STATE OF CALIFORNIA

PETE WILSON, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
Division of Labor Standards Enforcement
Section
5 Golden Gate Avenue, Room 3166
San Francisco, CA 94102

October 31, 1991

Ms. Monica J. Lizka-Miller
Proskauer, Rose, Goetz & Mendelsohn
2121 Avenue of The Stars, Suite 2700
Los Angeles, CA 90067-5010

Re: **"On-Call" Time—Beepers**

Dear Ms. Lizka-Miller:

Your letter of October 15, 1991, addressed to Acting Labor Commissioner James Curry[1], has been assigned to this office for response.

In your letter you ask the Division to clarify the enforcement policy in regard to circumstances under which an employee's "on-call" time is deemed sufficiently restrictive to constitute "hours worked". For purposes of this letter you ask that we assume the following scenario:

> "Assume a regularly-scheduled non-exempt employee who works at a hospital located in a rural area and is not required to remain at or about the hospital or any premises designated by the employer; during his off-duty hours, but is required to be "on-call" for designated periods of time during which time he must be reachable by telephone or beeper and arrive at the hospital within 20 minutes from the time he is called by pager or telephone."

You point out that in the above scenario the frequency with which the employee is placed on "on-call" status varies across departments and the number of calls received per "on-call" shift varies as well. You state that you do not believe these factors are relevant to the determination of whether the employee should be compensated for this time. You have attached an exhibit which sets out the variety of shifts (by department) of on-call time and the number of calls received during any one of those shifts. The number of shifts range from 1 to 4 per week and the number of calls per shift range from .5 to 7. In some instances the employees engage in "telephone consultation only" and are not required to come in to the hospital.

You state that in your opinion the federal regulations covering this subject provide more guidance than the Division's

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[1] Please be advised that effective October 15, 1991, Victoria Bradshaw was appointed Labor Commissioner. Mr. Curry's title is Chief Deputy Labor Commissioner.

Enforcement Operations and Procedures Manual. You point out that there are a number of federal court cases which address the issue of "on-call" time involving beepers in hospital settings. You further point out that this Division is not obligated to follow federal law in this area. Your statement that it is "common for the Commissioner and state courts to look to federal authority" is, however, not quite accurate.[2]

As you know, the Fair Labor Standards Act contains no definition of the term "hours worked" and the Department of Labor relies upon definitions first set out in the U.S. Supreme Court case of *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123* 321 U.S. 590 (1944) holding that employees must be paid for all time spent in "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer of his business." This definition was expanded later in the case of *Anderson v. Mt. Clemens Pottery Co.* 328 U.S. 680 (1946) which held that the workweek includes "all the time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place." The federal regulations provide that "[a]s a general rule the term 'hours worked' will include: (a) All time during which an employee is required to be on duty or to be on the employer's premises or at a prescribed workplace and (b) all time during which an employee is suffered or permitted to work whether or not he is required to do so." (29 C.F.R. §778.223)

On the other hand, the California Industrial Welfare Commission has adopted a specific definition of the term "hours worked":

> "**Hours worked**, means the 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.[3]

As you can see, there is a substantial difference between the definition of hours worked adopted by the IWC and that used by the Department of Labor for enforcement of the FLSA. Under California

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[2] Where the IWC has given the DLSE the authority to adopt the federal guidelines the Division does so to the extent that is possible. However, as caselaw both in the California courts and the Ninth Circuit clearly illustrates, the IWC Orders differ substantially from the requirements of the FLSA and federal rules are not persuasive authority nor can they be utilized in interpreting and enforcing the California law in this area.

[3] Order 5-89 adds to this definition the provision "and in the case of an employee who is required to reside on the employment premises, that time spent carrying out assigned duties shall be counted as hours worked."

law it is only necessary that the worker be subject to the "control of the employer" in order to be entitled to compensation.

You point to a few federal cases which hold that employees required to respond to beeper calls within twenty minutes were not entitled to be paid for the "on-call" time pursuant to the FLSA. Your research has overlooked the case of *Berry v. County of Sonoma*, 763 F.Supp. 1055, which discusses the problems raised in determining, even under the broader FLSA standard, the proper application of the rule to the factual situation in each case. Judge Weigel of the District Court for the Northern District of California in the *County of Sonoma* case set out the factors which must be considered in determining whether restrictions placed on employees during on-call hours were so extensive that such time should be deemed "hours worked" under the Fair Labor Standards Act (FLSA). According to Judge Weigel, those factors include: (1) geographical restrictions on employees' movements; (2) required response time; (3) frequency of calls during on-call hours; (4) use of pager; (5) ease with which on-call employees can trade on-call responsibilities; (6) extent of personal activities engaged in during on-call time; and (6) existence and provisions of any agreement between the parties governing the on-call work.[4]

More important, however, Judge Weigel pointed out: "The test this Court must apply in ascertaining whether on-call time is compensable under the FLSA is '[w]hether time is spent predominantly for the employer's benefit or for the employee's'...**This is a question 'dependent upon all the circumstances of the case.'** Id. In other words, the facts may show that the employee was 'engaged to wait' or 'waited to be engaged.' **This is a highly fact-driven test."**

Of further note is the fact that in the *Sonoma County* case, Judge Weigel points out that, contrary to your research, there is little agreement among the federal courts as to what constitutes compensable and non-compensable "on-call" time.

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[4] This particular issue was puzzling to Judge Weigel. He commented at fn. 12 that: "There is a seeming inconsistency between the Supreme Court's holding that the agreement between the parties is a factor to consider and its holding that agreements in violation of the FLSA are unenforceable. This apparent inconsistency may be resolved by resort to language in Supreme Court opinions suggesting that courts may consider the presence and terms of a working agreement when '<u>difficult and doubtful questions as to whether certain activity or nonactivity constitutes work</u>' are involved." This language clearly differentiates the federal test from the one which may be used under California law. Under the federal tests, whether or not the employee is engaged in "work" is an important ingredient; however, under the California definition of "hours worked" the extent of "control" by the employer is the issue to be addressed.

While the Division cannot adopt the federal test because of the obvious differences in the statute, the test to be applied under the California law is also "highly fact-driven." The difference is that the California test places no reliance on whether the individual is engaged in "work" and, thus, the existence of an "agreement" regarding the understanding of the parties is of no importance. The ultimate consideration in applying the California law is determining the extent of the "control" exercised.

On the one hand, the Division does not take the position that simply requiring the worker to respond to call backs is so inherently intrusive as to require a finding that the worker is under the control of the employer. However, such factors as (1) geographical restrictions on employees' movements; (2) required response time; (3) the nature of the employment; and, (4) the extent the employer's policy would impact on personal activities during on-call time, must all be considered. The bottom-line consideration is the amount of "control" exercised by the employer over the activities of the worker. In some employments, the employer can be said to be exercising some limited control over his employee at all times. For instance, by statute the employee must give preference to the business of his employer if it is similar to the personal business he transacts. (Labor Code §2863). However, immediate control by the employer which is for the direct benefit of the employer must be compensated.

We can offer no "bright-line" test. As with the federal test, the California test is "highly fact-driven". However, we can offer some parameters:

Geographical restrictions which would limit the worker in any way would "control" the activities of the worker. However, the timing, extent and nature of the restrictions would effect the amount of the control. For instance, if the employer's policy places a fifty-mile limit on an employee who is "on-call" for an overnight period, the limit would have much less practical effect than if the employer placed a fifty-mile limit on an employee who is "on-call" over a weekend period. This is not to say that under certain circumstances it would not be an unwarranted exercise of control for an employer to place an employee in an on-call status and limit the employee to fifty miles overnight. Geographical restrictions which made the control exercised by the employer unreasonable (when due weight is given to all of the criteria listed) would be compensable.

Required response time which would, in practice, unreasonably restrict the geographical boundaries of the worker would, to that extent, "control" the activities of the worker and would be compensable.

The nature of the employment is used to determine whether the "on-call" requirement is reasonable. A reasonable and long-standing industry practice which clearly indicates that workers in the affected classifications are expected to be on-call and that depriving the employer of the right to require uncompensated on-call status of the workers in this category will have a serious negative impact on the employer's business will be considered in making this determination.

The extent the employer's policy would impact on personal activities during on-call time will, in conjunction with the limits placed on geographical restrictions, be considered in determining the scope of the "control" the employer exercises under the on-call policy.

Again, the question comes down to the amount of "control" the employer may exercise. In the event that consideration of all of the above criteria leads to the conclusion that, under the circumstances, the control exercised by the employer is unreasonable, the on-call time is compensable.

It goes without saying that the employer may compensate the on-call worker and alleviate the necessity of applying the above test. If the worker is paid at least the minimum wage (and, of course, applicable overtime) for the on-call hours there is no further need to grapple with the problem.[5]

The Division chooses not to answer the specific questions you ask in your letter. We believe that the answer to those questions lie in an application of the test outlined above. For example, a specific response time might be found to be reasonable in one situation but may not be in another. The specifics of each situation would have to be carefully examined.

Thank you for your interest in California labor law enforcement. We are sorry that we can not be more specific in regard to the questions you raise. All we can do is lay out the test which must be applied to the factual matters which our investigation reveals.

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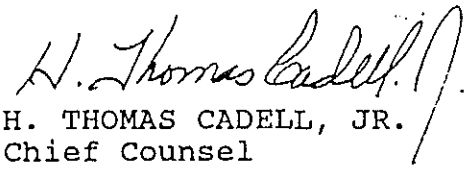
[5] The State of California, unlike the federal government, uses the rate in effect method in determining overtime liability. If the duties of the worker are different, a different hourly rate may be paid for all hours during which the worker is performing those "different" duties. That would include the duty of being "on-call". However, the employees "regular rate" for performing regular duties would be required (including the applicable premium rate) in the event the "on-call" employee resumes regular duties. You may want to carefully consider the impact this may have under the "weighted average test" used by the federal government.

However, we hope this letter will help you in assisting your client.

Yours truly,



H. THOMAS CADELL, JR.
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c.c. Victoria Bradshaw, State Labor Commissioner
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