

DIVISION OF LABOR STANDARDS ENFORCEMENT

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ARTHUR S. LUJAN, *State Labor Commissioner*

September 17, 2001

Robert L. Balgenorth, President
State Building & Construction Trades Council
921 - 11th Street, Suite 400
Sacramento, CA 95814

Re: Wage Order 16 Rest Period Provisions

Dear Mr. Balgenorth:

This in response to questions that you and other members of the Building Trades have asked, seeking our interpretation as to the extent of employer flexibility in providing and scheduling rest periods that are required under Industrial Welfare Commission ("IWC") Order 16-2001. This wage order went into effect on January 1, 2001, and applies to all persons employed in the on-site occupations of construction, drilling, logging, and mining.

Although rest period requirements are found in all of the IWC industry or occupational wage orders, these requirements are new to construction employers (at least as to those employees covered by Order 16), in that prior to January 1, 2001, on-site construction employees, though covered by the general minimum wage order, were not covered by any IWC industry or occupational wage order. Thus, the past few months have been difficult as employers, employees and labor organizations in the construction industry have grappled with the day-to-day issues of implementing the wage order's rest period requirements.

Adding to the difficulty is the fact that, in recognition of some of the unique operational requirements of on-site construction, drilling, logging, and mining, the IWC fashioned rest period provisions in Order 16-2001 that markedly differ from those found in the other wage orders. We must therefore strongly caution all employers who employ workers covered by wage orders other than Order 16 that the following responses -- which are founded upon the far greater flexibility regarding rest period scheduling under Order 16 than is found under any other wage

order -- do not apply to any workers other than those covered by Order 16. For example, a construction employer should not rely on these responses in implementing rest period requirements for its office clerical workers, as those employees have always been, and still are, covered by IWC Order 4, and its stricter provisions governing rest period scheduling.

The rest period requirements are found at section 11 of Order 16-2001. As is the case with the other industry and occupational wage orders, "authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages." (Order 16-2001, sect. 11(C)) Also, "authorized rest period time shall be based on the total hours worked daily at the rate of ten minutes net rest time for every four hours worked, or major fraction thereof." (Order 16-2001, sect. 11(A)) However, "a rest period need not be authorized for employees whose total daily work time is less than three and one-half hours." (Order 16-2001, sect. 11(C)) And as is the case with all other industry and occupational wage orders, section 11, subsection (A) starts as follows: "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 language that follows this sentence distinguishes Order 16's rest period requirements from those founded upon the other wage orders. Specifically, Order 16 goes on to provide:

"Nothing in this provision shall prevent an employer from staggering rest periods to avoid interruption in the flow of work and to maintain continuous operations, or from scheduling rest periods to coincide with breaks in the flow of work that occur in the course of the workday. . . ." (Sect. 11, subd. (A))

"Rest periods need not be authorized in limited circumstances when the disruption of continuous operations would jeopardize the product or process of the work. However, the employer shall make-up the missed rest period within the same workday or compensate the employee for the missed ten minutes of rest time at his or her regular rate of pay within the same pay period." (Sect. 11, subd. (B))

Order 16 then goes on to set out the premium pay provision for rest period violations that is was contained in all of the 2000 industry and occupational wage orders except for Order 14, and that is now contained in all of 2001 wage orders (including Order 14): "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 work day that the rest period was not provided." (Sect. 11, subd. (D))

Finally, Order 16 differs from the other wage orders with respect to rest period provisions in two other ways. First, most of the other wage orders require that "suitable resting facilities shall be provided in an area separate from the toilet rooms and shall be available to employees during work hours." (Order 4-2001, sect. 13) Order 16 contains no such requirement, but rather, provides that "rest periods shall take place at employer designated areas, which may include or be limited to the employees' immediate work area." Second, none of the other wage orders contain a collective bargaining agreement opt-out from rest period requirements. In contrast, Order 16-2001 provides for a very restrictive collective bargaining agreement opt-out, under which section 11 of the order "shall not apply to any employee covered by a valid collective bargaining agreement if the collective bargaining agreement provides equivalent protection." Of course, in order to provide "equivalent protection," the collective bargaining agreement would have to provide the same substantive requirements, both as to the right to rest periods and the right to premium pay for rest period violations.

With this background out of the way, we will now respond to the specific questions that have been asked:

1. An employer typically begins the day at 7:00 a.m., working five hours before the 12:00 noon thirty minute lunch break. Can that employer comply by providing a ten minute rest period sometime during the morning and then add 10 minutes to lunch in order to comply with the afternoon break requirement? Yes, as long as the first rest period is within the first four hours worked. The combined meal period and afternoon rest period would run from 12 noon to 12:40 p.m., of which ten minutes would constitute paid rest time. The afternoon portion of the regular workday would run until 3:30 p.m.
2. Can an employer who begins work at 7 a.m., working five hours before the 12 p.m. lunch, combine the 10-minute morning break with lunch at the end of the five hour period, and then provide a 10-minute break in the afternoon and be in compliance? No. In order to comply with the wage order, the first rest period would have to start no later than 10:50 a.m. (so that it is taken within four hours after the start of the workday), and the morning rest period would have to precede the meal period. In other words, the morning break would run from 10:50 a.m. to 11:00 a.m., the meal period would commence at 11:00 a.m., and the workers would be entitled to their 10 minute afternoon break during the afternoon.
3. Can an employer provide the ten minute rest period at the end of the day by having the employees leave work ten minutes early?

No. A rest period must be preceded and followed by some work period during the workday. Otherwise, it is not a rest period, but rather, merely a means of shortening the workday. The purpose of the rest period is to refresh workers during the workday, and this purpose would be subverted by essentially eliminating the rest period in exchange for a shorter workday.

4. The wage order requires the employer to "authorize and permit" rest periods. Does this imply that employees can opt not to take a rest period or waive a rest period? Unlike meal periods, during which the employer has an affirmative obligation to ensure that workers are actually relieved of all duty, not performing any work, and free to leave the worksite; the employer is merely required to "authorize and permit all employees to take rest periods." An employer is not subject to any sort of penalty or premium pay obligation if an employee, who was truly authorized and allowed to take a rest break, *freely chooses without any coercion or encouragement* to forego or waive a rest period.

5. If an employer regularly requires employees to work five hours prior to their 30 minute lunch break, could that employer provide a ten minute rest period after two hours, followed by a second ten minute rest break upon the fourth hour, and then work a fifth hour, break for lunch and then work the final three hours of the eight hour day without another break? As a general matter, the first rest period should come sometime before the meal break and the second rest period should come sometime after the meal break. Unless the nature of the work after lunch is such that any rest break would jeopardize the product or process of work, so as to permit an employer to shift the afternoon rest period to the morning, the scenario described in this question appears not to comport with the requirement that rest periods "insofar as practicable, shall be in the middle of each work period." While it is true that Order 16 offers employers far more flexibility than is found in any other wage order as to the scheduling of rest periods, this scenario goes beyond what would be permitted absent truly unusual circumstances.

6. Can an employer comply by providing one 20 minute break in the morning or afternoon? A combined 20 minute rest period is never allowed under ordinary circumstances. Rather, the first break must precede the meal period and the second break must follow the meal period. A combined 20 minute break may be allowed only "in limited circumstances where the disruption of continuous operations would jeopardize the product or process of work." These "limited circumstances" are intended to be exceptional, not routine.

7. If an employee does have the right to waive a rest period, is

there any prohibition on an employer paying an employee for a full day's work if the employee voluntarily waives the afternoon rest period and then leaves the worksite ten minutes early? The problem with this scenario is that it appears to cross the line into encouragement and solicitation of a waiver of the rest period. The IWC intended that as a normal practice, employees ought to have two 10 minute rest period during an eight hour day, one in the first four hours of the day, and the other in the second four hours of the day. As noted above, a "ten minute break" followed by quitting time is not a rest break at all, and having the employer pay for that fictitious break seems like a subterfuge.

8. Does the wage order allow employers to change the schedule of rest periods from one workday to the next, or does the schedule need to be fixed? There is no requirement that the scheduling of rest periods be fixed. Quite the opposite, as Order 16-2001 permits flexibility in scheduling rest periods on a day-to-day basis based on the employer's operational needs, so as to "avoid interruption in the flow of work and to maintain continuous operations," and to permit the "scheduling [of] rest periods to coincide with breaks in the flow of work that occur in the course of the workday."

9. Under the wage order, rest periods need not be authorized in limited circumstances when the disruption of work would "jeopardize the product or process of work." Does this provision give discretion to the employer to determine when the product or process of work is jeopardized? Does DLSE have any established standards to be used? Although it is initially the employer that gets to decide whether "the disruption of continuous operations would jeopardize the product or process of the work," so as to permit the employer to prohibit employees from taking an otherwise required and scheduled rest period, the employer must exercise this discretion in a manner consistent with the legal standard set out in Order 16. And ultimately, it is the Division of Labor Standards Enforcement ("DLSE") or the courts that will rule on any claim that may be filed challenging the employer's decision to prohibit employees from taking a rest period. Other than the language of the wage order itself, DLSE does not have any established regulation or standard that would be used in determining whether circumstances exist under which a disruption of work for purposes of a ten minute rest period would "jeopardize the product or process of work." In view of the multitude of variables, this would be a fact intensive inquiry, with determinations made as cases arise.

10. Would this exception apply to processes, such as cement pours, plaster applications, or certain types of welds that might be compromised if work is disrupted? These sorts of work

processes would appear to be of the type where a disruption of work *might* "jeopardize the product or process of work." Of course, certain cement pours may be less critical than others with respect to the sort of cement used, the purpose for which the cement is being poured, the precise weather conditions, the number of workers on the job, the amount of time that it is safe to halt operations, etc. These are the sorts of factors that would be considered in determining whether an employer can refuse to permit a rest period.

11. Under this provision, can an employer determine that for safety concerns, such as limiting an employee's exposure to potentially dangerous conditions such as conditions on many highway projects, to not provide breaks and instead make it up later or pay straight time for the missed break? Certainly, bona fide safety considerations would be a factor in determining whether a disruption of work for a ten minute rest period would "jeopardize the product or process of work. Toward that end, however, it would appear that as a general rule, safety considerations would militate in favor of permitting a rest break, so as to refresh workers and provide them with a period of respite from potentially hazardous work.

We hope this letter will help clarify the rest period requirements in IWC Order 16-2001. As always, feel free to contact us with any further questions.

Sincerely,

Arthur S. Lujan
Labor Commissioner

cc: Miles E. Locker
Tom Grogan
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