

S166350

**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

**BRINKER RESTAURANT CORPORATION, BRINKER INTERNATIONAL, INC
and BRINKER INTERNATIONAL PAYROLL COMPANY, L.P.,**
Petitioners,

v.

THE SUPERIOR COURT OF SAN DIEGO COUNTY,
Respondent,

**ADAM HOHNBAUM, ILLYA HAASE, ROMEO OSORIO, AMANDA JUNE
RADER, and SANTA ALVARADO,**

Real Parties in Interest.

**PETITION FOR REVIEW OF A DECISION OF THE COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION ONE, CASE No. D049331
GRANTING A WRIT OF MANDATE TO THE SUPERIOR COURT
FOR THE COUNTY OF SAN DIEGO, CASE No. GIC834348
HONORABLE PATRICIA A. Y. COWETT, JUDGE**

**APPLICATION TO FILE BRIEF OF *AMICUS CURIAE* IN SUPPORT OF
PETITIONERS BRINKER RESTAURANT CORPORATION, ET AL.**

LAW OFFICE OF ROBIN L. UNANDER

Robin L. Unander (179729)
1029 State Street, Suite 150
Santa Barbara, CA 93101
Telephone: (805) 962-5949
Facsimile: (805) 962-2068

ATTORNEY FOR *AMICUS CURIAE*

CALIFORNIA AUTOMOTIVE BUSINESS COALITION

RECEIVED

AUG 19 2009

Schubert Jonckheer Kolbe &
Kraowec LLP

S166350

**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

**BRINKER RESTAURANT CORPORATION, BRINKER INTERNATIONAL, INC
and BRINKER INTERNATIONAL PAYROLL COMPANY, L.P.,**
Petitioners,

v.

THE SUPERIOR COURT OF SAN DIEGO COUNTY,
Respondent,

**ADAM HOHNBAUM, ILLYA HAASE, ROMEO OSORIO, AMANDA JUNE
RADER, and SANTA ALVARADO,**

Real Parties in Interest.

PETITION FOR REVIEW OF A DECISION OF THE COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION ONE, CASE No. D049331
GRANTING A WRIT OF MANDATE TO THE SUPERIOR COURT
FOR THE COUNTY OF SAN DIEGO, CASE No. GIC834348
HONORABLE PATRICIA A. Y. COWETT, JUDGE

**APPLICATION TO FILE BRIEF OF *AMICUS CURIAE* IN SUPPORT OF
PETITIONERS BRINKER RESTAURANT CORPORATION, ET AL.**

LAW OFFICE OF ROBIN L. UNANDER

Robin L. Unander (179729)
1029 State Street, Suite 150
Santa Barbara, CA 93101
Telephone: (805) 962-5949
Facsimile: (805) 962-2068

ATTORNEY FOR *AMICUS CURIAE*

CALIFORNIA AUTOMOTIVE BUSINESS COALITION

**TO THE CHIEF JUSTICE OF THE SUPREME COURT
OF THE STATE OF CALIFORNIA:**

In accordance with Rule 8.520, subdivision (f), of the California Rules of Court, the California Automotive Business Coalition (hereinafter "CALABC") respectfully applies for leave to file a brief as *Amicus Curiae* in support of the Petitioners Brinker Restaurant Corporation, Brinker International, Inc., and Brinker International Payroll Company, L.P. (hereinafter "Brinker"). Attached to this application is the proposed brief.

CALABC is familiar with the questions presented by the Petition and Answer, and believes additional argument is necessary for the reasons that follow.

STATEMENT OF INTEREST

CALABC, formerly Automotive Repair Coalition formed in 1992, is a trade association comprised of California independent, corporate and franchise members of the automotive repair/maintenance industry. The mission of CALABC is to work with Legislators and Regulators on laws and regulations which govern the automotive industry. The results will improve the automotive repair industry, thereby creating a win for consumers, industry and government.

Members of CALABC include, but are not limited to, major automotive repair retailers (Firestone, Goodyear, Sears, Midas and AAMCO), along with industry associations such as Automotive Service Councils of California (ASC), California Service Station and Automotive Repair Association (CSSARA), Independent Automotive Professionals Association (IAPA) and Automotive Trade Organizations of California (AuTO-CA). These associations are representative of automotive repair shops, auto body repair shops, smog shops, service stations, auto parts retailers, and automotive

aftermarket businesses. Most of these are small businesses, with a minority of owners having more than one business location. The CALABC members are quite different from the Petitioners in *Brinker*, however, the issues presented on the appeal apply equally to CALABC members.

As small businesses, CALABC members generally employ an average of 15 employees at each business location, including administrative employees as well as technicians. Employers have been wary of potential violations of the meal and rest period laws since the inception of sanctions for violations in 2000, and the rapid rise of litigation since then has led to confusion and an increase in existing tensions between employer and employee. Given the apparent uncertainty by both employer and employee regarding application of the meal and rest period laws, it's evident that the only people benefitted by Labor Code section 226.7, which imposes sanctions, are plaintiffs' attorneys.

CALABC supports the *Brinker* court's and Petitioners' interpretation of California Labor Code sections 512 and 226.7 and Wage Order 5 both in spirit and the intent of the meal and rest period laws and practicality of application.

BASIS FOR CALABC'S REQUEST FOR LEAVE TO FILE AN *AMICUS* BRIEF IN SUPPORT OF BRINKER

CALABC submits this brief *Amicus Curiae* to assist this Court in recognizing the importance of the issues presented on this appeal. The fundamental issue of whether an employer must police its employees to enforce the break periods at specific intervals, or merely provide the opportunity for the employees to take breaks needs clarification.

Likewise, the timing of the meal and rest periods is an issue that would benefit from this Court's guidance.

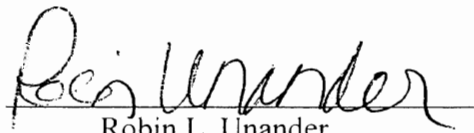
Small businesses, such as members of CALABC, have been struggling over the past several years to understand these Labor Code and Code of Regulations requirements as they apply to them. Various interpretations of the employers' obligations regarding meal and rest periods are discussed in different trade publications trying, in vain, to decipher the employers' responsibility to employees, and since most small business owners are not educated with law degrees it is often times confusing to understand exactly what is required when it comes to the meal and rest periods. Likewise, the employees are also confused about what their rights are. One issue that regularly comes up, for example, is whether an employee *must* take his break at a specified time during his work shift when it may be inconvenient for him or ultimately detrimental to him financially. While the CALABC members do not dispute an employee's entitlement to rest and meal breaks, there are serious practical issues about whether these breaks should be enforced by the employer, and when the break periods shall be taken by the employee.

CONCLUSION

For the foregoing reasons, the CALABC respectfully requests that this Court grant their Application for Leave and accept the attached *Amicus Curiae* brief.

Respectfully submitted,

Dated: August 14, 2009


Robin L. Unander,
Attorney for *Amicus Curiae*
California Automotive
Businesses Coalition

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SANTA BARBARA

I am employed in the County of Santa Barbara, State of California. I am over the age of 18 and not a party to the within action; my business address is: 1029 State Street, Suite 150, Santa Barbara, California 93101.

On August 17, 2009, I served the foregoing document described as: Amicus Brief on the interested parties below using the following means:
SEE ATTACHED SERVICE LIST

 X BY OVERNIGHT DELIVERY I enclosed the document(s) in an envelope or package provided by an overnight delivery carrier and addressed to the respective addresses(es) of the party(ies) stated above. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 17, 2009, at Santa Barbara, California.

Robin L. Unander _____

L. Tracee Lorens, Esq.
Wayne Alan Hughes, Esq.
Lorens & Associates, APLC
701 B Street, Suite 1400
San Diego, CA 92101
Tel: 619.239.1233
Fax: 619.239.1178
[Attorneys for Real Parties in Interest]

Robert C. Schubert, Esq.
Kimberly A. Kralowec, Esq.
Schubert Jonckheer Kolbe &
Kralowec LLP
Three Embarcadero Center
Suite 1650
San Francisco, CA 94111
Tel: 415.788.4220
Fax: 415.788.0161
[Attorneys for Real Parties in Interest]

Timothy D. Cohelan, Esq.
Isam C. Khoury, Esq.
Michael D. Singer, Esq.
Cohelan Khoury & Singer
605 C Street, Suite 200
San Diego, CA 92101-5305
Tel: 619.595.3001
Fax: 619.595.3000
[Attorneys for Real Parties in Interest]

William Turley, Esq.
Robert D. Wilson III, Esq.
David T. Mara, Esq.
The Turley Law Firm, APLC
555 West Beech Street, Suite 460
San Diego, CA 92101
Tel: 619.234.2833
Fax: 619.234.4048
[Attorneys for Real Parties in Interest]

California Court of Appeal
Fourth Appellate District
Division One
Symphony Towers
750 B Street, Suite 300
San Diego, CA 92101

Hon. David B. Oberholtzer
San Diego County Superior Court
Hall of Justice, Dept. 67
330 W. Broadway
San Diego, CA 92101
[Trial Court Judge]

Karen J. Kubin, Esq.
Morrison & Foerster, LLP
425 Market Street
San Francisco, CA 94105
*[Attorneys for Defendants and
Petitioners]*

Rex S. Heinke, Esq.
Johanna R. Shargel, Esq.
Akin Gump Straus Hauer & Feld LLP
2029 Century Park East, Suite 2400
Los Angeles, CA 90067
*[Attorneys for Defendants and
Petitioners]*

Laura M. Franze, Esq.
M. Brett Burns, Esq.
Hunton & Williams LLP
550 South Hope Street, Suite 2000
Los Angeles, CA 90071-2627
*[Attorneys for Defendants and
Petitioners]*

S166350

**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

**BRINKER RESTAURANT CORPORATION, BRINKER INTERNATIONAL, INC
and BRINKER INTERNATIONAL PAYROLL COMPANY, L.P.,**
Petitioners,

v.

THE SUPERIOR COURT OF SAN DIEGO COUNTY
Respondent,

**ADAM HOHNBAUM, ILLYA HAASE, ROMEO OSORIO, AMANDA JUNE
RADER, and SANTA ALVARADO,**

Real Parties in Interest.

PETITION FOR REVIEW OF A DECISION OF THE COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION ONE, CASE No. D049331
GRANTING A WRIT OF MANDATE TO THE SUPERIOR COURT
FOR THE COUNTY OF SAN DIEGO, CASE No. GIC834348
HONORABLE PATRICIA A. Y. COWETT, JUDGE

**BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS BRINKER
RESTAURANT CORPORATION, ET AL.**

LAW OFFICE OF ROBIN L. UNANDER

Robin L. Unander (179729)
1029 State Street, Suite 150
Santa Barbara, CA 93101
Telephone: (805) 962-5949
Facsimile: (805) 962-2068

ATTORNEY FOR *AMICUS CURIAE*

CALIFORNIA AUTOMOTIVE BUSINESS COALITION

RECEIVED

AUG 19 2009

Schubert Jonckheer Kolbe &
Kralowec LLP

S166350

**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

**BRINKER RESTAURANT CORPORATION, BRINKER INTERNATIONAL, INC
and BRINKER INTERNATIONAL PAYROLL COMPANY, L.P.,**
Petitioners,

v.

THE SUPERIOR COURT OF SAN DIEGO COUNTY
Respondent,

**ADAM HOHNBAUM, ILLYA HAASE, ROMEO OSORIO, AMANDA JUNE
RADER, and SANTA ALVARADO,**

Real Parties in Interest.

**PETITION FOR REVIEW OF A DECISION OF THE COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION ONE, CASE No. D049331
GRANTING A WRIT OF MANDATE TO THE SUPERIOR COURT
FOR THE COUNTY OF SAN DIEGO, CASE No. GIC834348
HONORABLE PATRICIA A. Y. COWETT, JUDGE**

**BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS BRINKER
RESTAURANT CORPORATION, ET AL.**

LAW OFFICE OF ROBIN L. UNANDER

Robin L. Unander (179729)
1029 State Street, Suite 150
Santa Barbara, CA 93101
Telephone: (805) 962-5949
Facsimile: (805) 962-2068

ATTORNEY FOR *AMICUS CURIAE*

CALIFORNIA AUTOMOTIVE BUSINESS COALITION

TABLE OF CONTENTS

	Page
INTRODUCTION.....	1
ARGUMENT	1
A. Practical Application Supports Providing, Not Enforcing Break Periods	1
B. Spirit and Language of the Laws Support Providing Break Periods Versus Enforcing Break Periods	6
CONCLUSION	10
CERTIFICATE OF COMPLIANCE.....	11

TABLE OF AUTHORITIES

	Page
CALIFORNIA STATE CASES	
<i>Brinker v. Superior Court</i> (Oct. 12 2007, D049331) 2007 WL 2965604	7
<i>Corder v. Houston's Restaurants, Inc.</i> , (C.D. Cal. 2006) 424 F.Supp.2d 1205	9
CALIFORNIA STATUTES AND REGULATIONS	
California Code of Regulations, Title 8, §11050	7
California Government Code §8547.1	8
California Labor Code §512	6, 7
California Labor Code § 226.7	6, 7, 8, 9
California Labor Code §1102.5	8
LEGISLATIVE HISTORY	
Wage Order 5	6, 7, 8

INTRODUCTION

In this brief, *Amicus Curiae* California Automotive Business Coalition (hereinafter “CALABC”), formerly Automotive Repair Coalition formed in 1992, a trade association comprised of California independent, corporate and franchise members of the automotive repair/maintenance industry, supports Petitioners Brinker Restaurant Corporation, Brinker International, Inc., and Brinker International Payroll Company, L.P. (hereinafter “Brinker”). This brief does not address nor recapitulate each issue, argument or point of law raised by Brinker in the Answer. Rather, this *Amicus* brief offers further argument on points that would benefit from additional perspective.

Brinker identifies issues of significant relevance to the CALABC members concerning whether an employer must police its employees to ensure they take their breaks, or merely provide the opportunity for employees to take breaks. CALABC supports the *Brinker* opinion in believing that California law does not require employers to enforce the meal and break periods against their employees. Rather, it is the employers’ responsibility to provide meal and break period opportunities for employees, and it is the employees’ responsibility to take those breaks. Both the language and spirit of the law and the practical application in the workforce support this interpretation.

ARGUMENT

A. Practical Application Supports Providing, Not Enforcing Break Periods

The practical application of *providing* meal and rest periods to employees supports the workplace environment, and ultimately the employee, more advantageously

than *ensuring* such break periods are taken. For several reasons, both the employer and the employee benefit if the break periods are flexible.

The CALABC members¹, while different from Brinker, are representative of many small businesses in California. CALABC members generally provide customer service on a retail or wholesale level, or both. There are times during a working day when the employees are busy handling a customer rush, and other times when things are a slower. Much of the day is spent working steadily, and meal and rest periods can be predictably scheduled. However, not every day is the same, and enforcing break periods at inopportune times can detrimentally affect both employer and employee. Further, an employee may not want to have his meal or rest period scheduled for him each day, and may on occasion prefer to forego or delay such a period for his own reasons.

Employee technicians of CALABC members often are compensated on a flat rate, or in essence piece work. They would prefer to work and take meal and rest periods as they can fit them in between projects because it is to their financial benefit. Sometimes nothing is more frustrating than being required to drop what you are doing to take a break that you neither want at that moment nor need, but, as Plaintiffs argue, the law that 'protects your well being' currently requires your employer to make sure you take one; even if taking a break at that moment is to your financial detriment.

In another instance, said employee technician may have a customer waiting for her vehicle to be repaired, and requiring the employee to stop in the midst of the repair to

¹ CALABC members are comprised of major automotive repair retailers (Firestone, Goodyear, Sears, Midas and AAMCO), along with industry associations, such as Automotive Service Councils of California (ASC), California Service Station and Automotive Repair Association (CSSARA), Independent Automotive Professionals Association (IAPA) and Automotive Trade Organizations of California (AuTO-CA), which are representative of automotive repair shops, auto body repair shops, smog shops, service stations, auto parts retailers, and automotive aftermarket businesses. Most CALABC members are small businesses generally employing an average of 15 employees at each business location, including administrative employees as well as technicians.

take a meal or rest period while the customer waits does not promote good business practice or customer satisfaction. Sometimes the only distinction between automotive repair shops or services is the level of customer service one business provides over its competition. If a customer sees the technician who is working on her car stop to take a break while she is waiting, she's not likely to be empathetic for the employee being required to take his break at that moment. She will more likely be upset with the business and not return in the future.

An employee may also have personal reasons for not wanting to take a meal or rest period at a certain time during his work shift. Perhaps he has something he needs to do during his break period other than eat or rest, and it would be convenient for him to have flexibility over when he may exercise his option for such a period. Enforcing the break periods at certain intervals omits the employee flexibility over his own work schedule, and the decision to take a meal or rest period should be decided by each employee on a daily basis. While the meal and rest period statutes are a good idea in concept, uniform application does not work the same for every employee and industry.

The practical application of providing a meal or rest period impacts the employer as well as the employee. In theory, as small businesses the CALABC members should be able to enforce break periods amongst their employees with little inconvenience. After all, there aren't that many employees to monitor compared to a large business with many employees all working different shifts. However, the reality is that the typical managing employee or owner of a CALABC member is also working alongside his employees, and doesn't have the capacity to act as both a busy technician and administrative break enforcer. It is practical for the employer to establish a break schedule for the employees

for each day, but making certain that each employee takes his break in the manner intended is a different story. CALABC members do not employ primarily administrative managers.

An employer who has flexibility to request that an employee take a meal period at the beginning of his shift (with the consent of the employee) because it is more practicable for the employer to lose an employee for 30 minutes at that time, and permit the employee to take a rest period later in his shift supports the needs of the business to run efficiently and provide the level of service necessary to compete. An example of such an employer is a service station that is open 24 hours. The overnight attendant will come on for duty typically while another employee is still working, but will end up working the shift alone at some point that evening. It is not practicable for the employee to take his meal break or rest periods when there is no other employee available to cover him, but it is practicable to have him take breaks at the beginning or towards the end of his shift when there is another employee available. A simplistic but unrealistic response to this dilemma would be to hire 2 employees to work the overnight shift. The reality is it is not cost effective for the business to employ 2 employees during that shift for no other reason than to cover each other's breaks. The overnight shift is typically slow, and the on-duty employee has plenty of down-time to eat, use the restroom, stretch his legs, etcetera as long as he stays on duty. Requiring him to stay on duty under these circumstances is not unreasonable and is not a hardship on the employee because he is not working under circumstances that demand he take a break for his own health and well being. The employer does not intend to deny break periods entirely to the employee,

however, the required break periods should be flexible and not to the detriment of the employer.

The practical application of the laws under the *provide* standard puts the employee in control of his rest and meal periods, and relieves the employer from having to chase down his employees to make sure everyone is in compliance. This avoids a confrontation between an unwilling employee who has no ability to waive his exercise of taking the breaks and a caught-between-a-rock-and-a-hard-place employer. Such application also supports the needs of the employer business to regulate when employees take their breaks so the business can continue to offer an uncompromised level of service.

The practical application of the break period laws under the *enforcement* interpretation of the law disregards these real life examples, and hurts both the employer and employee by removing the flexibility of each to decide what is in their own best interests. Legislation which imposes a ‘big brother’ atmosphere into private matters is not in the public’s interest. Accordingly, employer enforcement of employee rest and meal breaks is inappropriate, doesn’t support the employee, and should not be endorsed.

B. Spirit and Language of the Laws Support Providing Break Periods Versus Enforcing Break Periods

The specific laws that are at the heart of the issue here, whether employers must ensure that employees take rest and meal breaks, are set forth in California Labor Code sections 512, subdivision (a)², and 226.7³, and Wage Order 5⁴.

² Labor Code section 512 provides,

An employer may not employ an employee for a work period of more than five hours per day without *providing* the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. An employer may not employ an employee for a work period of more than 10 hours per day without *providing* the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is

Two distinct intentions are apparent in the plain language of all three laws. First, as discussed at length in the Answer, the employer must *provide, authorize and permit* the employee with and to take meal and rest periods when the employee works for a certain duration. The common component in all three laws is the employer offering or making meal and rest periods available to its employees. The law says nothing about providing *and ensuring* or *guaranteeing* employees take meal or rest periods. The *Brinker* opinion supports the interpretation of providing versus forcing the employee to take a meal break.⁵

The second clear intention of the statutes is the employer and employee having flexibility over how, when and if to take a meal or rest period. Undisputedly, if the employee works a certain amount of time, five hours, then he is entitled to have an unpaid meal period. (Lab. Code, §§ 512, subd. (a), 226.7.) Likewise, when the employee

no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.
(Lab. Code, § 512, subd. (a), emphasis added.)

³Labor Code section 226.7, provides:

- (a) No employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission.
- (b) If an employer fails to *provide* an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not *provided*.

(Lab. Code, § 226.7, emphasis added.)

⁴ Wage Order 5 provides:

Every employer shall *authorize and permit* all employees to take rest periods, which insofar as *practicable* shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate often (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours.

(Regs., §11050, subd. (12)(A), emphasis added.)

⁵ The Court of Appeal held that “the plain language of section 512(a)” - stating that employers “must *provide*” meal periods - makes clear that “meal periods need only be made available, not ensured, as plaintiffs claim.” (*Brinker v. Superior Court* (2007) 2007 WL 2965604 Slip Op., p. 42.)

works a certain amount of time, four hours, he is entitled to a paid rest period that should fall within the middle of his four hour work period “*when practicable*”. (Wage Order 5, emphasis added; Lab. Code §226.7.) This very specific and intentional language suggests that meal and rest periods are flexible.

The concern that an employer may take advantage of the flexibility of employee break periods and coerce his employees against taking breaks or taking them well after the employee needs one, or retaliate against employees for taking breaks is a non-issue because employees have remedies to protect themselves from such an employer.

Whistleblower laws, which protect employees when reports of unlawful employer conduct are made to governing authorities, would allow employees to report their employer for such tactics or conduct without fear of consequence from the employer.

Simply stated, California Whistleblower Act, Government Code section 8547.1,⁶ and California whistleblower statute, Labor Code section 1102.5,⁷ are available statutory

⁶ The Whistleblower Act embodies a strong public policy to deter and punish those who retaliate against public employees for reporting wrongdoing. Government Code section 8547.1 states, “The Legislature finds and declares that state employees should be free to report waste, fraud, abuse of authority, violation of law, or threat to public health without fear of retribution. The Legislature further finds and declares that public servants best serve the citizenry when they can be candid and honest without reservation in conducting the people's business.” (Govt. Code §8547.1)

⁷ Labor Code section 1102.5

(a) An employer may not make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.

(b) An employer may not retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.

(c) An employer may not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.

(d) An employer may not retaliate against an employee for having exercised his or her rights under subdivision (a), (b), or (c) in any former employment.

(e) A report made by an employee of a government agency to his or her employer is a disclosure of information to a government or law enforcement agency pursuant to subdivisions (a) and (b).

protections for employees and serve as a strong discouragement for employers inclined to cheat the break period rights of employees.

In other words, recognizing that employees have discretion to exercise their rights to break periods, and how, when and if they take their breaks will not encourage coercion or retaliation by employers when an employee exercises such rights. The employer is still required to provide the employee with meal or rest periods, however, the employee who exercises his rights will do so on his terms, and without concern over whether it reflects poorly on his work performance in the eyes of the employer.

Fairness to employees aside, the language of the statutes supports the intent that employers also have flexibility over the timing of employee meal or rest periods. An employer does not have discretion to grant or aggregate meal or rest periods (see *Corder v. Houston's Restaurants, Inc.*, (C.D. Cal. 2006) 424 F.Supp.2d 1205, 1208; Lab. Code §226.7, subd. (a)), but taking a rest period “when practicable” means when convenient for both employer and employee. If the employer’s consideration were not a factor in employee rest period timing then the statute would state “when practicable *for the employee.*” Since this is not the case, the logical interpretation is that the employer also has flexibility over when the employee takes a rest period. If the employer is having a very busy rush of business then an employee meal or rest period in the midst of this may not be practicable. Clearly, the Legislature anticipated this impact on the employer when implementing these statutes, and built in language which supports the employers’ needs

(f) In addition to other penalties, an employer that is a corporation or limited liability company is liable for a civil penalty not exceeding ten thousand dollars (\$10,000) for each violation of this section.

(g) This section does not apply to rules, regulations, or policies which implement, or to actions by employers against employees who violate, the confidentiality of the lawyer-client privilege of Article 3 (commencing with Section 950), the physician-patient privilege of Article 6 (commencing with Section 990) of Chapter 4 of Division 8 of the Evidence Code, or trade secret information.

while benefiting employees. To hold otherwise completely puts employers at the mercy and whims of their employees, and this does not make practical sense.

CONCLUSION

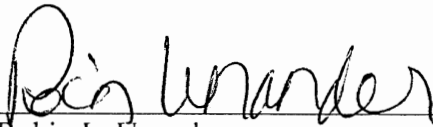
The spirit of the laws, to promote breaks for employees without coercion or retaliation from the employer, would be remiss in its support for employees if it eliminated an employee's free choice and flexibility to take a break - or not, how to take it and when to take it. Further, support for employees taking breaks is not accomplished by requiring employers to enforce break periods. Legislation is already enacted to protect an employee who wishes to exercise his right to take a break from being retaliated against by his employer, and the employee's right to take a break is statutorily protected.

Enforcement by the employer of break periods is, therefore, unnecessary and socially undesirable.

For these reasons, the judgment of the Court of Appeal recognizing the employer's duty to provide or offer break periods should be affirmed in its entirety.

Respectfully submitted,

Dated: August 14, 2009

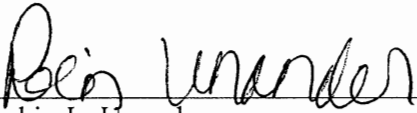


Robin L. Unander,
Attorney for *Amicus Curiae*
California Automotive Business Coalition

CERTIFICATE OF COMPLIANCE
[CA Rules of Court, rule 8.204 (c)]

This brief consists of 3,223 words as counted by the Microsoft Word version 2007 word processing program used to generate the brief.

Dated: August 14, 2009



Robin L. Unander,
Attorney for *Amicus Curiae*
California Automotive Business Coalition

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SANTA BARBARA

I am employed in the County of Santa Barbara, State of California. I am over the age of 18 and not a party to the within action; my business address is: 1029 State Street, Suite 150, Santa Barbara, California 93101.

On August 17, 2009, I served the foregoing document described as: Amicus Brief on the interested parties below using the following means:
SEE ATTACHED SERVICE LIST

X BY OVERNIGHT DELIVERY I enclosed the document(s) in an envelope or package provided by an overnight delivery carrier and addressed to the respective addresses(es) of the party(ies) stated above. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 17, 2009, at Santa Barbara, California.

Robin L. Unander

Robin Unander

L. Tracee Lorens, Esq.
Wayne Alan Hughes, Esq.
Lorens & Associates, APLC
701 B Street, Suite 1400
San Diego, CA 92101
Tel: 619.239.1233
Fax: 619.239.1178
[Attorneys for Real Parties in Interest]

Robert C. Schubert, Esq.
Kimberly A. Kralowec, Esq.
Schubert Jonckheer Kolbe &
Kralowec LLP
Three Embarcadero Center
Suite 1650
San Francisco, CA 94111
Tel: 415.788.4220
Fax: 415.788.0161
[Attorneys for Real Parties in Interest]

Timothy D. Cohelan, Esq.
Isam C. Khoury, Esq.
Michael D. Singer, Esq.
Cohelan Khoury & Singer
605 C Street, Suite 200
San Diego, CA 9210 1-5305
Tel: 619.595.3001
Fax: 619.595.3000
[Attorneys for Real Parties in Interest]

William Turley, Esq.
Robert D. Wilson III, Esq.
David T. Mara, Esq.
The Turley Law Firm, APLC
555 West Beech Street, Suite 460
San Diego, CA 92101
Tel: 619.234.2833
Fax: 619.234.4048
[Attorneys for Real Parties in Interest]

California Court of Appeal
Fourth Appellate District
Division One
Symphony Towers
750 B Street, Suite 300
San Diego, CA 92101

Hon. David B. Oberholtzer
San Diego County Superior Court
Hall of Justice, Dept. 67
330 W. Broadway
San Diego, CA 92101
[Trial Court Judge]

Karen J. Kubin, Esq.
Morrison & Foerster, LLP
425 Market Street
San Francisco, CA 94105
*[Attorneys for Defendants and
Petitioners]*

Rex S. Heinke, Esq.
Johanna R. Shargel, Esq.
Akin Gump Straus Hauer & Feld LLP
2029 Century Park East, Suite 2400
Los Angeles, CA 90067
*[Attorneys for Defendants and
Petitioners]*

Laura M. Franze, Esq.
M. Brett Burns, Esq.
Hunton & Williams LLP
550 South Hope Street, Suite 2000
Los Angeles, CA 90071-2627
*[Attorneys for Defendants and
Petitioners]*