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DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
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H. THOMAS CADELL, *Of Counsel*

June 14, 2002

Jeffrey A. Berman
Sidney Austin Brown & Wood, LLP
555 West Fifth Street
Los Angeles, CA 90013

Re: **Meal Period Requirements**

Dear Mr. Berman:

Anne Stevason, Acting Chief Counsel of the Division, has asked me to respond on behalf of the Division of Labor Standards Enforcement to your letter of March 7, 2002, regarding the above-referenced issue.

In your letter, you cite the provisions of Section 11 of Wage Order 5-2001 as follows:

> "No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day''s work the meal period may be waived by mutual consent of the employer and employee."

You then indicate that it is your conclusion that the "five-hour work period provision of Section 11 requires than an employer provide employees with one 30-minute meal period during each five-hour block of time worked." This, you state, is the "block of time approach" You then postulate that under this approach "an employee is entitled to one 30-minute meal period for the first five-hour work period of the day, and another 30-minute meal period if the employee works a second five-hour work period in that workday."

According to the "block of time" approach you advocate, "an employee who works an eight-hour shift could take a 30-minute meal period at any time during the first five hours." Thus, you ask us to assume, "a meal period is taken two and one-half hours after the employee begins work. Even though the employee would work for five and one-half hours after returning from the meal period, the employee would have taken one 30-minute meal period for the first five-hour block of time. Because only three hours of work remained after the five hour work period, the employee would not be entitled to a second meal period."

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As you point out in the next paragraph, if your "block of time approach" were not the correct interpretation of the rule, "this would mean that a new five-hour work period would begin immediately after an employee takes a meal period, no matter when the meal period was taken. Thus, an employee who works an eight-hour shift and who takes a meal period, two and one-half hours after the workday begins would be required to take a second meal period, as five and one-half hours would remain in the workday after the meal period was taken."

It is your position that "[t]he possibility of shifts that are sufficiently long to require two meal periods underscores the validity of the block of time approach." You then point out that "employees in the health care industry who work shifts in excess of eight (8) total hours in a workday may voluntarily waive their right to one of their two meal periods"[1]. You contend that this provision would prove impossible to interpret if the employee chose to waive the first meal period because it would not be possible to determine when the second meal period must be taken[2]. You then go on to list a number of situations wherein you feel confusion would result unless DLSE were to adopt your "block of time approach".

DLSE Position

As you know, the DLSE is the agency mandated by law to enforce the provisions of the IWC Orders. The Division must interpret the laws in order to enforce them. Interpretation requires, primarily, that the agency look to the clear language of the regulation or the code section it is enforcing for guidance.

In this particular case, the language of IWC Order, Section 11(A), and the statute upon which the language is based (Labor Code § 512) is clear and unambiguous:

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[1]You state in a footnote that this differs from the previous Wage Orders issued in 1998 in that, you contend, the previous Orders only allowed the employee to waive the second meal period. The 1998 version of the Orders provided that "employees who work shifts in excess of eight (8) total hours in a workday may voluntarily waive their right to a meal period." The Orders did not limit the waiver to the second meal period. However, IWC staff informed DLSE that while the language used by the Commission was "confusing", the actual intent was to limit the waiver to the second meal period and that was the enforcement position the DLSE adopted.

[2]However, in the next paragraph you state the obvious: "where an employee who works a 12-hour shift waives the first meal period, the employee must begin the second meal period between the seventh and tenth hours." That result is, of course, correct because the employee, by waiving the first meal period allows the employer to escape the obligation imposed by the Orders and the statute (Labor Code § 512) that forbids an employer from employing 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..."

"No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes...[3]"

Note that the language does not say: "An employee is entitled to a meal break during each five-hour work period during the work day." The IWC Order and the statute both state unequivocally that "[N]o employer shall employ any person for a work period of more than five hours..." The language (1) puts the burden on the employer by placing a prohibition on him or her from employing any employee in contravention of that provision[4], and (2) makes it clear beyond any question that each five-hour "work period" stands alone. There is nothing in the language or the accompanying Statement As To The Basis which would indicate that the term "a work period of more than five hours" means anything other than what it says: a period of five hours in length during which the employee is working.

Consequently, as you suggest, if an employee is assigned a meal period in the first two and one-half hours of the eight-hour workday, the employer would be prohibited from employing that employee past seven hour and thirty-first minute of the workday.

The plain language of the Order and the statute would also prohibit an employer employing a worker eight hours a day in a restaurant from requiring the employee to take a meal period within the first hour of the work day so as to accommodate the employer's work schedule. We note that if we were to adopt your "block of time approach" such a meal schedule would be permitted.

Your letter cites a number of examples of situations where an employee is working a 12-hour shift (7 a.m. to 7:30 p.m.) and has decided to waive either the first meal period or the second. You state that absent the use of your "block of time approach" it is not only "difficult for employers to schedule meal periods, it also

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[3]Labor Code § 512 is, perhaps, even more unambiguous (if that is possible) inasmuch as the Labor Code prohibits the employer from employing an employee "for a work period of more than five hours per day without a meal period..." The additional language which indicates that each work period within a day is subject to this restriction was not incorporated into the Orders for unknown reasons. However, of course, the IWC Order cannot be less restrictive than the Labor Code upon which it is grounded and, consequently, the language must be read into the provisions of Section 11 of the Orders.

[4]We note that in your letter you continually allude to situations where "an employee takes a meal period..." and leave the distinct impression that it is the employee who generally decides when to take a meal period. Experience has taught that it is the employer who assigns the meal period and the employee who accepts the assignment. We note, also, that it would be an unusual employee who would wish to take a meal period two and one-half hours after coming to work as the example you use indicates.

restricts the timing of meal periods in a manner that is potentially harmful to employees." You don't describe the difficulty the employer faces so we cannot address that concern. The employee in your example, who may not take a meal break in the middle of the 12-hour work period because that would require him or her to work more than a five-hour work period without a meal period has chosen that result. He or she is given the right, if they so decide, to waive one of the meal periods. The employee is not forced to do so and may opt to revoke that waiver in writing at any time. It is the employer's obligation which the IWC Orders and the statute address (i.e., "[N]o employer shall"); not the right of the employee to, in effect, waive that obligation for whatever reason the employee may have and have the convenience of having the meal period in the middle of the 12-hour shift.

The Legislature and the IWC obviously concluded that limited inconvenience faced by an employee who chooses to waive one of the meal periods should not have the effect of allowing employers to force employees to work more than five hours without a meal period.

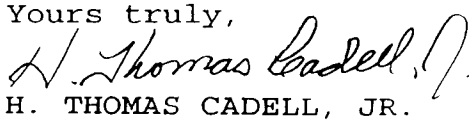
Again, on page 4 of the letter, you quote the statute and conclude that Section 512 "requires that an employer provide an employee with one 30-minute meal period during each five-hour work period. It does not require that a new five-hour period begin immediately following the first meal period." As we have discussed, above, your conclusion is inconsistent with the clear language of the statute. The statute does not speak of five-hour periods in the abstract, it states that the employer may not employ an employee for a <u>work period</u> of more than five hours.

The interpretation this agency has adopted is the only logical interpretation of the language and, not surprisingly, this is the reason that it is the long-standing enforcement policy of DLSE.

The DLSE is confused by your quote from the 1998 Policies and Procedures Manual (Section 48.1.3) which, you state "clearly follows the five-hour block of time approach". We can only suggest that you reread the provision you cite. The manual addresses only the fact that an employee may waive the second meal period.

We hope this adequately addresses the issues you raised. Thank you for your continued interest in California labor laws.

Yours truly,



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