STATE OF CALIFORNIA PETE WILSON, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
AL SECTION
Golden Gate Avenue, Room 3166
San Francisco, CA 94102
(415) 703-4150

H. THOMAS CADELL, JR., *Chief Counsel*

February 3, 1994

Bruce P. Crary
Ballard, Rosenberg & Golper
10 Universal City Plaza, 16th Floor
Universal City, CA 91608-1097

Re: **Compensable Time**

Dear Mr. Crary:

Labor Commissioner Victoria Bradshaw has asked me to respond to your letter of December 8, 1993, addressing the above issue.

Your client operates a meat packing plant and the facts surrounding your inquiry are as follows:

> The United States Department of Agriculture ("USDA") requires that your client's employees wear clean white "lab coats" and sanitary head coverings in working areas of the plant. Your client's employees generally wear hair nets and/or hard hats to comply with the USDA's head covering regulations. Moreover, your client requires employees to wear rubber surgical gloves while working and to use ear plugs when necessary to comply with regulations of the Cal OSHA. Although not required by government regulations or company rules, your client also makes available disposable plastic aprons, work boots, tape and cotton gloves exclusively for the comfort and convenience of employees.
>
> Employees are required to pick up clean lab coats from racks adjacent to the time clocks at the beginning of each shift and to deposit soiled coats in receptacles at the end of the shift. Although employees are free to put on such other protective gear as they may wish at home, many do so in changing areas provided by your client. Once dressed for work, employees proceed to their assigned work stations. With the exception of the lab coats, employees may either remove their work gear in the employer's changing areas or wear it home. Employees who choose to change at the work site generally spend about five minutes putting on their gear at the beginning of the shift and slightly longer removing it at the end of the shift.

You ask the following questions:

1. Whether all or any portion of the time spent by our client's employees in putting on lab coats, head coverings, work boots, rubber gloves, cotton gloves, disposable aprons, or taping sleeves is compensable under California law.

2. Assuming that all or some portion of the above changing activities are compensable under California law, whether an employer may compensate employees for such preliminary and/or postliminary activities at a different hourly rate, so long as that rate equals or exceeds the minimum wage.

You have attached a copy of a federal district court case from Kansas (*Reich v. IBP, Inc.*, 820 F.Supp. 1315 (D.Kan. 1993) and ask that we consider this case in determining your client's obligations under California law. For various reasons, discussed herein, we cannot use the analysis employed by the federal courts in establishing the obligation of California employers under the unique provisions of the Industrial Welfare Commission Orders.

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.

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

The Division of Labor Standards Enforcement's enforcement policy follows, of course, the dictates of the IWC and requires compensation for all time the employee spends, either directly or indirectly, performing services which inure to the benefit of the employer.

The Supreme Court in *Anderson v. Mt. Clemens Pottery Co., supra*, 328 U.S. at 691-92, was addressing many of the same issues you raise in your letter. The Court was dealing with a different definition of the term of the terms used to describe the time during which a worker is entitled to be compensated. However, even under the more limited definition which had been adopted by the Court, the Court held that much of the "preliminary" time was compensable. As the court in *Reich v. IBP, Inc., supra*, pointed out, Congress, in response to the *Mt. Clemens* decision, adopted the Portal-To-Portal Act of 1947 (29 U.S.C. §254) which limited the compensable time under the FLSA. California has not adopted any of the provisions of the Portal-To-Portal Act[1] and, consequently, the analysis used by the federal district court in the *IBP* case is not relevant here.

Some of the analysis used by the Supreme Court in *Anderson v. Mt. Clemens Pottery, supra*, is of assistance in deciding the reach of the California law despite the use of the broader test the Court applied. As pointed out above, the California law requires that the worker be paid for all hours he or she is "subject to the control of the employer." The *Mt. Clemens* court discussed the issue raised by the fact that the employees were required to walk on the employer's premises following the punching of the time clocks and concluded that:

> "Such time was under the complete control of the employer, being dependent solely upon the physical arrangements which the employer made in the factory. Those arrangement in this case compelled the employees to spend an estimated 2 to 12 minutes daily, if not more, in walking on the premises. Without such walking on the part of the employees, the productive aims of the employer could not have been achieved. The employees' convenience and necessity, moreover, bore no relation whatever to this walking time; they walked on the employer's premises only because

---

[1]The federal courts now use the "integral and indispensible" test in determining whether the activity is compensable. (See *Steiner v. Mitchell*, 350 U.S. 247, 250)

they were compelled to do so by the necessities of the employer's business." *Id.*, 328 U.S. at 691

Using the above analysis, we think, would be useful in explaining the Division's enforcement posture. However, it must be noted that due to the fact-intensive nature of the question you pose, it is impossible to establish a bright-line test which would preclude the necessity of establishing facts in every situation involving "preliminary" or "postliminary" activities. We think this is evident from the difficulty the *Reich v. IBP* court had in establishing what was and what was not compensable even under the federal regulations.

Consequently, without making a determination on each of the activities which you discuss in your letter, suffice to say that in the event the activities are undertaken by the employee "only because they were compelled to do so by the necessities of the employer's business" the time is compensable. If, for instance, the temperature in the work area would make the wearing of warm clothing which would not ordinarily be worn by the employee necessary[2], the reasonable time consumed by the employee in changing into that clothing would be compelled by the necessities of the employer's business.

It should also be noted that the Division has adopted the *de minimis* rule relied upon by the federal courts. (See *Anderson v. Mt. Clemens Pottery Co., supra*, 328 U.S. at 692; *Lindow v. United States*, 738 F.2d 1057 (9th Cir.1984) In the *Lindow* case the Ninth Circuit held that employees cannot recover for otherwise compensable tasks under the FLSA where the time spent performing those tasks is *de minimis*. To determine what is *de minimis*, the court stated, "we will consider (1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time, and (3) the regularity of the additional work." The Division will consider the same factors.

The second question you pose has to do with whether the time spent changing gear could be compensated at a rate different from the regular rate of pay. As with the federal requirements, different rates may be paid for different jobs so long as the work involved is objectively <u>different</u>. Also, the DLSE has opined that such "nonproductive" time as that spent traveling may be paid at a different rate. The same would apply to any "nonproductive" time.

---

[2]Assume, for example, that the employee works in Southern California and would have little or no use for a heavy clothes which might be necessary in the work area. The time it takes to change into those heavy clothes would be compensable. On the other hand, assume that the worker is employed in the winter months in North Dakota and would normally wear such heavy clothing. There would be no reason to compensate the employee who chooses to wear heavy clothing on the job site different from that he or she wore to work.

However, since the IWC Orders do not contain the language of Section 207(g)(2) of the Fair Labor Standards Act, there would be no authority under California law which would allow the employee and employer to enter into an agreement which would provide that the premium rate of the different work would be based upon the rate paid for that work during non-overtime hours. The premium rate for either travel time or different work must be based on the *weighted average* of all of the rates paid in that day.

In summary, the time spent changing clothes may be compensable if it is determined that the activity was compelled by the necessities of the employer's business. The time would be compensable unless it is *de minimis*, and may be paid at a rate of pay different from the regular rate of pay.

Thank you for your continuing interest in California labor laws and the enforcement policies of the Division of Labor Standards Enforcement. I hope this adequately addresses the issues you raised in your letter of December 8, 1993.

Yours truly,

H. Thomas Cadell, Jr.

H. THOMAS CADELL, JR.
Chief Counsel

c.c. Victoria Bradshaw
Nance Steffen
Simon Reyes
Gus Carras
Bob Smith
Lola Felix