

# BENDER'S CALIFORNIA LABOR & EMPLOYMENT BULLETIN

Vol. 2021, No. 8 • August 2021  
Deborah J. Tibbetts, Editor-in-Chief



## California Court of Appeal Confirms Importance of Examining Both Plaintiff's Theory of Recovery and the Evidence Necessary to Establish Meal Period Violations at the Class Certification Stage

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In *Salazar v. See's Candy Shops, Inc.*,<sup>1</sup> a California appellate court affirmed the trial court's denial of class certification in a proposed statewide class action alleging that See's Candy Shops failed to provide legally required meal periods. The case has implications for both employees seeking and employers trying to defeat class certification of meal break claims. The decision emphasizes that in determining whether class certification is appropriate, a court must critically examine the evidence to decide whether the plaintiff's theory of recovery would resolve the claims without necessitating individualized inquiries. For employers, the case also makes clear that statistical analyses of employee time records can defeat class certification of meal break claims.

### Salazar v. See's Candy Shops

#### Factual Background

Plaintiff Debbie Salazar alleged, among other things, that See's failed to provide second meal periods to non-exempt employees whose shifts lasted more than 10 hours. See's written policy complied with California law by requiring a second meal period when an employee's

<sup>1</sup> *Salazar v. See's Candy Shops Inc.*, 64 Cal. App. 5th 85, 2021 Cal. App. LEXIS 391 (2021).

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## California Court of Appeal Confirms Importance of Examining Both Plaintiff's Theory of Recovery and the Evidence Necessary to Establish Meal Period Violations at the Class Certification Stage

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work shift exceeded 10 hours.<sup>2</sup> However, Salazar contended that, in practice, See's failed to provide the breaks because the preprinted form it used to schedule employee shifts did not include a space for the second meal period.

See's countered that shifts exceeding 10 hours were "very rare" and not scheduled, pointing to time records reflecting that only "0.3 percent of See's employee shifts during the relevant time period were longer than 10 hours."<sup>3</sup> However, 76 percent of shifts over 10 hours did not include a recorded second meal break.<sup>4</sup>

### The Trial Court's Denial of Salazar's Class Certification Motion

Salazar sought certification of two classes of employees: (i) a "single staffing class"; and (ii) a "meal break class."<sup>5</sup> For certification of the meal break class (the class at issue on appeal), Salazar relied on the Scheduling Form to argue that "scheduling procedures provided common evidence of a practice to deny employees a second meal period during shifts exceeding 10 hours."<sup>6</sup>

In opposition, See's submitted 55 employee declarations (managers and shop employees) to demonstrate that the Scheduling Form was not the exclusive means to provide second meal periods.<sup>7</sup> The declarations provided evidence that See's "also provided employees with training on its policies and required its shop managers to implement those policies."<sup>8</sup>

The trial court denied class certification. First, the trial court found that Salazar "failed to show that she could prove through common evidence that See's had

a consistent practice to deny second meal breaks."<sup>9</sup> Relying on the time records analyses, the trial court inferred that "at least some" employees were offered a break, because a minority of the shifts over 10 hours actually included a recorded second meal break.<sup>10</sup> Thus, the trial court concluded that "individualized testimony" would be needed "to show that the proper breaks were offered (or not) and that the complained of practice was (or was not) consistently applied."<sup>11</sup> Second, the trial court found that Salazar's proposed trial plan was "inadequate" and did not consider how "See's will be able to present its defenses without individual inquiry."<sup>12</sup>

Salazar appealed the denial of certification for the second (i.e., meal break) class.

### The Court of Appeal Affirmed Denial of Class Certification

The court of appeal affirmed. The court's rationale can be distilled into the following findings:

- When deciding whether to certify a class, the court must critically examine the evidence and whether the plaintiff's theory provides common proof of violations across the class. If plaintiff's theory cannot establish a class-wide violation with common evidence, the class should not be certified.
- Employers may rebut the presumption of meal period violations created by time records reflecting short, late, or missed meal periods, by introducing evidence that employees voluntarily chose not to take their meal periods—which may necessitate individualized inquiries that make class certification inappropriate.

<sup>2</sup> 64 Cal. App. 5th at 89-90.

<sup>3</sup> 64 Cal. App. 5th at 90.

<sup>4</sup> 64 Cal. App. 5th at 90.

<sup>5</sup> 64 Cal. App. 5th at 91.

<sup>6</sup> 64 Cal. App. 5th at 91.

<sup>7</sup> 64 Cal. App. 5th at 91.

<sup>8</sup> 64 Cal. App. 5th at 91.

<sup>9</sup> 64 Cal. App. 5th at 91.

<sup>10</sup> 64 Cal. App. 5th at 91 (internal quotation omitted).

<sup>11</sup> 64 Cal. App. 5th at 91.

<sup>12</sup> 64 Cal. App. 5th at 91-92.

- For meal period claims, statistical analyses of time records evidencing that some employees took meal periods and some did not may show individualized issues predominate as to whether there is a *common* practice of denying meal breaks.
- Trial courts can and should consider at the class certification stage whether a plaintiff's trial plan would adequately manage individualized issues.

Salazar made the following arguments, and the court of appeal rejected each in turn:

***The Court Rejected Salazar's Argument That See's Scheduling Form Was Its Only Means to Provide a Second Meal Break***

As common proof of his theory, Salazar relied on time records analyses showing a high percentage of shifts without recorded second meal breaks and argued that See's scheduling form was the *only* means to provide a second meal break. The appellate court looked to the time records analyses and declarations submitted by See's and held that the Scheduling Form itself "was not sufficient" to establish a consistent practice of denying second meal breaks.<sup>13</sup> The court based this holding on the following:

- The time records analyses indicated that "at least some" employees were offered a second meal break.<sup>14</sup> Indeed, "about 43 percent of employees who worked a shift more than 10 hours were able to take a second meal break despite the Scheduling Form."<sup>15</sup>
- See's declarations demonstrated that many employees were provided second meal periods when they worked more than 10 hours but voluntarily chose not to take second meal periods.<sup>16</sup>
- See's Director testified that "employees are usually scheduled to work fewer than 10 hours in a single shift" but are "trained that they are entitled to breaks as provided in See's Breaks and Meal Periods policy based on the total number of hours they work."<sup>17</sup>

<sup>13</sup> 64 Cal. App. 5th at 93-95.

<sup>14</sup> 64 Cal. App. 5th at 94.

<sup>15</sup> 64 Cal. App. 5th at 94, n.2.

<sup>16</sup> 64 Cal. App. 5th at 94-95.

<sup>17</sup> 64 Cal. App. 5th at 96.

The Scheduling Form is thus "irrelevant for shifts of more than 10 hours that had originally been scheduled for less."<sup>18</sup>

Based on this evidence, the court of appeal concluded "the Scheduling Form could not have been See's exclusive means to provide a second meal break to employees who worked shifts over 10 hours."<sup>19</sup> Therefore, individual testimony would be "necessary to distinguish" such situations in which "managers failed to provide a second meal break" and situations where "employees made their own decisions to decline second meal breaks that they otherwise could have taken."<sup>20</sup>

***The Court Rejected Salazar's Argument That Individualized Witness Testimony Would Not Be Necessary to Establish Violations***

Salazar argued that the trial court "made an erroneous legal assumption" in finding that testimony from numerous witnesses would be needed.<sup>21</sup> Salazar asserted that her theory of liability "depended solely on the Scheduling Form and related evidence allegedly showing that the form was See's exclusive means to schedule breaks."<sup>22</sup> The court of appeal held that the trial court properly concluded that Salazar's theory could not be proved through common evidence based on the time record analyses showing how many shifts over 10 hours actually included a second meal break.<sup>23</sup> Thus, the appellate court found that the trial court "properly concluded that the parties must be permitted to introduce individual testimony" regarding why particular second meal periods were missed.<sup>24</sup>

***The Court Rejected Salazar's Argument That Individualized Witness Testimony Was Irrelevant to Class Certification Because It Concerned See's Affirmative Defenses***

Salazar argued that individual testimony was irrelevant to class certification because it concerned See's affirmative defense that employees waived their second meal periods (an issue over which Salazar did not have the burden of proof).<sup>25</sup> In rejecting this argument, the appellate court explained that testimony evidencing

<sup>18</sup> 64 Cal. App. 5th at 96.

<sup>19</sup> 64 Cal. App. 5th at 94.

<sup>20</sup> 64 Cal. App. 5th at 95.

<sup>21</sup> 64 Cal. App. 5th at 96.

<sup>22</sup> 64 Cal. App. 5th at 96.

<sup>23</sup> 64 Cal. App. 5th at 97.

<sup>24</sup> 64 Cal. App. 5th at 97.

<sup>25</sup> 64 Cal. App. 5th at 97.



that employees in fact were offered second meal breaks but declined to take them for personal reasons would “negate liability.”<sup>26</sup> In so holding, the court reiterated the California Supreme Court’s holding in *Brinker*<sup>27</sup>— “the employer is not obligated to police meal breaks and ensure no work thereafter is performed.”<sup>28</sup>

That the testimony concerned an affirmative defense “does not change this analysis.”<sup>29</sup> The court of appeal explained the impact of the rebuttable presumption of violations created by time records under the California Supreme Court’s recent decision in *Donahue v. AMH Services, LLC*,<sup>30</sup> as follows:

Where an employer fails to provide time records showing that a meal break was taken, a presumption can arise that the employee was not offered such a break. In that case, an employer’s claim that a break was in fact offered but the employee declined it is an affirmative defense that an employer must prove.

However, as the trial court correctly recognized, this presumption is rebuttable only by individualized evidence regarding why each meal period was missed.<sup>31</sup>

At the class certification stage, the question before the trial court was “not what the evidence would ultimately show, but whether that evidence was common to the class.”<sup>32</sup> Thus, the court of appeal held the trial court was within its discretion to determine that the individual issues precluded certification because the “Scheduling Form itself could not establish liability on a common basis.”<sup>33</sup>

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<sup>26</sup> 64 Cal. App. 5th at 97.

<sup>27</sup> *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004 (2012).

<sup>28</sup> *Salazar*, 64 Cal. App. 5th at 97 (citing *Brinker*, 53 Cal. 4th at 1040).

<sup>29</sup> 64 Cal. App. 5th at 98.

<sup>30</sup> *Donahue v. AMN Services, LLC*, 11 Cal. 5th 58, 74-76 (2021).

<sup>31</sup> *Salazar*, 64 Cal. App. 5th at 98-99.

<sup>32</sup> 64 Cal. App. 5th at 99.

<sup>33</sup> 64 Cal. App. 5th at 99.

### ***The Court Rejected Salazar’s Argument That It Must Accept Her Theory of Recovery Without Evaluating Whether It Would Actually Prove Violations***

Salazar argued the trial court was “obligated to ignore the individual testimony that See’s offered merely because it was inconsistent with Salazar’s theory,” and “accept that the Scheduling Form provided a method to prove liability through common evidence simply because that was Salazar’s trial theory.”<sup>34</sup> The court of appeal rejected this argument for two reasons.

First, the appellate court explained that Salazar “leaves no room for the trial court to assess the evidence.”<sup>35</sup> Simply because the trial court must consider Salazar’s theory of proof does not mean that a court must accept Salazar’s assertion that its theory of liability can be proved through common evidence.<sup>36</sup> Rather, a trial court “considering class certification must analyze the facts if necessary to determine whether common or individual issues predominate.”<sup>37</sup> The court of appeals explained that a trial court has an obligation to resolve any merits issues that are necessary for certification, which may require sorting through disputed evidence.<sup>38</sup> Indeed, the appellate court held that “a class plaintiff’s theory of common proof ‘must have a foundation in the evidence’”<sup>39</sup> and “must present substantial evidence that proving both the existence of the defendant’s uniform policy or practice and the alleged illegal effects of that policy or practice could be accomplished efficiently and manageably within a class setting.”<sup>40</sup>

Second, the court reasoned that “the class action procedural device may not be used to abridge a party’s substantive rights.”<sup>41</sup> “In deciding whether to certify a class, the trial court could not limit its focus only to Salazar’s proof if doing so meant that See’s would be precluded from presenting evidence supporting a potentially meritorious defense.”<sup>42</sup>

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<sup>34</sup> 64 Cal. App. 5th at 99.

<sup>35</sup> 64 Cal. App. 5th at 99.

<sup>36</sup> 64 Cal. App. 5th at 99-100.

<sup>37</sup> 64 Cal. App. 5th at 100.

<sup>38</sup> 64 Cal. App. 5th at 100.

<sup>39</sup> 64 Cal. App. 5th at 100 (citing *Payton v. CSI Elec. Contractors, Inc.*, 27 Cal. App. 5th 832, 842 (2018)).

<sup>40</sup> 64 Cal. App. 5th at 99-100 (citing *Cruz v. Sun World Int’l, LLC*, 243 Cal. App. 4th 367, 384 (2015)).

<sup>41</sup> 64 Cal. App. 5th at 99-100 (citing *Duran v. U.S. Bank Nat’l Ass’n*, 59 Cal. 4th 1, 34 (2014)).

<sup>42</sup> 64 Cal. App. 5th at 99-100.

***The Court Rejected Salazar’s Argument That Her Trial Plan Adequately Managed Individualized Issues, Including See’s Defenses***

Salazar’s trial plan focused on using dispositive motions as a means to decide liability.<sup>43</sup> Salazar claimed that she could prove See’s liability through See’s own written policies, handbooks, shift scheduling documents and records, as well as deposition and witness testimony. The court of appeal found that Salazar, however, “did not provide a means to prove that See’s consistently *applied* a practice of denying second meal breaks without individualized evidence, other than relying on the referenced ‘shift scheduling documents and records.’”<sup>44</sup> The records alone, the court explained, are insufficient.<sup>45</sup> Finally, the appellate court found that Salazar’s trial plan did not provide a means to litigate See’s defenses “without individual inquiry” and “lacked any specific procedural mechanisms to manage the individual issues.”<sup>46</sup>

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<sup>43</sup> 64 Cal. App. 5th at 101.

<sup>44</sup> 64 Cal. App. 5th at 101.

<sup>45</sup> 64 Cal. App. 5th at 101.

<sup>46</sup> 64 Cal. App. 5th at 101-02.

**Impact of Decision**

The court of appeal’s decision makes clear that a trial court cannot simply accept at the class certification stage that a plaintiff’s theory of recovery would establish liability, and instead must carefully examine the evidence offered by both parties to determine whether class certification is appropriate. It also underscores the importance that statistical analysis can play in defeating class certification in certain cases, especially where the employer has legally compliant policies and employees’ time records suggest no uniform practice.

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