

THE  
NATIONAL LAW REVIEW

---

## To Successfully Oppose Class Certification, You Have To Do The CSI

---

Tuesday, October 23, 2018

Six years after the California Supreme Court's landmark decision in *Brinker v. Superior Court* (2012) 53 Cal. 4th 1004, virtually every California employer understands the rules concerning an employer's obligations regarding meal periods. The court gave California employers a "Big Win," ruling that employers need only provide and not ensure meal periods. Less publicized was that portion of the *Brinker* opinion that ostensibly allows for class certification where the employer's "uniform policies" are facially non-compliant, regardless of whether under the governing legal standard the material issues to be tried are, in fact, subject to individualized differences, making class treatment inappropriate.

Lost in *Brinker's* "uniform policies" analysis is a key question of whether the employer's supposedly uniform policies were in fact *implemented* consistently across the class, such that the plaintiff's theory of liability can be established through common proof. After all, the existence of any common policy is not sufficient to show that common issues predominate. The policy in question must be a means to establish *liability* on a class wide basis.

The recent decision in *Payton v. CSI Electrical Contractors, Inc.*, 2018 Cal. App. LEXIS 879 (Cal. Ct. App., Sept. 28, 2018) is illustrative. California law requires that employers authorize and permit rest breaks of at least 10 minutes for every four hours worked or substantial fraction thereof. Rest breaks should be scheduled in the middle of the work period to the extent practicable, and they may not be combined or added to meal periods to create one longer break time. In *CSI Electrical*, the employer's corporate representative testified at a deposition in response to questions about the company's rest break policies at the job site. The representative testified that class members received one 10-minute rest break per eight-hour day, "tacked on" at the end of their 30-minute meal period. He testified that there would be no separate rest breaks in the afternoon.

Based on this testimony, the plaintiff moved for certification of a rest break class and argued that the evidence showed a "common policy" that violated the law. The employer opposed the motion and submitted declarations from numerous employees testifying that they always received afternoon breaks separate from the lunch break. The declarations included testimony by a union business manager that part of his job was to ensure that employees took their afternoon breaks. The employer also presented a declaration from the corporate representative, who stated that he had only been speaking at his deposition about scheduled site-wide break policies, not whether individuals or individual work crews took *additional* rest breaks that were not scheduled. The court credited these declarations and denied class certification, concluding that, based on the evidence, the question of whether employees were permitted rest breaks was "highly individualized" and "trial would turn into an individual-by-individual exercise."

The decision in *CSI Electrical* underscores the need for employers to conduct a thorough investigation to develop facts in opposing class certification. Even where the plaintiff's theory of liability purports to rest on a "uniform policy," the employer should be sure to gather and present direct evidence showing individualized differences among putative class members; e.g., that its policies vary by location, or vary over time, or between departments, or by jobs, or by shifts, or by days worked during the week, etc. In such a case, the plaintiff likely cannot submit a workable trial plan to show that the class is manageable simply on the basis of the "uniform policies."



Article By [Jackson Lewis P.C.](#)  
[Joel P. Kelly](#) California Workplace Law Blog

[Labor & Employment  
Litigation / Trial Practice  
California](#)

**Source URL:** <https://www.natlawreview.com/article/to-successfully-oppose-class-certification-you-have-to-do-csi>