

DEPARTMENT OF INDUSTRIAL RELATIONS

**DIVISION OF LABOR STANDARDS ENFORCEMENT**

LEGAL SECTION

455 Golden Gate Avenue, 9th Floor  
San Francisco, CA 94102  
(415) 703-4863MILES E. LOCKER, *Attorney for the Labor Commissioner*

October 17, 2003

Michael L. Carver  
Law Offices of Michael L. Carver  
55 Independence Circle, Suite 202  
Chico, CA. 95973

Re: Whether there is a Private Right of Action to Enforce  
Amounts Owed Under the Meal Period Provisions of the  
IWC Orders and Under Labor Code section 226.7

Dear Mr. Carver:

This is in response to your recent letter in which you ask for the Labor Commissioner's views as to whether there is a private right of action under the section in the various Industrial Welfare Commission ("IWC") orders dealing with meal period requirements, and Labor Code section 226.7. For the reasons set out below, it is beyond question that under California law, there is a private right of action for unpaid compensation or other amounts owed by an employer to an employee under any provision of the Industrial Welfare Commission ("IWC") orders or under any section of the Labor Code, including Labor Code §226.7.

Labor Code section 226.7(b) provides: "If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided."

There are two alternative methods by which an employee can proceed in order to enforce his or her right to payment of this extra hour of pay. The employee can either file a claim with the Labor Commissioner under the procedures for administrative hearings set out at Labor Code §98. Under subdivision (a), "the Labor Commissioner may provide for a hearing in any action to recover wages, penalties, and other demands for compensation properly before the division or the Labor Commissioner including

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orders of the Industrial Welfare Commission ...." Alternatively, the employee can file a private civil action under Labor Code §218, which provides that, "[n]othing in this article shall limit the right of any wage claimant to sue directly or through an assignee for any wages or penalty due him under this article."

The article that is referred to in Labor Code §218 runs from sections 200 to 243. Thus, section 218 provides a private right of action for claims founded upon section 226.7. In this same manner, section 218 authorizes a private right of action for any claims founded upon Labor Code sections 201 (duty to pay all earned and unpaid wages immediately upon discharge from employment), 202 (duty to pay all earned and unpaid wages within 72 hours of voluntary quit), 203 (liability for "waiting time penalties" for willful failure to pay all wages owed within time required by sections 201 or 202), and 227.3 (duty to pay all accrued vacation wages upon termination of employment).

That section 218 authorizes private civil actions is made obvious by the attorney's fees provisions set out in section 218.5: "In any action brought for the non-payment of wages . . . the court shall award reasonable attorney's fees and costs to the prevailing party if any party to the action requests attorney's fees and costs upon the initiation of the action. This section shall not apply to an action brought by the Labor Commissioner." Section 218.5 is also expressly made inapplicable "to any action for which attorney's fees are recoverable under Section 1194." Private civil actions for the recovery of unpaid minimum wages or overtime compensation are founded upon the more specific provisions of section 1194.<sup>1</sup>

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<sup>1</sup> Labor Code §1194 provides that "any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit." The minimum wage is established by the IWC and is set out in the various wage orders. (see Labor Code §1197, IWC Order MW-2001, and section 4 of IWC Wage Orders 1-17 [8 Cal. Code of Regulations sections 11010-11170].) Overtime requirements were historically founded solely upon the IWC orders, but in 1999 the Legislature enacted AB 60, which codified the basic overtime requirements. (see Labor Code §§510-511, 515, 1198, and section 3 of IWC wage orders 1-17.) The imposition of attorney's fees in private civil actions for the payment of unpaid minimum wages or overtime is solely governed by Labor Code §1194, so that an employer can

The right to file a private civil action for unpaid wages and penalties was explicitly recognized by the California Supreme Court in *Cuadra v. Millan* (1998) 17 Cal.4th 855, 858:

If an employer fails to pay wages in the amount, time or manner required by contract or by statute, the employee has two principal options., The employee may seek *judicial* relief by filing an ordinary civil action against the employer for breach of contract and/or the wages prescribed by statute. (§§218, 1194.) Or the employee may seek *administrative* relief by filing a wage claim with the commissioner pursuant to a special statutory scheme codified in sections 98 to 98.8.

The right of an employee to proceed in either forum was again explicitly recognized by the Supreme Court in *Post v. Palo/Haklar & Associates* (2000) 23 Cal.4th 942, 946. And this right pertains equally to claims that are founded upon a provision in an IWC order. For example, in *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, the Supreme Court faced the question of whether employees of an agricultural employer who had filed a class action were entitled to payment of compensation for time spent traveling to and from the fields on employer-provided buses, under an IWC wage order that defined "hours worked" as "the time during which the employee is subject to the control of an employer,... includ[ing] all time the employee is suffered or permitted to work, whether or not required to do so." The Court held that because these employees were required to take these buses, and to report to pick-up points at specified time to meet the buses, time spent waiting for and riding inside the buses constituted time during which the employees were subject to employer control, so as to require compensation under the applicable wage order.

Controlling case law teaches us that even in the absence of those statutes that explicitly give employees the right to file a private civil action to recover wages, penalties or other compensation owed by an employer, an employee could always proceed on a breach of contract cause of action. This is true even when the amounts sought are not founded in any express provision of the employment contract, but rather, arise by virtue of statute or regulation requiring payment of such amounts. The violation of the statute, or IWC order, gives the employee a

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never recover attorney's fees in such an action, even if the employer prevails. (*Earley v. Superior Court* (2000) 79 Cal.App.4th 1420.)

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right of action for damages for breach of employment contract, because of the various requirements found in the Labor Code and IWC orders are considered to be part of the employment contract. In the words of the Supreme Court:

The contract of employment must be held to have been made in light of, and to have incorporated the provisions of existing law. [cites omitted.] Hence, upon violation of the section [of the Labor Code], an employee has a right of action for damages for breach of the employment contract.

*Lockheed Aircraft Corporation v. Superior Court* (1946) 28 Cal.2d 481, 486.

A breach of contract action will also lie for violations of IWC orders:

The minimum wages of employees fixed by law are deemed to be a part of the contract of employment. (*Hays v. Bank of America*, 71 Cal.App.2d 301, 304 [162 P.2d 679].) The Industrial Welfare Commission of California is authorized to fix reasonable minimum wages . . . in any occupation, trade or industry.

*Anders v. State Board of Equalization* (1947) 82 Cal.App.2d 88, 94.

We have recently received a number of inquiries as to whether the post-AB 60 IWC wage orders, those adopted on or after June 30, 2000, somehow limit the historic right of employees to maintain private actions to recover amounts owed under the wage orders. To begin with, we cannot fathom how the IWC would even have the authority to do that, as this right is founded upon statute and case law. But there is nothing anywhere in any of the post-AB 60 wage orders that even remotely purports to deny that right, and certainly, there is not one shred of evidence in the transcripts of IWC meetings leading up to the adoption of these wage orders of any such intent.

Section 20 of the post-AB 60 wage orders sets out a new mechanism for the recovery of unpaid wages that are owed as a result of violations of any provisions of the wage order, whereby the employer is subject to a civil penalty in a specified amount for each pay period during which there was an underpayment, plus the amount of the unpaid wages. The provisions of section 20 were previously enacted by the Legislature as part of AB 60 and are codified at Labor Code §558. The IWC simply took these

statutory provisions and inserted them into the various wage orders. Surely, if the Legislature intended, by the enactment of Labor Code §558, to abrogate the right of employees to file private civil actions to recover amounts owed under the IWC orders, the Legislature would have expressly said so. Clearly, they did not, and it is a well established precept of statutory construction that repeals by implication are disfavored. Moreover, to construe Labor Code §558 as somehow repealing or limiting the rights of employees to file civil actions under sections 218 or 1194 would fly in the face of the clearly enunciated remedial purpose underlying the adoption of AB 60.

The court's reasoning in *Crusader Insurance Company v. Scottsdale Insurance Company* (1997) 54 Cal.App.4th 121 is consistent with the conclusions we reach herein. *Crusader* held that the Legislature, in enacting Insurance Code §1763, did not create a new private right to sue, and that a statute does not create a private right of action in the absence of legislative intent to do so.<sup>2</sup> In affirming the trial court's order sustaining a demurrer to a lawsuit filed by an admitted insurer against surplus line brokers and nonadmitted insurers for damages resulting from alleged violations of Insurance Code §1763, the court observed that:

Crusader ... had no relationship or transaction with any defendant out of which any common law duty enforceable by Crusader could arise. Crusader therefore had no common law causes of action to allege, such as ... breach of contract.... Instead, Crusader's suit depends wholly upon the proposition that Insurance Code section 1763 gives Crusader (and hence every other admitted insurer in California) a new private right to sue on the claim that California risks have been placed on a surplus line basis without an adequately diligent search.

*Ibid.* at 124-125.

The differences between enforcement of an employee's right

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<sup>2</sup> Insurance Code §1763 provides that surplus line insurance brokers must conduct a diligent search for an admitted insurer who will accept a risk before placing that risk with a nonadmitted insurer. The statute authorizes the Insurance Commissioner to review the adequacy of the brokers efforts, and to make remedial orders and to take disciplinary action for violations.

to compensation under the provisions of the IWC orders or the Labor Code, and an insurer's right to damages for alleged violations of this section of the Insurance Code are stark, indeed. Unlike the non-relationship between Crusader and the targets of its lawsuit, an employee has "a relationship or transaction with [the employer] out of which any common law duty enforceable by [the employee] could arise." Unlike Crusader, the employee seeking payment of amounts owed under an IWC order or Labor Code section can proceed through "common law causes of action ... such as ... breach of contract." And most importantly, unlike Crusader, reduced to arguing that a private right of action ought to exist even absent legislative intent, an employee has the benefit of legislation -- Labor Code sections 218 and 1194 -- that expressly gives employees the right to maintain private civil actions to recover amounts due under the Labor Code or the IWC orders, whether these amounts are unpaid minimum wages, unpaid overtime, unpaid meal period premium pay, or unpaid final wages of any sort.

We do not take issue with the proposition that "[t]he Legislature can have legitimate reasons for not creating a private right to sue for violation of a regulatory statute." *Crusader Insurance Company, supra*, 54 Cal.App.4th 121, 134. Conversely, we would note that the Legislatures that enacted Labor Code sections 218 and 1194 were motivated by equally legitimate reasons for creating such a private right to sue to recover amounts owed under the Labor Code or the IWC orders. We would imagine the Legislature is well aware that an enforcement agency as small as ours will never have the resources to bring about redress for every California employee who has a claim for unpaid wages or other compensation arising under the Labor Code or IWC wage orders. Try as we might, any meaningful enforcement scheme must include the right of employees to proceed independently of the Labor Commissioner, through the maintenance of private civil actions.

Finally, you asked for clarification of the rate that must be paid to an employee in the event the employee has worked eight hours without a required meal break, and specifically, whether the meal period premium pay must then be paid at the employee's regular rate or overtime rate. Meal period premium pay is specified, at Labor Code §226.7(b) and at section 11(B) of each of the IWC orders, as "one additional hour of compensation at the employee's regular rate of compensation" for each work day that the meal period is not provided in accordance with the requirements of the applicable IWC order. The "regular rate of compensation" is an hourly, non-overtime rate. It does not matter how many hours the employee works in a day-- the amount

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that is due for this additional hour of pay for a violation of the right to a meal period, whether the employee worked more or less than eight hours in the day, is one hour at the employee's regular rate of pay.

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

Sincerely,

Miles E. Locker  
Attorney for the Labor Commissioner

cc: Art Lujan, State Labor Commissioner  
Sam Rodriguez, Deputy Chief Labor Commissioner  
Anne Stevason, Chief Counsel  
Assistant Chief Counsel  
Assistant Labor Commissioners  
Regional Managers  
Bridget Bane, IWC Executive Officer

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