STATE OF CALIFORNIA PETE WILSON, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
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January 28, 1992

Rob Remar, Esq.
Leonard, Carder, *et al.*
1188 Franklin St., Suite 201
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Re: **Use of 'Beepers'**

Dear Mr. Remar:

In response to a letter received from Ann Casper of the Oakland office of your firm, I am addressing this letter outlining the Labor Commissioner's policy regarding the obligation of an employer to pay an employee for time when the employee is required to wear a beeper to your attention.

Initially, I should point out to you that federal law and state law use different criteria to determine "hours worked". For instance, the federal law, using a definition of "workweek" which is the result of court interpretations of the Fair Labor Standards Act[1], does allow an employer to require that the employee remain on the premises during a lunch period so long as the employee is relieved of all duties. For that reason, a discussion of the reasons underlying the DLSE's interpretation of the California IWC Orders in regard to the term "hours worked" is an important first step to explanation of the state policy.

The question of the DLSE's interpretation of the term "hours worked" in relation to the issue of meal periods has already been addressed in a decision by the Office of Administrative Law. (1990 OAL Determination No. 11, Docket No. 89-018) The main issue faced by OAL in that determination was:

> "[W]hether or not an enforcement policy of the Division of Labor Standards Enforcement which states that employers who require employees to remain on the employment premises during a meal period must compensate the employees for that meal period even when the employees are

[1] The IWC Orders specifically define the term "hours worked"; however, the FLSA does not define the term. The U.S. Supreme Court in the case of *Anderson v. Mt. Clements Pottery*, 328 U.S. 680 (1946) adopted a definition of the term "workweek" as used in the FLSA. The Court held that the term included "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." *Id.* 690-691.

> relieved of all duties is a "regulation" required to be adopted in compliance with the Administrative Procedures Act."

The main thrust of the argument presented before the OAL was that the DLSE enforcement policy constituted an "underground regulation" and that the Division had not properly followed the procedures set down in the Administrative Procedures Act in adopting this "regulation".

As the OAL pointed out:

> "The term "Hours worked" is defined as "time during which an employee is subject to the control of the employer, and includes all the time the employee is suffered or pemitted to work, whether or not required to do so." (Emphasis in original) There is no doubt that when an employer requires his or her employees to remain on the employment premises during meal periods that the employer is exerting control over the employees, even when the employees are relieved of all duties. *We conclude that the challenged enforcement policy is the only legally tenable interpretation, and therefore is not a 'regulation' as defined in Government Code section 11342, subdivision (b)*. (Emphasis added)

Pagers

One should not leap to the conclusion that based on the Division policy regarding meal periods that the mere fact that one is required to wear a pager *per se* indicates that all such time is "work time" and, therefore, compensable.

Announcements of Division policy in the past regarding the use of a pager have been limited to situations involving "call-back" or "standby" time and called for the Deputy to address the use of the pager on a case-by-case basis applying the two-step analysis first used by the California Supreme Court in *Madera Police Officers Assn v. City of Madera* (1984) 36 Cal.3d 403. That test requires that the determination first be made as to whether the restrictions placed on the employee are primarily directed toward the fulfillment of the employer's policies; and, second, determining whether the employee is substantially restricted so as to be unable to attend to private pursuits.

The *Madera* analysis, while responsive to the question of the use of pagers during call-back or controlled standby time, is not

so responsive to situations involving such use during scheduled meal periods because of the specific requirement that meal periods be "duty-free". In response to this confusion, the Division has decided to address this particular issue at this time.

Our analysis must begin with the fact that the IWC Orders require that (1) the employee be allowed a "duty free" meal period[2]; and (2) the term "hours worked" includes all time the employee is engaged, suffered or permitted to work. In order to clarify the Division policy in this regard we submit the following:

> If the employee is simply required to wear a pager or respond to an in-house pager during the meal period there is no presumption that the employee is under the direction or control of the employer so long as no other condition is put upon the employee's conduct during the meal period. If, on the other hand, the employer requires the employee to not only wear the pager or listen for the in-house paging system, but also to remain within a certain distance of a telephone or otherwise limits the employee's activities, such control would require that all of the meal period time be compensated.
>
> So long as the employee who is simply required to wear the pager is not called upon during the meal period to respond, there is no requirement that the meal period be paid for. On the other hand, if the employee responds, as required, to a pager call during the meal period, the whole of the meal period must be compensated.
>
> Some questions have been raised regarding *de minimis* time required to respond to a particular question or request after response to the pager. The Division takes the position that if the employee is required to respond and is called upon to respond, the whole of the meal period becomes compensable. Since the IWC orders require that the employee have a duty-free meal period, any "duty" which interferes with the meal period (even if the "duty" required *de minimis* time) would require that the whole of the meal period be paid.

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[2] An on-duty (compensable) meal period is allowed when the nature of the work permits. However, the "on-duty" meal period is counted as "time worked" and is fully compensable. (See IWC Orders, §11(A)).

> The IWC orders require that the "on-duty" meal period meet the requirements of Section 11 of the Orders. That is, that the "nature of the work prevents an employee from being relieved of all duty and...by written agreement between the parties an on-the-job paid meal period is agreed to." The agreement may provide that the on-the-job paid meal period is only effective if the worker is called upon to respond to the pager.

I hope that this adequately addresses the issues which were raised in the telephone conversation our Chief Counsel, Mr. Cadell, had with Ms. Casper. Since the use of the pager during meal periods was a question which was not specifically addressed in the Operations and Procedures Manual, the Division felt that her letter presented an opportunity to address this issue. You may be assured that this policy determination will be added to the Manual in order to assure that the issue is uniformly enforced throughout the state.

Yours truly,

Victoria Bradshaw

VICTORIA BRADSHAW
State Labor Commissioner

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