STATE OF CALIFORNIA

GRAY DAVIS, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
LEGAL SECTION
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MILES E. LOCKER, *Attorney for the Labor Commissioner*

November 3, 2003

Noel Anenberg
NASA Oil Corporation
4163 Green Meadow Court
Encino, CA 91316

ALSO FAXED TO: 818/474-8512

Re: Meal and Rest Period Requirements for Employees Working Alone With No Other Employees at the Work Site

Dear Mr. Anenberg:

I have been asked by Director Chuck Cake to respond to your e-mail of October 16, 2003, in which you inquired whether an employee who works alone at a gasoline station, with no other employees present at the work site, is covered by California meal and rest period requirements, or whether there is an available exemption from such requirements that would apply to single employee work-sites.

Rest period requirements are set out in the various wage orders of the Industrial Welfare Commission ("IWC"). For the most part, these requirements are the same in every wage order. Gasoline stations are covered by IWC Order 7-2001, which governs employers in the mercantile industry. Section 12 of Order 7 provides:

> (A) Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten minutes net rest time per four hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.

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> (B) If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this order, the employer shall pay the employee one hour of pay at the employee's regular rate of compensation for each workday the rest period is not provided.

There is no exception from these rest period requirements for small employers, or for employees who work alone without other employees at a work site. However, there is a provision in the wage order, at section 17, that allows for an exemption from the rest period requirements. Section 17 provides:

> If, in the opinion of the Division [of Labor Standards Enforcement] after due investigation, it is found that enforcement of any provision contained in . . . Section 12, Rest Periods . . . would not materially affect the welfare or comfort of employees and would work an undue hardship on the employer, exemption may be made at the discretion of the Division. Such exemptions shall be in writing to be effective and may be revoked after reasonable notice is given in writing. Application for exemption shall be made by the employer or by the employee and /or the employee's representative to the Division in writing. A copy of the application shall be posted at the place of employment at the time the application is filed with the Division.

The plain language of Section 17 leaves no doubt that there can be no exemption from rest period requirements without first applying to the Division of Labor Standards Enforcement ("DLSE") for an exemption, and that no exemption can be issued by the DLSE without an investigation. The DLSE investigation consists of sending a deputy labor commissioner to the worksite to conduct interviews of affected employees, and an exemption will not issue unless the investigation establishes that such exemption would not materially affect the health and comfort of the employees. Of course, any such exemption would only be prospective from the date it is issued. An application for an exemption from rest period requirements should be sent to the attention of the State Labor Commissioner, or Deputy Chief Labor Commissioner, at the address shown on our letterhead.

Unlike the situation with rest periods, there is no

provision under the law that would allow the Labor Commissioner, or any other state officer, to exempt an employer from meal period requirements. The section of the IWC order that allows for such exemptions from rest period requirements, Section 20, fails to include the section mandating meal periods within the list of sections as to which exemptions are available. IWC wage orders in effect prior to 2000 contained a provision authorizing the Labor Commissioner to grant exemptions from meal period requirements, but with the adoption of the 2000 and post-2000 wage orders, the IWC withdrew this authorization.

Meal period requirements are set out at section 11 of the various IWC orders. Section 11 of Order 9-2001 provides, in relevant part:

> (A) No employer shall employ a person for a work period of more than five hours without a meal period of not less than 30 minutes, except when a work period of not more than six hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee. 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 paid meal period is agreed to.** The written agreement shall state that the employee may, in writing, revoke the agreement at any time.
>
> (B) If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this order, the employer shall pay the employee one hour of pay at the employee's regular rate of compensation for each workday the meal period is not provided.

Thus, as a general rule, the required meal period must be an off-duty meal period of no less than 30 minutes in duration, during which time the employee is relieved of all duty; that is, the employee is neither required to work, nor is suffered or permitted to work. Moreover, except for employees in the health care industry covered by IWC Orders 4 or 5, the employee must be free of employer control so as to have the right to leave the

employment premises during an off-duty meal period. (*Bono Enterprises v. Bradshaw* (1995) 32 Cal.App.4th 968, reversed on other grounds in *Tidewater Marine Western v. Bradshaw* (1996) 14 Cal.4th 557, approved for the proposition cited above in *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575.)

An employer need not pay an employee for an off-duty meal period. An employer must pay an employee at his or her regular rate of pay for an on-duty meal period, as the entire on-duty meal period constitutes "hours worked". Finally, if the employer fails to provide an employee entitled to a meal period under the wage order with (1) a timely off-duty meal period of not less than 30 minutes duration, or (2) an on-duty meal that meets the requirements for a lawful on-duty meal period, the employer must pay the employee an additional one hour of pay at the employee's regular rate of pay for each day in which the employee was not provided with this lawful, required meal period.

In a normal eight hour shift, the off-duty meal period is timely if it is provided to the employee not more than five hours after the start of the workday, and not more than five hours before the end of the workday (i.e, no sooner than 3 hours and no later than 5 hours after the start of the workday). An on-duty meal period is not permitted under the wage orders unless **each of the following three factors are present:** (1) the "nature of the work" prevents the employee from being relieved of all duty during the meal period, and (2) the employee and employer entered into a signed written agreement authorizing the on-duty meal period prior to the dates in question, and (3) this written agreement explicitly states that the employee may revoke the agreement in writing at any time. In order to understand what factors the Labor Commissioner will consider in deciding whether the first of these three factors is present, please refer to the attached opinion letter of September 4, 2002. Applying the test set out in that letter to an isolated retail industry worksite in which only a single employee is present, we would conclude that this first factor is satisfied. However, that is not enough to establish a lawful on-duty meal period, absent the second and third required factors. Also, please note that the first factor will generally not be met if there is another employee employed at the worksite, as this second employee should then be able to relieve the first employee during a meal break, even if this second employee is primarily assigned to some other task.

In your e-mail, you state that the employees in question

"work alone in an environment where business is sporadic." You contend that "over the course of an eight hour shift there are myriad and sometimes lengthy opportunities to eat, smoke and to rest." Though that may be, an employee in a gasoline station (like an employee in any retail store) is considered to be on-duty if the employee is expected to wait for customers to arrive, and to ring up a sale or otherwise provide service to a customer upon the customer's arrival. Such time constitutes "hours worked" and is compensable. For the past sixty years, courts have interpreted the Fair Labor Standards Act (and similar California wage and hour laws) to require payment of time during which an employee is required to remain on the employer's premises to respond to unscheduled contingencies. As the United States Supreme Court explained in *Armour & Co. V. Wantock* (1944) 323 U.S. 126, 133:

> Of course, an employer, if he chooses, may hire a man to do nothing or to do nothing but wait for something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employment in a stand-by capacity.... Readiness to serve may be hired, quite as much as service itself.

In short, a retail clerk who is engaged to wait for customers is not off-duty while he or she is so engaged. This means that no matter how long the wait may be between customers, these employees are nonetheless entitled to meal and rest periods in accordance with the provisions of IWC Order 7-2001.

Finally, in your e-mail you state that "eating and rest breaks . . . were enumerated in our Employee Handbook, but for lack of affordable supervision, were never monitored." Employers have somewhat different obligations with respect to meal and rest periods. As to meal periods, employers have an obligation to self-police, and to ensure that employees are in fact taking required meal periods. The wage orders provide: "No employer shall employ a person" without providing the required meal period. And self-policing, even in a single employee worksite, should present no practical difficulty in that the wage orders also provide, at section 7(A)(3), that every employer maintain accurate records showing when each employee begins and ends each work period, and that "meal periods . . . shall also be reported." To be sure, the provision goes on to state that "meal periods during which operations cease . . . need not be

recorded," but it would certainly behoove any employer of an employee working at a location without supervision to record meal periods to enable the employer to review these records to ensure compliance.

As to rest periods, the employer's obligation does not extend to self-policing to ensure that employees are in fact taking their required rest breaks. The wage orders provide only that "every employer shall authorize and permit all employees to take rest periods...." "Authorize" means that employers have some affirmative obligation to advise employees of the right to take rest periods in accordance with the provisions of the wage order; and "permit" means that employers must allow employees to take the rest periods to which they are entitled, and cannot deny permission to an employee or make it impossible for an employee to exercise this right. But if an employee, after having been "authorize[d] and permit[ted]" to take the rest period that he or she is entitled to under the applicable wage order, nonetheless chooses not to take any rest period, the employer has not violated the provisions of the wage order.

We understand your concerns about the impact these laws and regulations may have on the cost of doing business. But in our role as a law enforcement agency, we must enforce the laws that have been enacted by the Legislature, and the regulations that have been adopted by the Industrial Welfare Commission, as they are written, and as interpreted by controlling judicial decisions. We hope this explanation of meal and rest period requirements will help you better understand the legal framework within which we must decide those cases that come before us.

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: Chuck Cake, Director
Art Lujan, State Labor Commissioner
Sam Rodriguez, Deputy Chief Labor Commissioner
Anne Stevason, Chief Counsel

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