STATE OF CALIFORNIA GRAY DAVIS, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
LEGAL SECTION
455 Golden Gate Avenue, 9th Floor
San Francisco, CA 94102
(415) 703-4863

MILES E. LOCKER, *Chief Counsel*

April 2, 2001

Richard D. Prochazka
Richard D. Prochazka & Associates
PO Box 881566
San Diego, CA 92168-1566

Re: Meal Period and Rest Period Requirements for Ready-Mix Drivers Working Under the Terms of a Collective Bargaining Agreement

Dear Mr. Prochazka:

This in response to your letter of November 22, 2000 to State Labor Commissioner Art Lujan, in which you inquired about the applicability of meal period and rest period requirements that arise under the Labor Code or the appropriate Industrial Welfare Commission ("IWC") order to ready-mix drivers who deliver product from the cement plant to the purchaser's jobsite. Please accept my apology for the delay in providing a response.

You state that these drivers are employed by the businesses that manufacture the ready-mix, and that they are covered by a collective bargaining agreement which is silent as to breaks, but which provides for an uninterrupted 30 minute unpaid lunch period, to commence near the middle of the worker's shift, during which time the employee is relieved from duty. However, the collective bargaining agreement expressly provides that these employees may waive the unpaid meal period by filing a written waiver with the employer, and that this provision has been applied to allow a driver to waive the lunch period in order to complete an eight hour work shift after only eight hours. These drivers are permitted to eat while driving, or while waiting to load or unload.

Finally you note that the industry tradition is that breaks are taken "on the fly," either while the driver is waiting on line to load at the batch plant, or perhaps by quickly stopping to get a cup of coffee en route to the purchaser, or while waiting on line to unload product at the purchaser's jobsite. You state that such breaks often do not exceed five minutes duration, but that a driver may take several such breaks during a workday.

Ready-mix drivers engaged in the delivery of cement from a cement plant to a construction job-site, if employed by the business that manufactures the cement, are covered by IWC Order 1-2001. This wage order governs wages, hours and working conditions of all employees employed by employers in the "manufacturing industry," which is defined to include "any . . . business . . . operated for the purpose of . . . preparing, producing, [or] making . . . goods, articles, or commodities." (IWC Order 1-2001, subd. 2(H).)

The first issue that we address is whether the existence of a collective bargaining agreement covering these drivers exempts them from the wage order's meal period requirements. Initially, we note that meal period requirements are also founded upon statute. (See Labor Code §512, enacted as part of AB 60.) But AB 60 contains an opt-out provision for workers covered by certain collective bargaining agreements, so that section 512 would not apply to any employee covered by a CBA, if the CBA provides premium wage rates for all overtime hours worked and a regular hourly rate of pay for those employees of not less than 30 percent more than the state minimum wage. (Labor Code §514.) But the IWC retained the authority to maintain or establish higher standards than those set by statute, and as such, the IWC could (and did) decide to maintain certain pre-existing requirements, and adopt certain new requirements governing meal periods that, in most wage orders, apply to all workers whether or not they are covered by CBAs[1]. (See Labor Code §§1173, 1198.) Thus, the meal period requirements set forth in IWC Order 1-2001 would apply to the ready-mix drivers in question.

These meal period requirements are found at subdivision 11 of Order 1-2001, and provide, in relevant part, as follows:

(A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than thirty (30) minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and employee.

(B) An employer may not employ an employee for a work period of more than ten (10) hours per day without providing the employee with a second meal period of not less than thirty (30) minutes, except that if the total hours worked is no more than twelve (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

---

[1] IWC Order 16-2001, governing on-site construction, drilling, mining and logging occupations, contains a CBA opt-out which exempts workers covered by a CBA that meets the specifications described at Labor Code §514 from most of the wage order's provisions regarding meal periods. No other wage order contains any sort of CBA opt-out from meal period requirements.

not waived.

(C) Unless the employee is relieved of all duty during a thirty (30) minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.

(D) If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this Order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day that the meal period is not provided.

Thus, as a general rule, an employee working an eight hour day is entitled to an off-duty meal period, which need not be paid, provided the meal period is not less than 30 minutes, and the employee is relieved of all duty during that period, performs no work during that period, and is free to leave the worksite during that period. (See *Bono Enterprises v. Labor Commissioner* (1995) 32 Cal.App.4th 968, *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 582.) If the meal period is less than 30 minutes, or if the employee is not relieved of all duty during the meal period, or if the employee works during the meal period, or if the employee is restricted to the worksite during the meal period, it is treated as an "on-duty meal period," and it is fully compensable as "hours worked".

There are two kinds of on-duty meal periods: those that are permissible under the IWC orders, and those that are not. In order to have a permissible on-duty meal period: 1) the nature of the work must prevent the employee from being relieved of all duty, *and* 2) the employee and employer enter into a written agreement authorizing the on-duty meal period, *and* 3) this written agreement expressly states that the employee can revoke the agreement in writing at any time. An on-duty meal period is not permitted if *any* of these factors are not present. And if the employee is working an on-duty meal period that is not permitted under the IWC order, or if the employee is not getting any meal period at all, then the employee is entitled to one hour of pay at the employee's regular rate of pay, as a penalty for the employer's failure to provide a lawful meal period, for each day that the required meal period is not provided.

An employee's written waiver of the off-duty meal period, by itself, is not sufficient to create a lawful on-duty meal period. Your letter does not indicate that it is the nature of the work that prevents the employee from being relieved of all duty.

Rather, it appears that to a large degree, the waiver is used to allow the employees to end their workday a half hour early by skipping the unpaid, off-duty meal. That being the case, the failure to provide an off-duty meal period constitutes a violation of the order's meal period provisions, thereby entitling these drivers to payment of one additional hour at their regular rate of pay for each day in which they were deprived of the required off-duty meal period[2].

Rest period requirements are found at subdivision 12 of Order 1-2001. Initially, we note that a rest period is considered compensable work time, and an employee must be paid at his or her regular rate for any required rest period. Order 1-2001, subdivision 12 provides:

A) 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 of ten (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 ½) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.

(B) If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this Order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day that the rest period is not provided.

The rest period requirement in Order 1-2001 contains no collective bargaining agreement opt-out. The phrase "ten minutes net rest time" has been previously interpreted to require that as to each required rest period, the employee must be free from work for ten minutes, not including any additional time needed to walk to a place of rest. Also, the Labor Commissioner has followed a long-standing enforcement policy, based on a review of IWC's intent as set out in transcripts leading up to the adoption of the 1980 wage orders (which contained the requirement for rest breaks of "ten minutes net rest time"), that multiple

---

[2] Of course, to the extent that a meal break cannot be provided during a workday because "the nature of the work prevents the employee from being relieved of all duty," *and* the employee has previously signed a voluntary authorization for an on-duty meal period that comports with the requirements of the IWC order, the employer is not liable for the penalty pay. In situations where the product would be damaged or destroyed if the employee takes an off-duty meal period, the existence of a voluntary written authorization would therefore permit an on-duty meal period. For example, the nature of the work would probably prevent an off-duty meal period during a cement pour, if the services of the driver are needed during the pour.

"incremental rest periods" will not be permitted in lieu of a full ten-minute rest period. (see attached opinion letter by former Labor Commissioner Lloyd W. Aubry, Jr., dated January 3, 1986.) Consequently, the practice you describe of multiple breaks in which no one break equals ten minutes would not meet the requirements of the IWC order. Unless the employees were "authorized and permitted" to take the full "ten minutes net" required break(s), these employees would be entitled to one hour pay at the regular rate as a penalty for each day a required rest period is not provided.

There is, to be sure, a significant difference between required meal and rest periods. An employer is liable for the meal period penalty not only if the employer prohibits the employee from taking the required meal break, but also, if the employee (though authorized and permitted to take a meal break) works, with the employer's sufferance or permission, during the period that the employee had been authorized to take his or her meal period. An employer is deemed to have suffered or permitted the employee to work if the employer (or the employer's agent, including managers and supervisors) knew, or reasonably should have known, that the employee was working instead of taking the required meal break. And an employer should always have that knowledge, in view of the employer's record keeping obligations under subdivision 7 of the wage order.

In contrast, as long as an employer authorizes and permits his employees to take their required rest periods (and clearly communicates this authorization and permission), the employer will not be liable for the rest period penalty if the employees fail to take the full amount of authorized time for their rest breaks, provided that the employees did not forego the full rest period as a result of employer coercion or encouragement. An employer is not required to monitor employees to ensure they take the full rest period, and subdivision 7 of the wage order expressly states that rest periods need not be recorded.

Thank you for your interest in California wage and hour law. Feel free to contact us with any further questions.

Sincerely,

Miles E. Locker
Chief Counsel

cc: Art Lujan
Tom Grogan
Roger Miller
Greg Rupp
Nance Steffen
Doug McConkie, IWC
✓ All DLSE Attorneys

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
525 GOLDEN GATE AVENUE
SAN FRANCISCO, CALIFORNIA 94102
(415) 557-3827

GEORGE DEUKMEJIAN, Governor

ADDRESS REPLY TO:
P.O. BOX 603
San Francisco, CA 94101

IN REPLY REFER TO:

January 3, 1986

Fresno, CA 93727

Dear

Thank you for your letter of December 22, 1985, outlining the differences of opinion between yourself and our staff concerning Industrial Welfare Commission Order 8-80, Section 12, Rest Periods.

I have examined the records of the Industrial Welfare Commission and found that the language in Section 12, "at the rate of ten (10) minutes net rest time per four (4) hours" was developed after discussion of a proposal to extend the ten minute rest period to fifteen or twenty minutes. The point of the proposal was to insure that the employee would be free from work for ten minutes and the rest period would not include any time to walk or otherwise travel to a place of rest. Rather than adopt such a provision, the Commission opted for the term "net" to cover all the different situations involved where rest periods are concerned.

As you mentioned in your letter, the Commission also reviewed a proposal to permit incremental rest periods to be used in lieu of a full ten minute period. However, the Commission took the opposite position by finding that there should be a full ten minute rest period, particularly where employment is around noisy machinery, noxious fumes or other intrusions on the ambience, and that "net" referred to no travel time.

Therefore, it is my opinion that employees engaged in the cotton gin industry are entitled to a full ten minute rest period as provided in IWC Order 8-80, Section 12.

I hope this answers your questions; if not, please let me know.

Very truly yours,

Lloyd W. Aubry, Jr.
State Labor Commissioner

LWA:ba