STATE OF CALIFORNIA GRAY DAVIS, Governor

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

December 9, 2002

Carrie E. Bushman, Esq.
Cook Brown, LLP
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Sacramento, CA 95814-4503

Re: **Impact Of SB 1208 On Existing CBA** (00238)

Dear Ms. Bushman:

Your letter of October 18, 2002, addressed to Chief Counsel Anne Stevason regarding the above-referenced subject has been referred to this office for response.

Specifically, you ask:

1. What impact, if any, will SB 1208 have on existing collective bargaining agreements that do not provide for a meal period?
2. May the parties to such a collective bargaining agreement wait until their current contract expires to negotiate for the provision of a meal period pursuant to Labor Code § 512?
3. What will the enforcement policy of DLSE be as to those employers who wait until their current CBAs expire to negotiate for the provision of a meal period pursuant to Labor Code § 512?

Labor Code § 514 was amended effective January 1, 2002, to repeal the statutory exemption from the meal period requirement in the case of workers covered by a collective bargaining agreement which had been placed in the law in 2000. The Legislature adopted a statement that this amendment was declarative of existing law and shall not be deemed to alter, modify or otherwise affect any provision of any IWC Order. IWC Orders 1-15 and 17 do not provide, and never have provided, a CBA opt-out for meal period requirements. However, Order 16 does contain such an opt-out.

Labor Code § 512 provides:

"Sections 510 and 511 do not apply to an employee covered by a valid collective bargaining agreement if the agreement

expressly provides for the wages, hours of work, and working conditions of the employees, and if the agreement provides premium wage rates for all overtime hours worked and a regular hourly rate of pay for those employees of not less than 30 percent more than the state minimum wage."

Labor Code §§ 510 and 511 deal with the overtime requirements in California. Neither of these sections address the question of meal periods requirements. The meal period requirement is contained at Labor Code § 512:

"(a) An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.
"(b) Notwithstanding subdivision (a), the Industrial Welfare Commission may adopt a working condition order permitting a meal period to commence after six hours of work if the commission determines that the order is consistent with the health and welfare of the affected employees."

You state in your letter that your client had implemented work schedules containing requisite meal periods as required by Labor Code § 512. The union filed a grievance claiming that the implementation of the meal period violates its collective bargaining agreement with the company.

As you will note, there is no "opt-out" for employers subject to collective bargaining. In other words, a collective bargaining agreement may not be used as a tool to waive the requirement that an employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes. The IWC Orders have never allowed an opt-out from the requirements of a meal period. Thus, the provisions of Section 512 are not a departure from former law.

In the past, the IWC Orders allowed the Labor Commissioner the right to investigate and determine if an on-duty meal period could be allowed; however, that provision of the Orders was removed in 2000.

The requirement that employees in the State of California receive a meal period is what is commonly known as a minimum state standard. Another example of a minimum state standard is the

California minimum wage which, of course, is higher than the federal minimum wage.

As the courts have explained, "Congress's main goal in enacting the NLRA was to establish an equitable bargaining process, not to establish any particular substantive terms to which the parties must agree. *Metropolitan Life v. Mass.,* 471 U.S. at 753, 105 S.Ct. at 2396. State laws which set minimum safety standards do not interfere with the bargaining process itself. To preempt such laws would 'allow unions and employers to bargain for terms of employment that state law forbids employers to establish unilaterally.' *Metropolitan Life v. Mass.,* 471 U.S. at 755, 105 S.Ct. at 2398. Such an outcome was obviously not intended by the NLRA."

In *Metropolitan Life v. Mass., supra,* the Supreme Court considered the legislative history of the NLRA and made the following statement: "Most significantly, there is no suggestion in the legislative history of the Act that Congress intended to disturb the myriad state laws then in existence that set minimum labor standards, but were unrelated in any way to the processes of bargaining or self-organization. To the contrary, *we believe that Congress developed the framework for self-organization and collective bargaining of the NLRA within the larger body of state law promoting public health and safety.* The States traditionally have had great latitude under their police power to legislate as 'to the protection of the lives, limbs, *health,* comfort, and quiet of all persons.' *Slaughter-House Cases,* 83 U.S. (16 Wall.) 36, 62, 21 L.Ed. 394 (1873), quoting *Thorpe v. Rutland & Burlington R. Co.,* 27 Vt. 140, 149 (1855). '*States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State.* Child labor laws, minimum and other wage laws, *laws affecting occupational health and safety* ... are only a few examples.' *De Canas v. Bica,* 424 U.S. 351, 356, 96 S.Ct. 933, 937, 47 L.Ed.2d 43 (1976)." 471 U.S. at 756, 105 S.Ct. at 2398 (emphasis added).

Thus, the U.S. Supreme Court recognized that Congress did not intend to preempt all local regulations that touch or concern the employment relationship. Minimum state standards, such as meal period requirements are not inconsistent with the general legislative goals of the NLRA.

Thus, to characterize your client's position as one of a "classic Catch 22" is, we think, misplaced. Your client had no more right to implement a work schedule which did not meet the requirements of Labor Code § 512, than an employer would have the right to implement a wage schedule arrived at through collective bargaining which provided less than the California minimum wage.

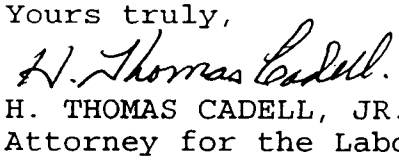
We note that your letter indicated that an arbitration on the

union's grievance was scheduled for November 19th. Unfortunately, we did not meet that deadline and we apologize. We feel, however, that the material contained in this letter is pretty widely disseminated and, consequently, are confident that your firm had probably pointed the law out to the arbitrator.

We would like to advise you and your client that there would be no impediment to negotiations between the union and your client concerning implementation of "on-duty" meal periods if it can be shown that the nature of the work prevents the employees from having a full 30-minute meal period. There is, of course, language in the Orders which allows an employee to waive the meal period by accepting an on-duty meal period if all of the required circumstances exist. California law has always allowed a union, as the collective bargaining representative, to act on behalf of its members where such waiver is allowed. (*Porter v. Quillin* (1981) 123 Cal.App.3d 869) However, as is the case where there is no CBA, it must be established by objective criteria, that the conditions for the on-duty meal period are met before the waiver is allowed. The parties may not agree to the on-duty meal period simply because it is desired or helpful.

Thank you for your continued interest in California labor law.

Yours truly,



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