INITIAL STATEMENT OF REASONS

SPECIFIC PURPOSE OF THE REGULATION

The proposed regulation would: (1) establish criteria to determine if an employer has met the requirement of providing a meal period; (2) clarify that employees may chose to begin the initial meal period in a workday by the end of the sixth hour of the workday; (3) provide a definition of the term "work period"; and (4) clarify that the one hour of pay an employer must pay an employee for each workday in which a meal or rest period is not provided in accordance with the applicable Industrial Welfare Commission Order is considered a penalty.

NECESSITY

Assembly Bill (AB) 3018 of the 2003-04 Regular Session of the California Legislature contained a proposal to establish criteria to regulate meal periods through collective bargaining for unionized employers in the transportation industry. In his September 28, 2004, veto message for Assembly Bill 3018, Governor Arnold Schwarzenegger acknowledged that inconsistent interpretation has resulted in confusion as to when and how employers must provide meal and rest periods for their employees. This confusion has resulted in the imposition of penalties on many employers, an increase in the number of lawsuits concerning the issue of meal periods, and the use of strict policies that do not provide employees sufficient flexibility when meals may be scheduled.

In the veto message for AB 3018, the Governor indicated that the issue should be addressed administratively through the implementation of regulations to clarify when an employer has complied with the requirement of providing meal periods. Consequently, he directed the Labor and Workforce Development Agency "to immediately commence rulemaking on the regulations it believes necessary to resolve the confusion in existing law without hindering employees' access to meal and rest periods in any manner."

The California Labor and Workforce Development Agency is an executive branch agency which oversees departments, boards, and panels that serve California businesses and workers, including the Department of Industrial Relations of which the Division of Labor Standards Enforcement (DLSE) is a part. DLSE is charged with interpreting and enforcing California Labor Code provisions and Industrial Welfare Commission orders. To comply with both a recent court decision and the Governor's pre-existing directive to immediately promulgate regulations to clarify the existing law regarding meal and rest periods, DLSE has identified three areas of law that require clarification.

The first area of law concerns the question of whether the one hour of pay an employer must pay an employee for each workday in which a meal or rest period is not provided is considered a wage or penalty.

Labor Code section 512(a) specifies that "An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes…"

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."

The existing language providing for one hour of pay has been the subject of conflicting interpretations as to whether the additional amount is to be considered a wage or penalty under Labor Code section 226.7(b). DLSE itself has issued conflicting administrative opinion letters on this issue: in some opinion letters, this one hour of pay was interpreted to be a wage based on a strict reading of the statute; in another opinion letter, the one hour of pay was referenced as a penalty.

Reliance on DLSE opinion letters on meal periods was cast in doubt by a recent appellate case which held that some of DLSE's administrative opinion letters regarding the classification of meal and rest periods would be invalid as underground regulations if they applied generally. Consequently, DLSE has issued a memo rescinding specific opinion letters after determining these letters failed to pass the test outlined in the appellate decision. In light of both the conflicting interpretations as well as the recent rescission of some DLSE opinion letters, DLSE needs to provide clarification regarding this issue for its staff as well as the public.

The legislative history of Labor Code section 226.7 clearly indicates that the payment was meant to be a penalty. The payment provision of Labor Code section 226.7 was enacted as part of Assembly Bill 2509 of the 1999-2000 Regular Session of the California Legislature. The Assembly Floor Analysis of AB 2509 as amended on August 25, 2000, demonstrates that the Legislature intended to create a penalty. Specifically, in the description of the Senate amendments to AB 2509, section 4 states that the amendments "Delete the provisions related to penalties for an employer who fails to provide a meal or rest period, and instead codify the lower penalty amounts adopted by the Industrial Welfare Commission." In enacting Labor Code section 226.7, the Legislature deleted the provisions specifying a higher penalty amount for meal and rest period violations and utilized a lower amount, which was acknowledged as a penalty in the bill analysis.

In addition, the language of the payment provision ultimately enacted by the Legislature was taken largely from the Industrial Welfare Commission's Wage Orders. As the June 2000, minutes of the Industrial Welfare Commission

demonstrate, the intent of the Commission in enacting that provision was that the one hour of pay be classified as a penalty.

Furthermore, it is not common usage that, in the case of a labor law violation, the remedy is to pay a "wage on a wage". Wages are paid based on work performed. In situations where an employee is entitled to the one hour of additional pay, the employee has already been paid wages for the missed rest period since rest periods are always on paid time; the employee has also already been paid wages for meal periods through which the employee worked. The one hour of pay penalty is more similar to waiting time penalties, which are penalties calculated based on each individual employee's hourly wage, and to other provisions of the labor law where employers are to self-assess additional amounts as a penalty.

In large part, the confusion over the classification of the one hour of pay required by Labor Code section 226.7(b) is driven by DLSE's own opinion letters, which contain conflicting determinations. This confusion has resulted in costly litigation, including class action suits, in the courts over the issue of whether the additional amount is a penalty or wage. For example, pursuant to the provisions of Labor Code section 2699.3 (also known as the Private Attorneys General Act of 2004), approximately one-third of the notices filed since Labor Code section 2699.3 became effective in August 2004, alleged violations of the meal and rest period requirements. This litigation is primarily driven by the incentives for attorneys to focus on the currently conflicting interpretations of the one hour of pay. In order to avoid potential litigation, employers are implementing policies which significantly restrict workers' own flexibility regarding meal and rest periods.

For these reasons, DLSE must clarify that Labor Code section 226.7(b) was intended to be a penalty and to alleviate any further confusion to the public and its staff as well as reduce the time and money spent by employees and employers to litigate the issue. The objective of the regulation is to clarify that DLSE's interpretation for enforcement purposes is that any money paid by an employer to an employee under Labor Code section 226.7(b) or the Industrial Welfare Commission Wage Orders as a result of the employer's failure to provide the employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission is a penalty and not wages.

The second area of law requiring clarification relates to the time parameters in which meal periods can be taken.

Labor Code section 512(a) and the Industrial Welfare Commission (IWC) Orders specify that employers cannot allow employees to work more than five hours without taking a 30-minute meal period.

In prior staff opinion letters, DLSE has interpreted this requirement to require the employer to provide an employee with a 30-minute meal period starting no later

than the fifth hour after the start of the workday. This interpretation of the meal period criteria has resulted in the imposition of penalties on employers even in cases where the employee's meal period was scheduled to begin only five minutes after the fifth hour of the workday. To avoid these penalties, employers are forcing their employees to take meal periods when they do not necessarily desire to do so.

This prior interpretation was based on a narrow and literal application of the language contained in the IWC Orders, without reference to the statutory intent which can be obtained from reading Labor Code section 512(a) in conjunction with Labor Code section 512(b). Labor Code section 512(a) specifies that "An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes…" (Emphasis added). Labor Code section 512(b) specifies: "Notwithstanding subdivision (a), the Industrial Welfare Commission may adopt a working condition order permitting a meal period to commence after six hours of work if the commission determines that the order is consistent with the health and welfare of the affected employees." (Emphasis added).

The Legislature gave the IWC the specific authority to address meal periods which begin after the sixth hour, but not for meal periods which begin prior to the sixth hour. As for the interpretation of meal periods which occur between the beginning and sixth hour of the workday, DLSE has the authority to interpret the statute for enforcement purposes due to the fact that it is the State entity charged with enforcing claims based on both Labor Code provisions and IWC orders.

Labor Code section 512(a) does not specify that the meal period must begin exactly by the fifth hour of the workday. This section, when read in conjunction with Labor Code section 512(b), evidences an intent by the Legislature to create an employee right to a meal period upon working over five hours, but not to forbid the employee a more flexible window of time during which an employee could take a meal period if such meal period commences by the end of the sixth hour of work rather than the fifth hour. Labor Code section 512(a) does, however, give the employee a right to a meal period by the fifth hour, whereas Labor Code section 512(b) allows that employee to take the meal period during the sixth hour.

Furthermore, Labor Code section 512(a) does not define the term "work period." This term is essential in determining when meal periods are required during the workday. Consequently, the proposed regulation will provide a definition of the term "work period."

In summary, DLSE must clarify the parameters in which meal periods are to be taken and to allow increased flexibility for employees in scheduling meal periods according to their individual needs as well as for employers in ensuring the proper scheduling of meal periods.

The third area of law requiring clarification concerns the confusion in determining if an employer has met the requirement of providing a meal period.

Labor Code section 512(a) specifies that employers cannot allow employees to work more than five hours without "providing the employee with a meal period." Existing law does not define the term "providing the employee with a meal period".

Without a clear definition to follow, both employees and employers are confused as to the requirements regarding meal periods. The consequences of this confusion are that employees are forced to take their meal periods during times they are not hungry so that employers can avoid the imposition of penalties and lawsuits. Thus, DLSE must take action to specify criteria to establish if an employer has met the statutory requirement of providing a meal period. These criteria are not intended to diminish in any way an employer's obligation to offer a meal period. Rather, these criteria are intended to provide clarity to both employees and employers on the issue of meal periods.

TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS

DLSE relied upon the following documents in proposing this regulatory action:

(1) Veto message for Assembly Bill 3018; (2) Assembly Floor Analysis of AB 2509 as amended on August 25, 2000; (3) Portion of June 2000, minutes of the Industrial Welfare Commission; (4) DLSE memo rescinding certain opinion letters; and (5) Tidewater Marine Western, Inc. v. Victoria L. Bradshaw (14 Cal. 4th 557).

ALTERNATIVES TO THE REGULATIONS CONSIDERED BY THE AGENCY AND THE AGENCY'S REASONS FOR REJECTING THOSE ALTERNATIVES

No other alternatives were presented to or considered by DLSE.

ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS

DLSE has not identified any alternatives that would lessen any adverse impact on small businesses.

EVIDENCE SUPPORTING FINDING OF NO SIGNIFICANT ADVERSE ECONOMIC IMPACT ON ANY BUSINESS

The proposed regulatory action does not impose any additional expenses on businesses. Therefore, the proposed regulatory action would not have a significant adverse economic impact on any business.