STATE OF CALIFORNIA PETE WILSON, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
LEGAL SECTION
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H. THOMAS CADELL, JR., *Chief Counsel*

1995.06.02

June 2, 1995

Barbara L. Nielsen, Law Clerk
Kauf, McClain & McGuire
88 Kearny Street, 21st Floor
San Francisco, CA 94108

Re: **Rest Periods**

Dear Ms. Nielsen:

This is in response to your letter of June 1, 1995, wherein you ask whether the analysis set forth in my letter of May 28th, is applicable to the section on Rest Periods in all of the Wage Orders. Please be advised that the analysis does cover all of the Wage Orders.

As you know, the Labor Commissioner, Victoria Bradshaw, asked me to respond to your letter of May 9, 1995, regarding rest periods. In that letter, you stated that your firm represents a client who uses a time clock to record the employees' working times. Each employee clocks in at the start of the shift, clocks out at the start of the first rest period, clocks in at the end of the rest period, clocks out at the start of the meal period, clocks in at the end of the meal period, clocks out at the start of the second rest period, clocks in the at the end of that period and clocks out at the end of the shift. The work, you said, is covered under the Agriculture Order (Order 14) and, we assumed, the time clock must be in the field where the workers are employed. In our telephone conversation of May 31st and in your letter of June 1st, you correct this statement and explain that the workers are covered by wage order 8-80. However, this fact does not affect the analysis of the break time requirements of the Wage Orders.

In your letter May 9th letter you stated that the workers are currently represented by a union and the union has taken the position that the 10-minute rest period should begin at the time the worker reaches the "break area." You stated that by your calculations, if the 10-minute rest period were to begin when the workers reached their rest areas, the non-work time would be extended to 12 to 15 minutes. In our telephone conversation you corrected that statement as well and said that you now estimate the time at one minute.

Your letter did not state what constitutes a "rest area" and we assumed that such an area would be adjacent to toilet facilities and drinking water would be accessible. Based on the original information submitted, we noted that the rest areas are obviously one to two and one-half minutes from the workers' work site. Thus, we concluded, if the rest period were strictly limited to the ten-minute period from the time the worker punches the time clock at his or her work site, in order to use the toilet facilities or find fresh water to drink, the worker must walk as much as five minutes of the ten-minute rest period.

Our letter of May 28th noted that this agency had never been called upon to opine on such a policy in the past. We further noted that the use of time clocks is usually limited to office or factory situations where the area available for rest and use of facilities is not at a distance from the time clock.

As our May 28th letter explains, the Labor Commissioner has an established policy which holds that time which is *de minimis* need not be counted toward the employer's obligation to pay and, likewise, *de minimis* time may not be considered for purposes of deduction from an employee's pay. (Cf. Labor Code § 2928) This policy, based on the case of *Lindow v. United States*, 738 F.2d 1057, 1062 (9th Cir.1984) utilizes the following criteria to determine whether time spent is de minimis:(1) the practical administrative difficulty of recording the additional time;(2) the aggregate amount of compensable time; and (3) the regularity of the additional work." *Lindow, supra* at 1063.

The *de minimis* rule was first announced for purposes of the Fair Labor Standards Act in the 1946 Supreme Court case of *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680. There the Court held that "split-second absurdities are not justified by the actualities of working conditions or by the policy of the Act." *Id.*, at 692. The Labor Commissioner agrees with the High Court conclusion that "[W]hen the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded." *Id.*, at 692. However, the *Mt. Clemens Pottery* Court also concluded that "the precise scope of the application can be determined only after the trier of facts makes more definitive findings as to the amount of walking time in issue." Thus, it is clear, the issue is fact-driven and would require an investigation before a definitive opinion could be rendered.

The requirement that every employee have a <u>net</u> 10-minute rest period every four hours or major fraction thereof is a state-mandated minimum labor standard[1]. Any deviation from this

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[1]As a state mandated minimum standard the parties to a collective bargaining agreement may not deviate from that standard absent an exemption from the Labor Commissioner. See IWC Order 14-80, Section 17 (Exemptions).

requirement must be strictly construed. While requiring a worker to walk 30 seconds or so each way to toilet facilities or a suitable rest area during the break period would seem to be *de minimis;* a walk which took half of the 10-minute break period in order to use these facilities would certainly not be considered in the same light. The word "net" as used in the Orders is obviously meant to restrict the employer from practices which would limit the "rest" period and, at the same time, is designed to insure that the employee receives the rest which the Commission has deemed necessary.

I hope this adequately addresses the concern you raised in your letter of June 1st. Thank you for your continued interest in California labor laws.

Yours truly,

H. Thomas Cadell, Jr.

H. THOMAS CADELL, JR.
Chief Counsel

c.c. Victoria Bradshaw
All Assistant Labor Commissioners
All Attorneys