection laws. We urge, however, that this Court restate the certified questions under Rule 8.548(e)(3) to allow the Court to fully set forth an employer's obligations under the state's meal-and-rest-break laws, as well as to fully resolve CRST's liability on the facts of this case.

As properly restated, the certified questions for this Court are:

1) Does the absence of a formal **or informal practice or** policy regarding meal **or** rest breaks violate California law?

2) Does an employer's failure to keep records for meal ~~**and rest**~~ breaks taken by its employees create a rebuttable presumption that the meal and rest breaks were not provided?

Background

California law "obligates employers to afford their nonexempt employees meal periods and rest periods during the workday." (*Brinker Rest. Corp v. Superior Court* (2012) 53 Cal.4th 1004, 1018; see Cal. Labor Code §§ 226.7(c), 512(a); 8 C.C.R. § 11090(11), (12).) In its 2012 decision in *Brinker*, *supra*, 53 Cal.4th at 1040, this Court explained that, to satisfy its obligation to provide those breaks, an employer must "relieve[] its employees of all duty" during the break period, "relinquish[] control over their activities and permit[] them a reasonable opportunity to take an uninterrupted ...

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break." (Employers are also required to record meal breaks taken by employees, pay employees for time spent on rest breaks, and post a copy of the meal- and rest-break laws in a "conspicuous" and "frequented" area of the workplace. (Cal. Labor Code §§ 226.7(d), 1183(d); 8 C.C.R. § 11090(7)(A)(3), (12)(A), (22).)

For many years, CRST ignored those requirements. Indeed, the company long acted as if it was not subject to the meal-and-rest-break laws at all because it maintained—incorrectly—that those laws, as applied to its truck drivers, were preempted by federal regulations. (See *Cole v. CRST Van Expedited, Inc.* (9th Cir. 2015) 599 Fed.Appx. 755; see also *Dilts v. Penske Logistics* (9th Cir. 2014) 769 F.3d 637, cert. den. (2015) 135 S. Ct. 2049; *Ortega v. J. B. Hunt Transp., Inc.* (9th Cir. 2017) 694 Fed.Appx. 589, cert. den. (2018) 138 S. Ct. 2601.) The company therefore did nothing to provide the breaks guaranteed by law, instructed employees to take fewer and shorter breaks than the law allows, and imposed scheduling requirements that made it impossible for employees to take all their breaks. The company also failed to record meal breaks, to pay for rest breaks, or to post a copy of the break laws in a conspicuous and frequented area of the workplace.

CRST, in short, made zero effort to comply with the break laws' requirements. Yet, the federal district court in this case concluded that the company had nevertheless succeeded in complying with those laws through inaction. It was enough, the court held, that the company lacked a "policy of *preventing* drivers from taking meal and rest breaks," and that employees could thus have taken, on their own initiative, more breaks than CRST authorized them to take.

I.
This Court should clarify whether the meal-and-rest break laws impose any affirmative obligations on employers.

A. The first certified question is of critical importance to the effective enforcement of California's important worker-protection scheme. This Court has repeatedly held that the state's meal-and-rest-break laws must be "construed broadly in favor of protecting employees." (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103; see also *Brinker*, *supra*, 53 Cal.4th 1004 at 1026-1027). Relying on this Court's decision in *Brinker*, an unbroken line of California court of appeal decisions has held that the break laws "impose[] an affirmative obligation" on employers to provide the required breaks to their employees. (*Benton v. Telecom Network Specialists, Inc.* (2013) 220 Cal.App.4th 701, 728.) That line of cases, however, "conflict[s]" with the decisions of federal district court cases in the wake of *Brinker*, which have held that a company's only obligation under the break laws is to refrain from "prevent[ing]" employees from taking breaks. (*Cummings v. Starbucks Corp.* (C.D. Cal., Mar. 24, 2014, No. CV 12-06345-MWF FFMX) 2014 WL 1379119, *18-*20).

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Under those decisions—including the district court's decision in this case—an employer can comply with the break laws without taking any affirmative action to authorize the required breaks.

The result is to trivialize an employer's responsibilities under the break laws and to eviscerate California's carefully calibrated system of worker protections. The district court's decision here would take responsibility for providing breaks out of the hands of the party best positioned to understand, communicate, and consistently implement those requirements: the employer. By instead putting the whole burden of compliance on employees, the rule adopted by the district court's decision guarantees that those employees will not take all the breaks to which they are entitled and that they will thus face the increased stress and risk of work-related accidents that the break laws were intended to prevent. (See *Murphy*, *supra*, 40 Cal.4th at 1113.)

That federal courts are undermining California's critical worker-protection framework by flouting the consensus of the California appellate courts—on a pure question of substantive state law, no less—is unacceptable. Absent this Court's review, more and more defendants will follow the path taken by CRST here, removing meal-and-rest-break claims to federal court under the federal Class Action Fairness Act and thus avoiding any obligation or liability under the break laws. This Court should answer the Ninth Circuit's first certified question to return federal litigation under the break laws to "the course it would follow in state courts." (*Hanna v. Plumer* (1965) 380 U.S. 460, 473.)

B. This Court should first use its discretion under Rule 8.548(e)(3), however, to restate the question. As framed by the Ninth Circuit, the question asks whether the "absence of a *formal* policy regarding meal and rest breaks" violates California law. California courts, however, have not distinguished between "formal" and "informal" break policies, or required an employer's policy to satisfy a particular level of formality. The court of appeal in *Faulkinbury v. Boyd & Assocs., Inc.* (2013) 216 Cal.App.4th 220, 237, for example, recognized that "an employer could potentially defend" meal-and-rest-break claims "by arguing that it did have an *informal or unwritten* meal or rest break policy." (Italics added. See also *Benton*, *supra*, 220 Cal.App.4th at 722 [same]; *Bradley v. Networkers International, LLC* (2012) 211 Cal.App.4th 1129, 1150 [asking whether the employer "had a formal or *informal* practice or policy of permitting the required breaks" (italics added)].) Even in the absence of a policy, courts have recognized that an employer is not liable under the meal-and-rest-break laws if, in practice, it has actually provided employees with the required breaks. (See *Payton v. CSI Elec. Contractors, Inc.* (2018) 27 Cal.App.5th 832, 842 [holding that an employer did not violate the break laws where "afternoon breaks were not simply 'ad hoc,' but were regularly implemented as a matter of practice"]; *Benton*, *supra*, 220 Cal.App.4th at 722 [examining the employer's "lack of a meal/rest break policy *and the uniform failure to authorize such breaks*" (italics added)].)

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In accordance with those decisions, Mr. Cole's theory of liability in this case was not limited to CRT's lack of a formal policy. Rather, Mr. Cole argued that the company had *no* policy or practice—whether formal or informal—to provide the breaks required by California law. A holding by this Court that a *formal* policy is not required would thus not resolve the question of CRST's liability, because it would leave undecided the question whether the company was required to have *any* policy or practice of complying with the break laws. Nor would such a decision necessarily undermine the federal district court decisions holding that employers have no affirmative obligations under the law.

To avoid those problems, this Court should thus broaden the certified question. Rather than asking whether an employer is required to have a "formal policy regarding meal and rest breaks," the Court should ask whether the employer is required to have a "formal or informal practice or policy" regarding those breaks.

II.
The Court should also decide whether an employer's failure to keep records of the meal breaks taken by its employees creates a rebuttable presumption that the breaks were not provided.

A. The break laws require employers to keep records of all meal breaks taken by employees. 8 C.C.R. § 11090(7)(A)(3). In *Brinker*, Justice Werdegar, joined by Justice Liu, explained in a concurrence that "[i]f an employer's records show no meal period for a given shift," "a rebuttable presumption arises that the employee was not relieved of duty and no meal period was provided." (*Brinker*, *supra*, 53 Cal.4th at 1053 (conc. opn. of Werdegar, J.).) Justice Werdegar wrote the concurrence for the purpose of giving "guidance" to the lower court following remand on the issue of certifying a meal-break class. (See *id.* at 1052 (conc. opn. of Werdegar, J.).) A majority of the Court did not find it necessary to join that discussion because the majority opinion (also written by Justice Werdegar) did not reach the meal-break issue—not because the presumption lacked majority support.

This Court should take this opportunity to adopt Justice Werdegar's opinion. The presumption that she identifies is already well-established in the California courts of appeal. (See *Brinker*, *supra*, 53 Cal.4th at 1053 & fn. 1.) It is also supported by the Division of Labor Standards Enforcement, *ibid.*, an authority that this Court considers highly persuasive. (*Id.* at p. 1029, fn. 11.) And it is analogous to the federal rule shifting the burden of proof to employers who fail to comply with the record-keeping requirement of the Fair Labor Standards Act. (*Id.* at p. 1053 n.1 [quoting *Anderson v. Mt. Clemens Pottery Co.* (1946) 328 U.S. 680, 686-688].)

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The presumption is essential to effective enforcement of the break laws and accomplishment of their remedial objectives. (*Brinker*, *supra*, 53 Cal.4th at 1053.) Any other rule would "offer an employer an incentive to avoid its recording duty and a potential windfall from the failure to record meal periods." (*Id.* at p. 1053 n.1.) It would also "punish" employees for the "evidentiary gap created by the employer's failure to keep adequate records." (*Tyson Foods, Inc. v. Bouaphakeo* (2016) 136 S.Ct. 1036, 1047.)

B. Before answering the question, however, this Court should again slightly restate it. The question posed by the Ninth Circuit asks whether the presumption is created by "an employer's failure to keep records for meal *and rest breaks* taken by its employees." The break laws, however, require employers to keep records only of *meal* breaks. *See* 8 C.C.R. § 11090(7)(A)(3). There is thus no need for this Court to decide whether an employer's failure to record *rest* breaks also creates a presumption against the employer.

Respectfully submitted,

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