STATE OF CALIFORNIA PETE WILSON, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
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H. THOMAS CADELL, JR., *Chief Counsel*

February 16, 1994

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Re: **Opinion Regarding Travel Time and Unsolicited Opinion Regarding On-Call Time and Recoverable Expenses**

Dear Mr. Johnson:

In your letter of January 19, 1994, you seek this Division's opinion concerning three hypothetical questions concerning the following factual situation:

> Employer is in the business of providing repair and maintenance services on vending machines located on various business premises throughout the state. Employer's maintenance and repair services are provided under numerous individual contracts between Employer and the business entities where the machines are located. Those entites either own or lease the machines, but not from Employer. Employer's sole function is to repair and maintain the machines under its service contracts.
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> Employer has divided its working territory into a series of well-defined zones. The size of each zone was originally established by measuring the actual driving distance to the various customer sites within the zone, so as to insure that all sites within a given zone can easily be reached by Employer's Service Technicians ("Techs") within the time constraints of the service contracts, which typically require a response time of 60-90 minutes. The City of San Francisco, for example, has four or five zones, all of which are less than ten miles across at their widest points.
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> Techs are always assigned to work only in the zone in which they live, and they work at all times on an "on-call" basis. That is, during their "on-call" shifts, Techs are free to go about their personal business, at home or anywhere else in or out of the zone. Techs carry a beeper during "on-call" hours, and are required to respond to pages. If a vending machine

develops a problem, the owner or lessee calls Employer with the problem and location. Employer's dispatcher then pages an "on-call" Tech in the zone, and the Tech is required to call dispatch within seven (7) minutes of the page. Dispatch then gives the location of the machine and any other pertinent information, and the Tech gives an estimated time of arrival at that location. The Techs are trained only to deal with routine kinds of problems that can ordinarily be fixed in 10-20 minutes or less. More complex problems are handled by the vending machine manufacturer.

Under this system, a typical call requires about 15-30 minutes of travel time by the Tech to the location, and 10-20 minutes to fix the problem on site. Thus, it is unusual for total time, including actual travel and on-site work, to take or exceed an hour's time. Techs are typically "on-call" on Monday through Friday from 5 p.m. to 11 p.m., and on weekends from 8 a.m. to 11 p.m. (total of 60 hours/week). Most of the Techs have other jobs during the day on weekdays. Techs are paid a flat rate of $7.50 per call, plus a bonus of $3.00 whenever the Tech arrives on site within an hour of the original page. Techs are thus encouraged to arrive on site within an hour of the page, but there is no requirement for a faster response time and no penalty if the arrival time is longer than an hour. However, a Tech could be counseled if his or her response time was consistently in substantial excess of an hour. Since the vast majority of calls are handled with the one hour time frame, Techs receive $10.50 for most calls. On those few occasions when the Tech spends more than an hour on site working on a problem, they are paid extra for each excess quarter hour on site, on a $7.50 per hour basis. Techs are also paid a flat fee of $50.00 per week as a "beeper fee" for being on call with the beeper on.

The Techs do not report to a company location to await calls, but are free to do as they please while waiting for a page. They drive to each location in their own cars, and are free to resume their personal business when a call is completed, unless another one is waiting. The number of calls for a single Tech typically ranges from about 10-30 per week, averaging about 20 per week. Total travel time for 20 calls would typically be about 7.5 hours, with total work time on site typically about 6.5 hours. Thus, total travel time and work time would average about 14 hours per week.

DISCUSSION

1. **On-Call Time**

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.[1]

As we have pointed out on a number of occasions, 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.

While there are no reported California cases dealing with the issue of "on-call" time and the use of "beepers" there are a number of federal cases on point. While the DLSE may not rely exclusively on the federal caselaw in this area because of the differences in the statutes, the federal 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 is instructive. 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 dur-

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

ing on-call time; and (6) existence and provisions of any agreement between the parties governing the on-call work.[2]

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 there is little agreement among the federal courts as to what constitutes compensable and non-compensable "on-call" time.

While the Division cannot adopt the federal test in toto 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

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[2] 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 'difficult and doubtful questions as to whether certain activity or nonactivity constitutes work' 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

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.[3] Any sums paid to the worker may be used to offset this minimum wage obligation, and consequently, the "beeper fee" may be counted for this purpose. Additionally, the "on-call" time may be at a different rate than that paid for the production time so long as the rate is not less than the minimum wage.

We point out the above simply to alert you to the possible problems which your client might encounter with the program it has developed. The Division chooses not to address the specific question of whether that program complies with the IWC Orders. We believe that the answer to that question lies in an application of the test outlined above.

2. Travel Time

In Hypothetical Question No. 3 you ask if the Techs would have to be paid for the travel from home to the repair site (and, conceivably, between repair sites if another call came in before the Tech returned home)? You ask whether the $7.50 (or, perhaps, $10.50, if all conditions are met) received for the call could include the travel time?

Actually, the $10.50 represents an hourly rate of $7.50 plus a bonus of $3.00 which would be earned if the worker responds to the call within the time set out by the Employer. This is clearly illustrated by the fact that any additional time is paid in increments of fifteen (15) minutes at the rate of $7.50 per hour. Since the travel time is at the request of the Employer, that time must be compensated. Again, under the California rules, your client may establish a different pay scale for travel time[4] as opposed to regular production time. But, the time must be compensated.

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[3] The State of California uses the same "weighted average test" used by the federal government, in determining the "regular rate of pay" for overtime calculation. This is mentioned only because the adoption of this method is a recent development. In the past the State has used the "rate in effect" method for calculating the "regular rate of pay" when more than one rate is paid.

[4] The rate cannot, of course, be less than the California minimum wage.

Having addressed the basic premise upon which the payment of the Techs is based, it is now easier to tackle Hypotheticals No. 1 and 2.

Inasmuch as there is no "regularly-established work site", any travel by the workers could be considered time under the control of the Employer. However, in the case of training, employees would not normally be entitled to payment for travel within a reasonable distance from their home so long as the time actually spent in training is compensated. To insist that Employers in your client's situation pay for travel time from the employee's home to a training site within a reasonable distance simply because there is no regularly-established work site would be unfair.

Thus, if the training is to be held in or within a reasonable distance of the area where the worker is usually employed, there is no requirement that the travel time be compensated. As discussed, below, the worker is entitled to recover any expenses incurred in carrying out his or her duties. Such expenses would not be recoverable if the training is held within a reasonable distance of the area where the employee is usually employed.

3. Payment of Expenses

Your letter does not mention any payment to the employee to compensate for the out-of-pocket expenses incurred in the use of his or her own vehicle. Under the provisions of Labor Code §2804, the employee is entitled to payment for such expenses. The program which your client institutes should consider this expense as well.

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

Yours truly,

H. THOMAS CADELL, JR.
Chief Counsel

c.c. Victoria Bradshaw, State Labor Commissioner
Simon Reyes, Assistant Labor Commissioner

Regional Managers
Senior Deputies and Deputies-in-Charge