STATE OF CALIFORNIA
PETE WILSON, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
LEGAL SECTION
45 Fremont Street, Suite 3220
San Francisco, CA 94105
(415) 975-2060

MILES E. LOCKER, *Chief Counsel*

December 28, 1998

Laura G. Drenning
Gutierrez & Associates
930 Montgomery Street, Penthouse
San Francisco, CA 94133

Re: **Compensability of Resident Apartment Managers' "On-Call Time"**

Dear Ms. Drenning:

This is in response to your letter, dated September 2, 1998, to Labor Commissioner Jose Millan, in which you requested an opinion letter[1] from the Division of Labor Standards Enforcement as to whether apartment managers who reside on the premises should be compensated for time during which they are "on-call."

Unfortunately, you failed to state in your letter whether these apartment managers are required by their employer to reside on the employment premises. This is a critically important question, as Industrial Welfare Commission ("IWC") Wage Order 5, which governs employers that own or manage apartment buildings, provides a special definition of "hours worked" for "employees required to reside on the employment premises." Under this IWC Order, "hours worked" is initially defined in the same manner as in every other Wage Order, namely, as all "time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so," but then provides "*and in the case of an employee required to reside on the employment premises, that time spent carrying out assigned duties shall be counted as hours worked.*" (emphasis added.)

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[1] The Division is authorized by statute to issue opinion letters as a means of providing guidance to the public on issues related to the interpretation or enforcement of Industrial Welfare Commission wage orders. (Labor Code §1198.4; *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571 ["agencies may provide parties with advice letters which are not subject to the rulemaking provisions of the APA."]; *Yamaha Corp. v. State Board of Equalization* (1998) 19 Cal.4th 1 [discussing the degree of deference to be accorded by courts to agency opinion letters interpreting statutes or regulations].)

In Brewer v. Patel (1993) 20 Cal.App.4th 1017, the court of appeal held that a motel manager who was required to reside on the motel premises was not entitled to compensation for time during which he was "not working", despite the fact that this employee was required to remain on the premises twenty four hours a day. Time during which this motel manager could relax in his apartment, watch television, or attend to his own personal needs (albeit while confined to the premises) was therefore found to be non-compensable. This unusually restricted interpretation of the term "hours worked" is, of course, unique to employees covered by Wage Order 5 (as no other Order contains similar language) and who are required by their employers to reside on the employment premises.[2] An apartment manager who is not required to reside on the employment premises is not subject to this special definition, even if he or she does, in fact, reside on those premises as a matter of the employee's own free choice.

With this framework in mind, we turn to the facts presented in your letter. You indicate that your client employs five types of apartment managers: 1) "weekday managers" who work from 8 AM to 5 PM from Monday to Friday and are not "on-call"; 2) "weekday managers" who have no assigned shifts and who are "on-call" from Monday through Friday; 3) "weekday managers" who have no assigned shifts and who are "on-call" seven days a week; 4) "night managers" who have no assigned shifts but who are "on-call" from 5 PM to 8 AM seven days a week; and 5) "weekend managers" who have no assigned shifts but who are "on-call" on weekends. You

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[2] The *Brewer* Court, while focusing on the IWC's special definition of "hours worked" for employees required *to reside* on the employment premises, ignored the distinction between an employee who, though required to reside on the premises is nonetheless free to leave the premises (and therefore engage in a full panoply of personal activities, e.g., shopping, attending a movie, etc.) and an employee who is not only required to reside on the premises, but is also required to remain on the premises for the employer's benefit in order to respond to various exigencies (such as answering the telephone, checking guests into or out of the motel, etc.). Indeed, the express language of the Wage Order appears to include, as "hours worked," any time during which the motel manager's assigned duties prohibit him or her from leaving the employment premises. It is difficult, if not impossible, to reconcile *Brewer* with the express language of the Wage Order. Moreover, *Brewer* is at odds with well established federal caselaw that an employee who is required to remain at the employer's place of business and respond to emergency calls is working and must be paid for all hours, even if the employee is doing nothing more than standing by waiting for something to happen. *Armour & Co. v. Wantock (1944) 323 U.S. 126* [an employee may be "engaged to wait."]. For these reasons, we caution against excessive reliance on *Brewer*, and note that a resident motel or apartment manager's wage claim under the FLSA may subject an employer to greater liability than such claim under *Brewer's* reading of state law.

state that the only time the managers are required to be on the apartment premises is during assigned shifts (which only appear to be scheduled on weekdays from 8 AM to 5 PM), and that during these assigned shifts the "weekday manager" may not engage in personal activities. You also state that managers without assigned shifts, even while "on-call," are free to engage in personal activities and may leave the premises, and that on average, each "on-call" manager receives only one call per week.

There seems to be some ambiguity as to what is expected of a manager while "on-call." You state that while "on-call," the managers must carry beepers and that they "are required to respond to all beeper calls" by reporting to the premises within twenty minutes from the time the beeper call is received. However, you state that "no discipline is imposed on a manager for failure to respond to a beeper call," and that if an apartment manager fails to respond to a beeper call when he or she is "on-call," the call is routed to the Property Supervisor, who presumably assumes responsibility for responding to the call.

Under Brewer, apartment managers who are required to reside on the employment premises need not be compensated for time during which they are free to engage in personal activities, regardless of any geographic restrictions imposed by the employer on such activities. Applying the analysis of the Brewer Court, the "weekday managers" must be paid for all hours within their assigned shifts, as you state they are not free to engage in any personal activities during those shifts. The nine hour a day, five day a week shift that you describe would entitle these managers to five hours per week of overtime compensation. Every other apartment manager you describe does not work any assigned shift, and is always free to engage in personal activities. These "on-call" managers would only be considered to be working while actually responding to a call, or otherwise performing an assigned duty involving some physical or mental activity.

Brewer would not apply to any apartment managers who are not *required* to reside on the employment premises. Determining whether "on-call" time is compensable, once Brewer is removed from the picture, is complex and highly fact-driven. The issue of compensability of "on-call" time has been extensively considered in an opinion letter issued on March 31, 1993 by former Chief Counsel H. Thomas Cadell, Jr. For your guidance, a copy of that letter is attached hereto. Please note that Berry v. County of Sonoma, cited in that letter as a district court case, was ultimately reversed by the Ninth Circuit at 30 F.3d 1174 (1994). Although the Ninth Circuit disagreed with the

district court's decision that county coroners were entitled to compensation for their "on-call" time, the appellate court applied the very same factors in making this determination as did the district court. That both courts, in weighing these factors, reached different conclusions highlights the fact that this is not a bright-line test, but rather a multi-factor balancing test under which no single factor is dispositive.

This multi-factor test focuses on "whether [an employee] is so restricted during on-call hours as to be effectively engaged to wait." Berry v. County of Sonoma, supra, 30 F.3d at 1182. Of course, the simple requirement that the employee wear a beeper and respond to calls, without more, is not so inherently intrusive as to require a finding that the employee is subject to the employer's control so as to require the employee be paid for all hours the beeper is worn. "The requisite degree to which an employee must be free to engage in personal activities does not require that the employee have substantially the same flexibility or freedom as he would if not on call." Ibid. On the other hand, restrictions on the employee's personal activities may be so significant as to require compensation for all on-call hours. The following factors, identified by the Ninth Circuit, are used by the Division for determining the compensability of on-call time:

1. Whether there are excessive geographic restrictions on the employee's movements,
2. Whether the frequency of calls is unduly restrictive,
3. Whether a fixed time limit for response is unduly restrictive,
4. Whether the on-call employee can easily trade his or her on-call responsibilities with another employee, and
5. Whether and to what extent the employee engages in personal activities during on-call periods[3].

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[3] Federal courts will also consider the existence and provisions of any agreement between the parties governing the compensability of on-call work. Consideration of this factor is somewhat surprising, in view of the U.S. Supreme Court's holding that the Fair Labor Standards Act embodies "a policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act. Any custom or contract falling short of that basic policy, like an agreement to pay less than minimum wage requirements, cannot be utilized to deprive employees of their statutory rights." *Barrentine v. Arkansas-Best Freight System, Inc.* (1981) 101 S.Ct. 1437, 1445. Moreover, this factor does not really address the extent of the employer's control over the employee and as such, is not relevant to a determination of compensability under California law. Under the IWC's definition of "hours worked," it is only necessary that an employee be "subject to the control of an employer" to be entitled to

Under California law, these factors must be considered in order to answer the ultimate question - - namely, whether the control that the employer exercises over the employee's on-call time is of the requisite extent so as to constitute "hours worked" within the meaning of the IWC Order. Applying this test to the on-call weekday, weekend, and night managers described in your letter (and again, assuming that they are not required to reside on the employment premises), we note:

1. You do not indicate that these employees are subject to any geographic restrictions. By wearing beepers, they are not confined to a home or office location. However, a twenty minute required response time obviously would tend to limit the employee's movements to locations within twenty minutes of the apartment.

2. The frequency of calls -- an average of one a week per manager -- is not unduly excessive. This low frequency would tend to allow employees to engage in personal activities, such as eating dinner in a restaurant or attending a movie, without undue concern that the activity will be interrupted by a call. However, to the extent that there is no way of anticipating exactly when a call will be made, the employee must be prepared to respond to a call throughout the on-call period.

3. The twenty minute time limit for a response is quite restrictive, as it would tend to limit the employee to a fairly circumscribed geographic area, thereby precluding the employee from engaging in personal activities outside that geographic area. This is a critical factor in determining compensability. However, there is a world of difference between a required response time, and an optional response. A totally optional response would be considered "uncontrolled stand-by time" as the employee enjoys complete freedom in deciding whether or not to respond to a call, and thus, complete freedom to engage in personal activities. But a required response time implies that an employee who fails to respond timely may face discipline. However, you state that "no discipline is imposed on a manager for failure to respond to a beeper call." You do not state whether the employer has clearly advised the managers that no one will be disciplined for failure to timely respond to calls, or whether the employer, while not having imposed discipline,

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compensation. Consequently, this factor is not considered by the Division in determining the compensability of on-call time under state law.

retains the right to do so. It is certainly conceivable that the on-call managers, having been told that a twenty minute response is required, assume that this requirement may be enforced by discipline, and hence, invariably respond as required, thereby obviating the need for the imposition of discipline. Under such circumstances, the fact that the employer has not needed to impose discipline to enforce its required response time would not convert the on-call time to uncontrolled stand-by time. On the other hand, by adopting a policy and unequivocally advising the on-call employees that discipline will never be imposed for failing to respond to a call, the employer can establish the on-call time as uncontrolled stand-by time.

4. You do not indicate whether the on-call employee can readily trade his or her on-call duties with another employee. By allowing such employees to trade duties in advance of a scheduled on-call period, the on-call employee can freely engage in unrestricted personal activities without the fear of having to respond to a call. The fact that the Property Supervisor is called if an on-call manager fails to respond to a beeper call falls short of a system whereby the on-call managers can trade on-call duties with another employee before receiving a call.

5. It is somewhat unclear whether, and to what extent, employees engage in personal activities during their on-call periods. This is something that is not discussed in your letter, although we may infer that the on-call managers do, in fact, engage in those personal activities consistent with the inherent restrictions that are imposed by a required twenty minute response time.

As you can see, the absence of certain facts, and particularly, the ambiguity as to whether the twenty minute response time is truly required (or is understood by the managers to be required), precludes us from providing you with a yes or no answer to the question of whether your client's apartment managers must be compensated for their on-call time. Assuming these managers are not required to reside on the employment premises, the ultimate answer to this question lies in the application of the test outlined above.

Turning to the one remaining issue presented in your letter, you are correct when you state that interruptions to sleep (or for that matter, any other personal activity) caused by a call to duty must be counted as hours worked. However, the requirement that the entire sleeping period be counted as hours worked if the employee does not get at least five hours of uninterrupted sleep

does not apply to resident apartment managers. Rather, this requirement is intended to benefit certain types of employees who, while not residing on the employment premises, are required to work shifts of 24 hours or more, during which time they are provided sleeping facilities. Such employees covered by IWC Order 5 include ambulance drivers and attendants. See Monzon v. Schaefer Ambulance Service (1990) 224 Cal.App.3d 16. Please note that non-resident employees who are required to be on-duty for work shifts of less than 24 hours must be paid for all shift hours, even if the employee is permitted to sleep or engage in other personal activities when not busy.

Thank you for your interest in California wage and hour law. We hope this letter will help you in assisting your client. Please feel free to contact this office with any other questions.

Sincerely,

Miles E. Locker
Chief Counsel

cc: Jose Millan
Tom Grogan
Greg Rupp
Nance Steffen
Connie Martens, IWC

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