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DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
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November 3, 2000

Bob Roberts, Executive Director
California Ski Industry Association
74 New Montgomery Street, Suite 750
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Re: Ski Industry Employee Compensation Issues

Dear Mr. Roberts:

I have been asked by Labor Commissioner Art Lujan to respond to the questions raised in your letter of September 27, 2000, seeking advice from the Division of Labor Standards Enforcement ("DLSE") on various ski industry employee compensation issues.

First, you ask whether the ski industry can use the services of "volunteers" such as persons "acting in the capacity of safety information specialists" or "ambassadors/hosts" who, you state "assist in the operations of the ski patrol." As you know, Labor Code section 3352 provides that "any person performing voluntary service as a ski patrolman who receives no compensation for those services other than meals or lodging or the use of ski tow or ski lift facilities" is excluded from the definition of "employee" for workers' compensation purposes. National Ski Patrol members may fall within this exclusion; however "safety information specialists" and "ambassadors/hosts" who do not perform services as a "ski patrolman" would not. You also inquire whether "parents assisting in youth racing programs" would be similarly exempt. Labor Code section 3352(j) exempts from the definition of "employee" for workers' compensation purposes:

> "any person, other than a regular employee, performing officiating services relating to amateur sporting events sponsored by any public agency or private nonprofit organization, who receives no remuneration for those services other than a stipend for each day of service no greater than the amount established by the Department of Personnel Administration as a per diem expense for employees or officers of the state."

You do not indicate whether these "youth racing programs" are sponsored by a public agency or private nonprofit organization. If instead these programs are sponsored by private for-profit

businesses, the exemption would not apply.

Of course, the issue of whether a person providing service is a "volunteer" or an "employee"also has wage and hour implications. Each of the Industrial Welfare Commission ("IWC") orders, including Order 10-2000, which governs the ski industry, defines "employ" to mean "to engage, suffer, or permit to work." Nonetheless, DLSE will not treat a bona fide volunteer as an employee for wage and hour purposes. In general, a person "volunteering" his or her services to a for-profit business for the purpose of gaining experience in a particular occupation or for the purpose of deriving some other benefit from the work experience (e.g., the use of the employer's facilities) will be treated as an employee entitled to payment of no less than the minimum wage and applicable overtime for all hours worked. In contrast, a person who provides his or her services to a public agency, religious or humanitarian organization, or similar nonprofit corporation, without any expectation of pay, but rather, for public service, religious, or humanitarian objectives, will be treated as a bona fide volunteer. The nature of the entity to whom the services are provided, and the intent of the parties, is controlling.

Secondly, you ask whether DLSE field enforcement staff will require ski industry employers to provide required equipment, such as skis, bindings, boots and poles, to employees earning less than twice the minimum wage, and if so, whether the employees could be required to return this equipment to the rental shop at the end of the employee's work day. IWC Order 10-2000, section 9(B) provides that "when tools and equipment are required by their employer or are necessary to the performance of the job, such tools and equipment shall be provided and maintained by the employer, except that an employee whose wages are at least two times the minimum wage provided herein may be required to provide and maintain hand tools and equipment customarily required by the trade or craft." The term "hand tools and equipment" refers to small tools and equipment that are carried in a worker's hands while the worker is performing his or her work, such as a screwdriver, pruning sheers, etc. Neither skis, bindings, boots nor poles would fall into that category. Thus, the employer's obligation to provide employees with these items, if such items are required by the employer or necessary to perform the job, would extend to all employees, not just those earning less than twice the minimum wage.[1]

Of course, as you correctly state in your letter, the brand or quality of the equipment provided to the employees can be determined by the employer in its discretion, so long as the equipment is usable for its intended purpose. You also inquired as

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[1] Separate and apart from these IWC provisions, Labor Code §2802 requires every employer to indemnify its employees "for all that the employee necessarily expends or loses in direct consequence of the discharge of his duties." Under this statute, an employee is entitled to reimbursement for amounts spent purchasing equipment that is required in order to perform his or her job.

to whether the equipment that must be provided by the employer will be limited to skis, bindings, boots and poles. That would depend on whether the employer requires the employees to use any other equipment in performing their jobs, If this is the only equipment that is required or necessary for the performance of the job, then no other equipment need be provided. However, we should point out that section 9(A) of the IWC Order provides that "when uniforms are required to be worn by the employee as a condition of employment, such uniforms shall be provided and maintained by their employer. The term 'uniform' includes wearing apparel and accessories of distinctive design or color." Required items of clothing with a distinctive logo which bear the name of the employer would constitute a "uniform" for the purpose of this section, as would almost all required colors or designs.

Thirdly, you ask for DLSE's interpretation of the special provisions for the ski industry that were adopted by the IWC on June 30, 2000 that are now found at section 3(I) of Wage Order 10-2000. Specifically, you ask whether ski industry employers are subject to double time for all hours worked by an employee in excess of 12 hours in one workday. Section 3(I) of the Wage Order provides:

> "No employer who operates a ski establishment shall be in violation of this Order by instituting a regularly scheduled workweek of not more than 48 hours during any month of the year when Alpine or Nordic skiing activities, including snowmaking and grooming activities, are actually being conducted by the ski establishment; provided, however, that any employee shall be compensated at a rate of not less than one and one-half times the employee's regular rate of pay for any hours worked in excess of 10 hours in a day or 48 hours in a workweek."

IWC Order 10-2000 went into effect on October 1, 2000. Prior to that, Labor Code §1182.2 provided ski industry establishments with a workweek of up to 56 hours without payment of overtime during months of Nordic or Alpine ski activities. Any work performed in excess of 56 hours in a workweek required payment of time and a half the employee's regular rate of compensation, with no provision for daily overtime. As a result of AB 60, section 1182.2 was repealed on July 1, 2000, however, the IWC's Interim Wage Order extended this 56 hour workweek until the effective dater of Order 10-2000. Under the new wage order, the 56 hour workweek without overtime has been reduced to 48 hours, and employers must pay daily overtime at the rate of time and a half for all work in excess of 10 hours in a day. Section 3(I) does not provide for double time after 12 hours, and the testimony at the IWC's June 30, 2000 meeting leaves no doubt that the Commissioners understood that under the proposal they adopted by a 3 to 2 vote, there would be no double time for work performed during months of Alpine or Nordic ski activities. (Transcript of 6/30/00 IWC Meeting, p. 55-57.)

Fourthly, you ask whether part-time ski industry employees, whose hours of work do not exceed 10 in a day or 48 in a week, will be entitled to seventh day premium pay when they work seven consecutive days in a workweek. Labor Code §510(a) provides that "the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee . . . [and] any work in excess of eight hours on the seventh day of the workweek shall be compensated at no less than twice the regular rate of pay of an employee." Under Labor Code §515(b)(1), until January 1, 2005, the IWC may establish additional exemptions to hours of work requirements. In adopting Wage Order 10-2000, the IWC did not create any exemption from these seventh day premium pay provisions for ski industry employees. Section 3(I) of the wage order does not provide for any alternative to the statutory requirement for seventh day premium pay. Moreover, a review of the transcript of the IWC proceedings relative to the ski industry at its meeting of June 30, 2000 reveals that the subject of seventh day premium pay was never discussed, and thus, there is no evidence that the IWC had any intent to exempt the ski industry from the seventh day premium requirements set out at Labor Code §510(a). Consequently, part time ski industry employees (like full-time ski industry employees) would be entitled to seventh day premium pay at the rate provided in Labor Code §510(a), regardless of whether such employees work fewer than 48 hours in a week and no more than 10 hours in a day.

Fifthly, you ask whether ski patrol and repair technicians who are required to keep their radios on during lunch and rest breaks (and who, presumably, would be required to respond to any emergency calls during those breaks) qualify for paid "on duty" breaks. Also, you ask whether "snow groomers," who often work at a great distance from resort base facilities, qualify for such "on duty" breaks. In answering this question, it is important to distinguish between rest periods and meal periods. Section 12 of IWC Order 10-2000 requires every employer to "authorize and permit all employees to take rest periods . . . at the rate of ten minutes net rest time per four hours or major fraction thereof. . . . Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages." Meal periods are required pursuant to Labor Code §512 and section 11 of IWC Order 10-2000. The wage order provides:

> "Unless the employee is relieved of all duty during a 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 meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time."

Employees who are required to listen to their radios and promptly respond to emergencies during a meal break are considered to be on duty and any such time is considered hours worked, as during that time the employees are subject to the employer's control. See *Maderea Police Officers Ass'n v. County of Madera* (1984) 36 Cal.3d 403. Moreover, employees who are restricted to their employers' property during meal periods are likewise subject to employer control and are entitled to be paid for all such time. *Bono Enterprises v. Labor Commissioner* (1995) 32 Cal.App.4th 968. Thus, we would conclude, based on the facts you have presented, that ski patrol, repair technicians and "snow groomers" would be entitled to paid meal periods.

Lastly, you asked whether these wage and hour requirements will be applied retroactively. The answer to that depends on which legal requirements are being enforced. Certain provisions discussed above -- including restrictions on the use of unpaid "volunteers," the duty to provide employees with required equipment and uniforms, and the duty to pay employees for an on-duty meal period -- are not new, and have been the law for years, if not decades. Any employee complaints concerning these matters would trigger liability for the full period of time covered by the statute of limitations, which in the case of an obligation founded upon statute would run back three years from the date a claim is filed. See *Cuadra v. Millan* (1998) 17 Cal. 4th 855. Other provisions, such as the requirement to pay overtime for all hours worked in excess of 10 in a day or 48 in a week, did not exist prior to the effective date of IWC Order 10-2000, and thus, liability for such a claim could not extend back prior to October 1, 2000.

Thank you for giving us this opportunity to respond to your questions, and for your interest in complying with California wage and hour law.

Sincerely,

Miles E. Locker
Chief Counsel

cc: Art Lujan, State Labor Commissioner
Tom Grogan, Chief Deputy Labor Commissioner
Greg Rupp, Assistant Labor Commissioner
Roger Miller, Assistant Labor Commissioner
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✓All DLSE Attorneys
Andrew Baron, IWC Executive Officer

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