STATE OF CALIFORNIA
PETE WILSON, Governor
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
*LEGAL SECTION*
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H. THOMAS CADELL, JR., *Chief Counsel*

September 28, 1994

John H. Bennett
Lieberman & Bennett
1970 Broadway, 12th Floor
Oakland, CA 94612

Re: **Purported Waiver Of State Minimum Standards**

Dear Mr. Bennett:

This letter is intended to respond to your letter of September 26, 1994, regarding the above-referenced subject.

In your letter you state that all new employees of a large chain auto parts store operating within California are required to execute a statement which provides that the employer and employee agree as follows:

(1) The company will allow the employee, when his/her work period exceeds five (5) hours to have a thirty (30) minute meal period (the "Meal Period") while on duty.

(2) The company will allow the employee, when his/her work period exceeds four (4) hours, to have a ten (10) minute rest period (the "Rest Period") for each four hour (4) hours worked while on duty.

(3) The company will pay the employee for these meal/rest periods which are taken on duty. "On duty" is hereby defined as non-relieved work periods.

(4) The employee agrees to serve customers and/or maintain control of the audit situation during the Meal/Rest Periods and understands that he/she will not be relieved of work duties during these periods.

The IWC Orders in California state:

11. MEAL PERIODS

(A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than thirty (30) minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of employer and

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employee. Unless the employee is relieved of all duty during the thirty (30) minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to.

12. REST PERIODS

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 authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof.

However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3½) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.

The document you submit, bearing a date of 1991, appears to provide that the 30-minute meal period will be an on-duty meal period. I have no way of knowing whether the nature of the work prevents the employee from being relieved of all duties during the 30-minute meal period. In the view of the Division, the onus is on the employer to show that the work involved prevents the employee from being relieved of duty. Examples of situations where the nature of the work would require an on-duty lunch would be situations where the employee is the only person employed in the establishment and closing the business would work an undue hardship on the employer; or the continuous operation of machinery requiring monitoring is essential to the business of the employer. In both of these cases, however, it would be necessary to establish that the employee has adequate time to eat while on the job.

All of the necessary facts are not provided. Consequently, I could not give you an opinion on this situation.

As to the provision in the agreement which purports to waive the rest periods, any such agreement would be void. The IWC Orders clearly provide that the employer must provide a ten-minute rest period if the employee is employed more than 3½ hours (not four as stated in the agreement). Further, the employer cannot require that the employee perform duties during the paid rest period.

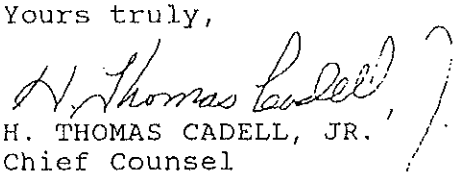
As to your allegation that this concern is attempting to circumvent the provisions of the Labor Code § 201, the inquiry is fact-intensive and a black-or-white answer is not available.

You are suggesting that the employer is engaging in a subterfuge to avoid prompt payment of wages. However, suspension without pay pending investigation of charges which may lead to discharge is not uncommon. On the other hand, if the policy of the company is to engage in a subterfuge such as this every time an employee is discharged then the penalty wage provided by § 203 would be imposed.

I hope this adequately addresses the questions you raised in your letter.

In response to your second letter dated September 26, 1994, please be advised that I can not locate the decision issued by Judge Orrick. My suggestion is you contact Mr. Zeiff.

Yours truly,



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