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DEPARTMENT OF INDUSTRIAL RELATIONS

Division of Labor Standards Enforcement (DLSE)

DLSE opinion letters - withdrawn

Revised 5/28/2009

WITHDRAWN OPINION LETTERS

* Withdrawn by order of the State Labor Commissioner pursuant to Executive Order S-2-03

Letter No.	Manual Reference/Action
2003.11.03	Withdrawn 12/20/04
2003.06.11	Withdrawn 12/20/04 found
2002.12.06	Withdrawn 11/29/05
2002.12.04	Withdrawn 7/6/06
2002.06.14	Withdrawn 12/20/04
2002.08.30	Withdrawn 5/31/05
2002.08.14	Withdrawn 3/20/07
2002.01.21	56.27 (eliminated 1/30/07) Withdrawn 5/28/09
2001.04.02	Withdrawn 12/20/04
2001.03.19	45.2.6 Withdrawn 3/20/07
1999.07.19	Withdrawn 7/6/06
1998.11.06	Withdrawn 3/1/06

1996.05.29	6.1 Withdrawn 11/22/05
1995.05.10	Withdrawn 12/28/06
1993.05.25-1	56.23.8 Withdrawn 12/28/06
1993.05.17	15.1.4; 15.1.4.1; 15.1.8 Withdrawn 11/22/05
1993.02.16	Withdrawn 11/22/05
1993.02.16-1	15.1.4 Withdrawn 11/22/05
1992.07.06	54.8.5 Withdrawn 12/28/06
1991.11.01	Withdrawn 12/28/06
1991.10.31	Withdrawn 11/22/05
1991.04.11	Withdrawn 11/22/05
1991.04.10	56.23.8 Withdrawn 12/28/06
1991.02.25	15.1.9 Withdrawn 3/20/07
1990.02.22	Withdrawn 11/22/05
1988.08.31	56.23.8 Withdrawn 12/28/06
1988.08.31-1	15.1.10 Withdrawn 3/1/06
1988.04.01	Withdrawn 11/22/05

1987.01.14	15.1.10 Withdrawn 3/1/06
1987.01.13	Withdrawn 3/1/06

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STATE OF CALIFORNIA GRAY DAVIS, Governor

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MILES E. LOCKER, *Attorney for the Labor Commissioner*

November 3, 2003

Noel Anenberg
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ALSO FAXED TO: 818/474-8512

Re: Meal and Rest Period Requirements for Employees Working Alone With No Other Employees at the Work Site

Dear Mr. Anenberg:

I have been asked by Director Chuck Cake to respond to your e-mail of October 16, 2003, in which you inquired whether an employee who works alone at a gasoline station, with no other employees present at the work site, is covered by California meal and rest period requirements, or whether there is an available exemption from such requirements that would apply to single employee work-sites.

Rest period requirements are set out in the various wage orders of the Industrial Welfare Commission ("IWC"). For the most part, these requirements are the same in every wage order. Gasoline stations are covered by IWC Order 7-2001, which governs employers in the mercantile industry. Section 12 of Order 7 provides:

> (A) 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 minutes net rest time per four 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 hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.

2003.11.03

> (B) If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this order, the employer shall pay the employee one hour of pay at the employee's regular rate of compensation for each workday the rest period is not provided.

There is no exception from these rest period requirements for small employers, or for employees who work alone without other employees at a work site. However, there is a provision in the wage order, at section 17, that allows for an exemption from the rest period requirements. Section 17 provides:

> If, in the opinion of the Division [of Labor Standards Enforcement] after due investigation, it is found that enforcement of any provision contained in . . . Section 12, Rest Periods . . . would not materially affect the welfare or comfort of employees and would work an undue hardship on the employer, exemption may be made at the discretion of the Division. Such exemptions shall be in writing to be effective and may be revoked after reasonable notice is given in writing. Application for exemption shall be made by the employer or by the employee and /or the employee's representative to the Division in writing. A copy of the application shall be posted at the place of employment at the time the application is filed with the Division.

The plain language of Section 17 leaves no doubt that there can be no exemption from rest period requirements without first applying to the Division of Labor Standards Enforcement ("DLSE") for an exemption, and that no exemption can be issued by the DLSE without an investigation. The DLSE investigation consists of sending a deputy labor commissioner to the worksite to conduct interviews of affected employees, and an exemption will not issue unless the investigation establishes that such exemption would not materially affect the health and comfort of the employees. Of course, any such exemption would only be prospective from the date it is issued. An application for an exemption from rest period requirements should be sent to the attention of the State Labor Commissioner, or Deputy Chief Labor Commissioner, at the address shown on our letterhead.

Unlike the situation with rest periods, there is no

provision under the law that would allow the Labor Commissioner, or any other state officer, to exempt an employer from meal period requirements. The section of the IWC order that allows for such exemptions from rest period requirements, Section 20, fails to include the section mandating meal periods within the list of sections as to which exemptions are available. IWC wage orders in effect prior to 2000 contained a provision authorizing the Labor Commissioner to grant exemptions from meal period requirements, but with the adoption of the 2000 and post-2000 wage orders, the IWC withdrew this authorization.

Meal period requirements are set out at section 11 of the various IWC orders. Section 11 of Order 9-2001 provides, in relevant part:

> (A) No employer shall employ a person for a work period of more than five hours without a meal period of not less than 30 minutes, except when a work period of not more than six hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee. Unless the employee is relieved of all duty during a 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.** The written agreement shall state that the employee may, in writing, revoke the agreement at any time.
>
> (B) If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this order, the employer shall pay the employee one hour of pay at the employee's regular rate of compensation for each workday the meal period is not provided.

Thus, as a general rule, the required meal period must be an off-duty meal period of no less than 30 minutes in duration, during which time the employee is relieved of all duty; that is, the employee is neither required to work, nor is suffered or permitted to work. Moreover, except for employees in the health care industry covered by IWC Orders 4 or 5, the employee must be free of employer control so as to have the right to leave the

employment premises during an off-duty meal period. (*Bono Enterprises v. Bradshaw* (1995) 32 Cal.App.4th 968, reversed on other grounds in *Tidewater Marine Western v. Bradshaw* (1996) 14 Cal.4th 557, approved for the proposition cited above in *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575.)

An employer need not pay an employee for an off-duty meal period. An employer must pay an employee at his or her regular rate of pay for an on-duty meal period, as the entire on-duty meal period constitutes "hours worked". Finally, if the employer fails to provide an employee entitled to a meal period under the wage order with (1) a timely off-duty meal period of not less than 30 minutes duration, or (2) an on-duty meal that meets the requirements for a lawful on-duty meal period, the employer must pay the employee an additional one hour of pay at the employee's regular rate of pay for each day in which the employee was not provided with this lawful, required meal period.

In a normal eight hour shift, the off-duty meal period is timely if it is provided to the employee not more than five hours after the start of the workday, and not more than five hours before the end of the workday (i.e, no sooner than 3 hours and no later than 5 hours after the start of the workday). An on-duty meal period is not permitted under the wage orders unless **each of the following three factors are present:** (1) the "nature of the work" prevents the employee from being relieved of all duty during the meal period, and (2) the employee and employer entered into a signed written agreement authorizing the on-duty meal period prior to the dates in question, and (3) this written agreement explicitly states that the employee may revoke the agreement in writing at any time. In order to understand what factors the Labor Commissioner will consider in deciding whether the first of these three factors is present, please refer to the attached opinion letter of September 4, 2002. Applying the test set out in that letter to an isolated retail industry worksite in which only a single employee is present, we would conclude that this first factor is satisfied. However, that is not enough to establish a lawful on-duty meal period, absent the second and third required factors. Also, please note that the first factor will generally not be met if there is another employee employed at the worksite, as this second employee should then be able to relieve the first employee during a meal break, even if this second employee is primarily assigned to some other task.

In your e-mail, you state that the employees in question

"work alone in an environment where business is sporadic." You contend that "over the course of an eight hour shift there are myriad and sometimes lengthy opportunities to eat, smoke and to rest." Though that may be, an employee in a gasoline station (like an employee in any retail store) is considered to be on-duty if the employee is expected to wait for customers to arrive, and to ring up a sale or otherwise provide service to a customer upon the customer's arrival. Such time constitutes "hours worked" and is compensable. For the past sixty years, courts have interpreted the Fair Labor Standards Act (and similar California wage and hour laws) to require payment of time during which an employee is required to remain on the employer's premises to respond to unscheduled contingencies. As the United States Supreme Court explained in *Armour & Co. V. Wantock* (1944) 323 U.S. 126, 133:

> Of course, an employer, if he chooses, may hire a man to do nothing or to do nothing but wait for something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employment in a stand-by capacity.... Readiness to serve may be hired, quite as much as service itself.

In short, a retail clerk who is engaged to wait for customers is not off-duty while he or she is so engaged. This means that no matter how long the wait may be between customers, these employees are nonetheless entitled to meal and rest periods in accordance with the provisions of IWC Order 7-2001.

Finally, in your e-mail you state that "eating and rest breaks . . . were enumerated in our Employee Handbook, but for lack of affordable supervision, were never monitored." Employers have somewhat different obligations with respect to meal and rest periods. As to meal periods, employers have an obligation to self-police, and to ensure that employees are in fact taking required meal periods. The wage orders provide: "No employer shall employ a person" without providing the required meal period. And self-policing, even in a single employee worksite, should present no practical difficulty in that the wage orders also provide, at section 7(A)(3), that every employer maintain accurate records showing when each employee begins and ends each work period, and that "meal periods . . . shall also be reported." To be sure, the provision goes on to state that "meal periods during which operations cease . . . need not be

recorded," but it would certainly behoove any employer of an employee working at a location without supervision to record meal periods to enable the employer to review these records to ensure compliance.

As to rest periods, the employer's obligation does not extend to self-policing to ensure that employees are in fact taking their required rest breaks. The wage orders provide only that "every employer shall authorize and permit all employees to take rest periods...." "Authorize" means that employers have some affirmative obligation to advise employees of the right to take rest periods in accordance with the provisions of the wage order; and "permit" means that employers must allow employees to take the rest periods to which they are entitled, and cannot deny permission to an employee or make it impossible for an employee to exercise this right. But if an employee, after having been "authorize[d] and permit[ted]" to take the rest period that he or she is entitled to under the applicable wage order, nonetheless chooses not to take any rest period, the employer has not violated the provisions of the wage order.

We understand your concerns about the impact these laws and regulations may have on the cost of doing business. But in our role as a law enforcement agency, we must enforce the laws that have been enacted by the Legislature, and the regulations that have been adopted by the Industrial Welfare Commission, as they are written, and as interpreted by controlling judicial decisions. We hope this explanation of meal and rest period requirements will help you better understand the legal framework within which we must decide those cases that come before us.

Thank you for your interest in California wage and hour law. Feel free to contact me with any further questions.

Sincerely,

Miles E. Locker
Attorney for the Labor Commissioner

cc: Chuck Cake, Director
Art Lujan, State Labor Commissioner
Sam Rodriguez, Deputy Chief Labor Commissioner
Anne Stevason, Chief Counsel

2003.11.03

Assistant Chief Counsel
Assistant Labor Commissioners
Regional Managers
Bridget Bane, IWC Executive Officer

STATE OF CALIFORNIA GRAY DAVIS, Governor

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H. THOMAS CADELL, *Of Counsel*

June 11, 2003

Michael D. Singer
Cohelan & Khoury
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San Diego, CA 92101-5305

Re: **Meal And Rest Period Requirements** (328-329)

Dear Mr. Singer:

Anne Stevason, Chief Counsel of the Division, has asked me to respond on behalf of the Division of Labor Standards Enforcement to the two letters you wrote on April 23, 2003, regarding the above-referenced subject.

In the first letter, you ask whether, in the opinion of the Division of Labor Standards Enforcement, the compensation required by Labor Code § 226.7 to be paid to employees who are not provided with meal and/or rest periods is a wage or a penalty? In the view of the DLSE, the premium required by Labor Code § 226.7 is just that, a premium wage, not a penalty.

The statute (Section 226.7) simply requires a premium in the event an employer fails to provide an employee a meal or rest period: The "employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation".

Unlike the provisions of, for instance, Labor Code §§ 203, 203.1 or 203.5 which provide for wages to "continue as a penalty", Labor Code § 226.7 simply requires the additional hour of pay as a premium for working under the circumstances. There is no mention of a "penalty" aspect of the requirement. It should also be noted that Section 203 actually provides that the action to recover the penalty is subject to the same statute of limitations as the action for the wages from which the penalties arise. Obviously, the Legislature was aware of the fact that the statute of limitations on actions to recover penalties would be limited to the one-year period provided in Code of Civil Procedure § 340(a).

We, too, are aware of the use of the word "penalty" in the IWC Statement As To The Basis concerning Wage Order 16. As you point out, that is the only use of the word in any of the Commission's discussions.

Actually, use of the word penalty to describe a premium required to be paid by an employer is not unusual but such usage does not imply that the premium is subject to the restrictive rules contained in C.C.P. § 320(a). In the case of *Industrial Welfare Commission v. Superior Court* (1980) 27 Cal.3d 690, for example, the California Supreme Court notes that in the Statement adopted by the Commission concerning the 1980 Orders the IWC stated:

> "The Commission relies on the imposition of a premium or penalty pay for overtime work to regulate maximum hours consistent with the health and welfare of employees covered by this order." *Id.* at 713. (Emphasis added)

Again, in the case of *Skyline Homes v. Department of Industrial Relations* (1985) 165 Cal.App.3d 239; 211 Cal.Rptr. 792; 166 Cal.App.3d 232(c); disapproved on other grounds in *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 573, 59 Cal.Rptr.2d 186, 927 P.2d 296), the court noted:

> "Amicus argues that the purpose and intent of federal and state law is to spread work more evenly throughout the work force by discouraging employers from requiring more than 40 hours work and to compensate employees for the strain of working long hours, and that the fluctuating workweek comports with this purpose. This argument ignores the fact that in California overtime wages are also recognized as imposing a premium or penalty on an employer for using overtime labor, and that this penalty applies to excessive hours in the workday as well as in the workweek." *Id.*, at 249 (Emphasis added).

It could hardly be argued that the overtime wages which the IWC and the California courts refer to as "a premium or penalty on an employer" would be considered a "penalty" subject to the restricted statute of limitations of C.C.P. § 340(a). It is simply a way of describing the effect of a premium wage requirement. Like the premium time and one-half and double time imposed on employers who work employees more than the standard hours in a day which the IWC has found to be healthful, the provisions of Labor Code § 226.7 imposes a premium requirement upon the employer who finds it necessary to production goals to deny an employee the required rest period or duty-free meal periods. Requiring such a premium encourages employers to provide the meal and rest periods which the IWC has found necessary.

Applying the common rules of statutory construction, the nature of the statute would require that, as with all "remedial legislation" it "is to be liberally construed to accomplish its evident purpose". (*Brown v. Smith* (1997) 55 Cal.App.4th 767, 778) The evident purpose of Labor Code § 226.7 is to insure that employees who are inconvenienced by the denial of rest periods and meal periods are properly compensated.

In your second letter of April 23rd, you ask whether an employer is responsible for Labor Code § 226.7 premium when the employer has a policy that rest periods are permitted but, as a practical matter, employees are not able to be relieved of duties and end up not getting their rest periods.

You provide the following example:

> "A private corporation provides detention officers for a detention facility housing over 1,000 detainees. For each shift, there are approximately 30 or more detention officers performing various functions around the facility. The employer advises the employees that they are authorized and permitted to take two paid ten-minute rest periods per eight-hour shift. In order to take a rest period, officers must radio their supervisor and be "relieved" at their station by another officer. ¶As a practical matter, the officers are consistently unable to take their rest periods because the supervisors do not provide relief officers to take over their duties. The officers are told they must check back later, but when they do, the supervisor does not permit the rest period."

In your letter, you contend that the officers believe that the failure to have sufficient reserves to allow relief is the result of under staffing.

This, of course, raises a factual determination; but at the same time, the trier of fact can rely upon certain presumptions and assumptions. The employer not only has the duty to allow the rest periods, but also has an affirmative duty not to interfere in the employee's ability to take the rest periods free of duty[1]. Simply repeating a mantra to the effect that "all employees are authorized to take rest periods", while at the same time placing obstacles in the path of employees who attempt to take the rest period, does not comply with the IWC Orders. The California Supreme Court was faced with a similar (though unrelated) situation in the case of *Ramirez v. Yosemite Water Company, Inc.* (1999) 20 Cal.4th 785, when it discussed the question of whether an exemption was available to outside salespersons. The issue involved whether the salesperson actually spent more than fifty percent of his or her time engaged in sales. In that case, our Supreme Court stated:

> "The logic inherent in the IWC's quantitative definition of outside salesperson dictates that neither alternative

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[1]Rest periods are "paid time" and while the Orders require that the employee be relieved of his or her duties during the ten-minute "net" period, the time is still counted as "hours worked". Thus, the employer may place certain restrictions on the employee (for instance, not allow the employee to leave the employer's premises) during this period.

> would be wholly satisfactory. On the one hand, if hours worked on sales were determined through an employer's job description, then the employer could make an employee exempt from overtime laws solely by fashioning an idealized job description that had little basis in reality. On the other hand, an employee who is supposed to be engaged in sales activities during most of his working hours and falls below the 50 percent mark due to his own substandard performance should not thereby be able to evade a valid exemption. A trial court, in determining whether the employee is an outside salesperson, must steer clear of these two pitfalls by inquiring into the realistic requirements of the job. In so doing, the court should consider, first and foremost, how the employee actually spends his or her time. But the trial court should also consider whether the employee's practice diverges from the employer's realistic expectations, whether there was any concrete expression of employer displeasure over an employee's substandard performance, and whether these expressions were themselves realistic given the actual overall requirements of the job." *Id.* at 802. (Emphasis added)

To extrapolate this lesson by the Supreme Court to the situation you describe, it appears obvious that the reasonable expectations of the employer must be considered and then the issue must be whether there was any "concrete expression of employee displeasure" over the fact that rest periods were not "reasonably" available. The employer may not hide his head in the sand, nor may the employee fail to convey to the employer that he or she cannot reasonably meet the expectation of the employer that rest periods are available given "the actual overall requirements of the job".

We hope this adequately addresses the issues you raised in your letters. Thank you for your continued interest in California labor law.

Yours truly,

H. THOMAS CADELL, JR.
Attorney for the Labor Commissioner

c.c. Arthur Lujan, State Labor Commissioner
Sam Rodriguez, Chief Deputy Labor Commissioner
Anne Stevason, Chief Counsel
Assistant Labor Commissioners
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STATE OF CALIFORNIA GRAY DAVIS, Governor

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H. THOMAS CADELL, *Of Counsel*

December 6, 2002

Alexander Collins, Jr.
Baker, Manock & Jensen
5260 North Palm Ave., 4th Floor
Fresno, CA

Re: **Personal Attendant Under Order 15** (00222)

Dear Mr. Collins:

I have been asked to respond to your letter addressed to Al Weaver, Senior Deputy Labor Commissioner, concerning the above-referenced subject.

Specifically, you ask whether an individual who cares for a person with advanced age and physical disabilities (i.e., opens pill bottles and places pills on table for person to take, drives person to doctor appointments, cooks for person) qualifies as a personal attendant as defined in IWC Order 15, Section 2(J)?

Section 1(B)[1] of Order 15 provides:

"Except as provided in Sections 1, 2, 4, 10, and 15, the provisions of this order shall not apply to personal attendants. The provisions of this order shall not apply to any person under the age of 18 who is employed as a baby sitter for a minor child of the employer in the employer's home."

Section 2(J) of Order 15 defines a personal attendant:

"'Personal attendant' includes baby sitters and means any person employed by a private householder or by any third party employer recognized in the health care industry to work in a private household, to supervise, feed, or dress a child or person who by reason of advanced age, physical disability, or mental deficiency needs supervision. The status of 'personal attendant' shall apply when no significant amount of work other than the foregoing is required."

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[1]Note that your letter incorrectly states the language in the Order.

Thus, for purposes of Order 15, covering household occupations, personal attendants (except minors babysitting another minor) must be paid minimum wages, but need not be paid premium overtime pay.

The DLSE has historically taken the position that "practical nurses are explicitly covered by Order 15 and may not be exempted as personal attendants even though many of their duties are the same. Any worker who regularly gives medication or takes temperatures or pulse or respiratory rate, regardless of the amount of time such duties take, falls within some classification of nurse, licensed or unlicensed." (Interpretive Bulletin 86-1) I make this observation only because your description of the work performed by the workers you are describing could be construed to include administering medications.

DLSE has opined that more is required to establish that the employee is engaged in nursing than that the employee hands a pill or other medication to the employer (Opinion Letter 1994.02.03). However, we have also pointed out that frequency of the giving of medication would defeat the personal attendant exemption. The DLSE position is set out more fully in O.L. 1994.02.15.

> "Initially, it must be pointed out that applicability of the FLSA and the regulations adopted by the Secretary of Labor pursuant to the Act, differ substantially from the coverage of the California IWC Orders. For instance, nurses are specifically covered under the IWC Orders while they are considered exempt under the provisions of 29 C.F.R. 541.302(e)(1) if they are licensed. Additionally, as was pointed out in [O.L. 1992.09.14] the IWC Orders do not provide any exemption categories of "domestic workers" as does the FLSA. The exemption contained in the IWC Order is only applicable to "personal attendants" as defined[2]. This definition does not comport with the definition of "companionship services" contained at 29 C.F.R. §552.6. The federal definition assumes that "meal preparation, bed making, washing of clothes, and other similar services" are an inherent part of the duties of the "companion". Those same regulations also allow the "companion" to perform "general household work: *Provided, however,* That such work is incidental, *i.e.,* does not exceed 20 percent of the total weekly hours worked."

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[2]The federal definition excludes "baby sitter" from its definition of "companionship services" while the state includes baby sitter within the definition of "personal attendant".

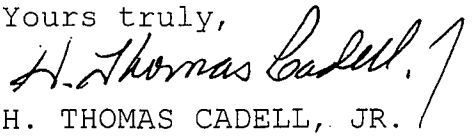
"The IWC Orders specifically provide that the exemption covers those who 'supervise, feed, or dress' the individual. The Orders then provide that the exemption shall apply 'when no significant amount of work other than the foregoing is required.' Thus, making beds, meal preparation, washing clothes and other similar services are not included in the work expected of the 'personal attendant'. However, this is not to say that such work may not be performed at all. But, if a significant amount[3] (20%) of the work the individual is performing is other than supervision, feeding or dressing the child or adult, there is no exemption for any of the work.

"The exemption, as with all exemptions from this remedial legislation, is narrowly construed. Additionally, as with all exemptions, the inquiry is fact-intensive. Thus, this Division will not attempt to give an opinion as to whether or not the workers employed by your client are exempt based upon a description of the work."

Your second question is: "Assuming an individual qualifies as a personal attendant and also lives on the premises of the physically disabled elderly person, is the personal attendant subject to the work day limitations of Section 3(A) above?"

Assuming the employee is found to be a personal attendant under Order 15, Section 1(B) of the Order limits the applicability of the order to Sections 1, 2, 4, 10 and 15; thus, none of the provisions found in Section 3 would apply.

Yours truly,



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c.c. Arthur Lujan, State Labor Commissioner
Tom Grogan, Chief Deputy Labor Commissioner
Anne Stevason, Acting Chief Counsel
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[3]The DLSE has adopted the amount of 20% (the same amount used in the Federal Regulations regarding companionship services) in determining what is "significant".

STATE OF CALIFORNIA GRAY DAVIS, Governor

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H. THOMAS CADELL, *Of Counsel*

December 4, 2002

Laura Lough, Esq.
American Payroll Association
30 East 33rd Street
New York, NY 10016-5386

Re: **Electronic Delivery of Pay Stubs** (000193)

Dear Ms. Lough:

This is in response to your letter directed to Anne Stevason, Chief Counsel of the Division of Labor Standards Enforcement. Ms. Stevason has asked me to respond to the questions you raise in your letter.

Labor Code § 226(a) states:

"(a) Every employer shall, semimonthly or at the time of each payment of wages, furnish each of his or her employees, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately when wages are paid by personal check or cash, an itemized statement in writing showing (1) gross wages earned, (2) total hours worked by the employee, except for any employee whose compensation is solely based on a salary and who is exempt from payment of overtime under subdivision (a) of Section 515 or any applicable order of the Industrial Welfare Commission, (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis, (4) all deductions, provided, that all deductions made on written orders of the employee may be aggregated and shown as one item, (5) net wages earned, (6) the inclusive dates of the period for which the employee is paid, (7) the name of the employee and his or her social security number, (8) the name and address of the legal entity that is the employer, and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.

"The deductions made from payments of wages shall be recorded in ink or other indelible form, properly dated, showing the month, day, and year, and a copy of the statement or a record of the deductions shall be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California.
"An employer that is required by this code or any regulation adopted pursuant to this code to keep the information required by this section shall afford current and former employees the right to inspect or copy the records pertaining to that current or former employee, upon reasonable request to the employer. The employer may take reasonable steps to assure the identity of a current or former employee. If the employer provides copies of the records, the actual cost of reproduction may be charged to the current or former employee.
"This section does not apply to any employer of any person employed by the owner or occupant of a residential dwelling whose duties are incidental to the ownership, maintenance, or use of the dwelling, including the care and supervision of children, or whose duties are personal and not in the course of the trade, business, profession, or occupation of the owner or occupant."

You state that there appears to be some confusion regarding whether or not the State of California allows employers to electronically deliver pay stubs to employees.

Based on an Opinion Letter written by then Chief Counsel Miles Locker, dated July 19, 1999, to Senator Richard Rainey and Assemblywoman Lynne Leach, you conclude that pay statements may be electronically delivered in California as long as the specific conditions outlined in that letter are met. You point out that Labor Code § 226 was amended by AB 2509 effective January 1, 2001, but that the amendments would not appear to change the conclusions reached in the Opinion Letter dated July 19, 1999.

We agree that so long as the specific conditions outlined in the Opinion Letter dated July 19, 1999, are met, electronically delivered pay stubs will meet the requirements of California law. We feel that it is important that we review the conditions imposed in the July 19, 1999, correspondence.

Initially, DLSE required employees who are hesitant to use computers or who have privacy concerns about electronic data, or who simply believe that their own record keeping needs would be better served by traditional paper wage deduction statement, must have the unfettered option, under Labor Code § 226, to receive the information in a non-electronic form.

For those employees who choose to receive the information electronically, the DLSE required the employer[1] to set up a system that would represent each worker's paycheck electronically, with the electronic representation of each paycheck available from an internet web site managed by the payroll company as a service to its customers.

According to the proposal, the web site would be secure using industry standard security and encryption technology. Employee access would be controlled through the use of unique employee identification and confidential personal identification numbers. Firewalls would be implemented to prevent unauthorized access to this information. The proposal also offered access to the website using properly configured web browsers through terminals located at the work site and from home computers with configuration being made available to employees to allow access. The service would be available 24/7 with the exception of occasional downtime to permit standard system maintenance. At work, every employee would have access to either an individual or network printer[2] at all reasonable hours throughout the day with no more than a minimal delay to enable each employee to print the electronic check/paystub image at no cost to the employee.

The proposal accepted by DLSE required that the employer who elects to comply with Labor Code § 226 by offering electronic wage deduction statement make all of the information required under that statute available to employees for downloading and printing for no less than three years as required by statute.

DLSE will approve any program which meets the specific terms set out in this letter. However, since every program contains nuances, the Labor Commissioner must insist that any employer proposing to use new technology must first seek specific DLSE approval before instituting the program in California. In view of the many nuances, blanket approvals are not possible. We reserve judgment on the statements in your letter to the effect that APA members have been told DLSE has a total ban on such programs.

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[1]The employer may delegate the procedure to a payroll company which would act as the agent of the employer. However, it must be noted that the employer is ultimately responsible for meeting the requirements of the law and may not delegate this responsibility.

[2]DLSE takes the position that it is not necessary that each employee have access to his or her own personal computer. If printing the payroll data is to be accomplished on networked printers, the printer must be secure so as to prevent others from printing the employee's personal data and the employee must be situated close enough to the network printer to eliminate any risk that the data, once printed, can be taken by someone else.

In order to alleviate any confusion by DLSE staff concerning the position of the Division on this issue, Chief Counsel Stevason has asked me to assure you that a copy of this letter will be disseminated to all offices.

Thank you for your continued interest in California labor law.

Yours truly,

H. THOMAS CADELL, JR.
Attorney for the Labor Commissioner

c.c. Arthur Lujan, State Labor Commissioner
Tom Grogan, Chief Deputy Labor Commissioner
Anne Stevason, Chief Counsel
Assistant Labor Commissioners
Regional Managers

STATE OF CALIFORNIA GRAY DAVIS, Governor

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MILES E. LOCKER, *Chief Counsel*

April 2, 2001

Richard D. Prochazka
Richard D. Prochazka & Associates
PO Box 881566
San Diego, CA 92168-1566

Re: Meal Period and Rest Period Requirements for Ready-Mix Drivers Working Under the Terms of a Collective Bargaining Agreement

Dear Mr. Prochazka:

This in response to your letter of November 22, 2000 to State Labor Commissioner Art Lujan, in which you inquired about the applicability of meal period and rest period requirements that arise under the Labor Code or the appropriate Industrial Welfare Commission ("IWC") order to ready-mix drivers who deliver product from the cement plant to the purchaser's jobsite. Please accept my apology for the delay in providing a response.

You state that these drivers are employed by the businesses that manufacture the ready-mix, and that they are covered by a collective bargaining agreement which is silent as to breaks, but which provides for an uninterrupted 30 minute unpaid lunch period, to commence near the middle of the worker's shift, during which time the employee is relieved from duty. However, the collective bargaining agreement expressly provides that these employees may waive the unpaid meal period by filing a written waiver with the employer, and that this provision has been applied to allow a driver to waive the lunch period in order to complete an eight hour work shift after only eight hours. These drivers are permitted to eat while driving, or while waiting to load or unload.

Finally you note that the industry tradition is that breaks are taken "on the fly," either while the driver is waiting on line to load at the batch plant, or perhaps by quickly stopping to get a cup of coffee en route to the purchaser, or while waiting on line to unload product at the purchaser's jobsite. You state that such breaks often do not exceed five minutes duration, but that a driver may take several such breaks during a workday.

Ready-mix drivers engaged in the delivery of cement from a cement plant to a construction job-site, if employed by the business that manufactures the cement, are covered by IWC Order 1-2001. This wage order governs wages, hours and working conditions of all employees employed by employers in the "manufacturing industry," which is defined to include "any . . . business . . . operated for the purpose of . . . preparing, producing, [or] making . . . goods, articles, or commodities." (IWC Order 1-2001, subd. 2(H).)

The first issue that we address is whether the existence of a collective bargaining agreement covering these drivers exempts them from the wage order's meal period requirements. Initially, we note that meal period requirements are also founded upon statute. (See Labor Code §512, enacted as part of AB 60.) But AB 60 contains an opt-out provision for workers covered by certain collective bargaining agreements, so that section 512 would not apply to any employee covered by a CBA, if the CBA 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 §514.) But the IWC retained the authority to maintain or establish higher standards than those set by statute, and as such, the IWC could (and did) decide to maintain certain pre-existing requirements, and adopt certain new requirements governing meal periods that, in most wage orders, apply to all workers whether or not they are covered by CBAs[1]. (See Labor Code §§1173, 1198.) Thus, the meal period requirements set forth in IWC Order 1-2001 would apply to the ready-mix drivers in question.

These meal period requirements are found at subdivision 11 of Order 1-2001, and provide, in relevant part, as follows:

(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 the employer and employee.

(B) An employer may not employ an employee for a work period of more than ten (10) hours per day without providing the employee with a second meal period of not less than thirty (30) minutes, except that if the total hours worked is no more than twelve (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

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[1] IWC Order 16-2001, governing on-site construction, drilling, mining and logging occupations, contains a CBA opt-out which exempts workers covered by a CBA that meets the specifications described at Labor Code §514 from most of the wage order's provisions regarding meal periods. No other wage order contains any sort of CBA opt-out from meal period requirements.

not waived.

(C) Unless the employee is relieved of all duty during a 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. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.

(D) If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this Order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day that the meal period is not provided.

Thus, as a general rule, an employee working an eight hour day is entitled to an off-duty meal period, which need not be paid, provided the meal period is not less than 30 minutes, and the employee is relieved of all duty during that period, performs no work during that period, and is free to leave the worksite during that period. (See *Bono Enterprises v. Labor Commissioner* (1995) 32 Cal.App.4th 968, *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 582.) If the meal period is less than 30 minutes, or if the employee is not relieved of all duty during the meal period, or if the employee works during the meal period, or if the employee is restricted to the worksite during the meal period, it is treated as an "on-duty meal period," and it is fully compensable as "hours worked".

There are two kinds of on-duty meal periods: those that are permissible under the IWC orders, and those that are not. In order to have a permissible on-duty meal period: 1) the nature of the work must prevent the employee from being relieved of all duty, *and* 2) the employee and employer enter into a written agreement authorizing the on-duty meal period, *and* 3) this written agreement expressly states that the employee can revoke the agreement in writing at any time. An on-duty meal period is not permitted if *any* of these factors are not present. And if the employee is working an on-duty meal period that is not permitted under the IWC order, or if the employee is not getting any meal period at all, then the employee is entitled to one hour of pay at the employee's regular rate of pay, as a penalty for the employer's failure to provide a lawful meal period, for each day that the required meal period is not provided.

An employee's written waiver of the off-duty meal period, by itself, is not sufficient to create a lawful on-duty meal period. Your letter does not indicate that it is the nature of the work that prevents the employee from being relieved of all duty.

Rather, it appears that to a large degree, the waiver is used to allow the employees to end their workday a half hour early by skipping the unpaid, off-duty meal. That being the case, the failure to provide an off-duty meal period constitutes a violation of the order's meal period provisions, thereby entitling these drivers to payment of one additional hour at their regular rate of pay for each day in which they were deprived of the required off-duty meal period[2].

Rest period requirements are found at subdivision 12 of Order 1-2001. Initially, we note that a rest period is considered compensable work time, and an employee must be paid at his or her regular rate for any required rest period. Order 1-2001, subdivision 12 provides:

A) 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 (3 ½) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.

(B) If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this Order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day that the rest period is not provided.

The rest period requirement in Order 1-2001 contains no collective bargaining agreement opt-out. The phrase "ten minutes net rest time" has been previously interpreted to require that as to each required rest period, the employee must be free from work for ten minutes, not including any additional time needed to walk to a place of rest. Also, the Labor Commissioner has followed a long-standing enforcement policy, based on a review of IWC's intent as set out in transcripts leading up to the adoption of the 1980 wage orders (which contained the requirement for rest breaks of "ten minutes net rest time"), that multiple

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[2] Of course, to the extent that a meal break cannot be provided during a workday because "the nature of the work prevents the employee from being relieved of all duty," *and* the employee has previously signed a voluntary authorization for an on-duty meal period that comports with the requirements of the IWC order, the employer is not liable for the penalty pay. In situations where the product would be damaged or destroyed if the employee takes an off-duty meal period, the existence of a voluntary written authorization would therefore permit an on-duty meal period. For example, the nature of the work would probably prevent an off-duty meal period during a cement pour, if the services of the driver are needed during the pour.

"incremental rest periods" will not be permitted in lieu of a full ten-minute rest period. (see attached opinion letter by former Labor Commissioner Lloyd W. Aubry, Jr., dated January 3, 1986.) Consequently, the practice you describe of multiple breaks in which no one break equals ten minutes would not meet the requirements of the IWC order. Unless the employees were "authorized and permitted" to take the full "ten minutes net" required break(s), these employees would be entitled to one hour pay at the regular rate as a penalty for each day a required rest period is not provided.

There is, to be sure, a significant difference between required meal and rest periods. An employer is liable for the meal period penalty not only if the employer prohibits the employee from taking the required meal break, but also, if the employee (though authorized and permitted to take a meal break) works, with the employer's sufferance or permission, during the period that the employee had been authorized to take his or her meal period. An employer is deemed to have suffered or permitted the employee to work if the employer (or the employer's agent, including managers and supervisors) knew, or reasonably should have known, that the employee was working instead of taking the required meal break. And an employer should always have that knowledge, in view of the employer's record keeping obligations under subdivision 7 of the wage order.

In contrast, as long as an employer authorizes and permits his employees to take their required rest periods (and clearly communicates this authorization and permission), the employer will not be liable for the rest period penalty if the employees fail to take the full amount of authorized time for their rest breaks, provided that the employees did not forego the full rest period as a result of employer coercion or encouragement. An employer is not required to monitor employees to ensure they take the full rest period, and subdivision 7 of the wage order expressly states that rest periods need not be recorded.

Thank you for your interest in California wage and hour law. Feel free to contact us with any further questions.

Sincerely,

Miles E. Locker
Chief Counsel

cc: Art Lujan
Tom Grogan
Roger Miller
Greg Rupp
Nance Steffen
Doug McConkie, IWC
All DLSE Attorneys

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ADDRESS REPLY TO:
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San Francisco, CA 94101

IN REPLY REFER TO:

January 3, 1986

Fresno, CA 93727

Dear

Thank you for your letter of December 22, 1985, outlining the differences of opinion between yourself and our staff concerning Industrial Welfare Commission Order 8-80, Section 12, Rest Periods.

I have examined the records of the Industrial Welfare Commission and found that the language in Section 12, "at the rate of ten (10) minutes net rest time per four (4) hours" was developed after discussion of a proposal to extend the ten minute rest period to fifteen or twenty minutes. The point of the proposal was to insure that the employee would be free from work for ten minutes and the rest period would not include any time to walk or otherwise travel to a place of rest. Rather than adopt such a provision, the Commission opted for the term "net" to cover all the different situations involved where rest periods are concerned.

As you mentioned in your letter, the Commission also reviewed a proposal to permit incremental rest periods to be used in lieu of a full ten minute period. However, the Commission took the opposite position by finding that there should be a full ten minute rest period, particularly where employment is around noisy machinery, noxious fumes or other intrusions on the ambience, and that "net" referred to no travel time.

Therefore, it is my opinion that employees engaged in the cotton gin industry are entitled to a full ten minute rest period as provided in IWC Order 8-80, Section 12.

I hope this answers your questions; if not, please let me know.

Very truly yours,

Lloyd W. Aubry, Jr.
State Labor Commissioner

LWA:ba

STATE OF CALIFORNIA GRAY DAVIS, Governor

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MILES E. LOCKER, *Chief Counsel*

July 19, 1999

Senator Richard K. Rainey
California State Senate
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Walnut Creek, CA 94596

Assemblywoman Lynne Leach
California State Assembly
800 S. Broadway #304
Walnut Creek, CA 94596

Re: **Electronic Itemized Wage Statements**

Dear Senator Rainey and Assemblywoman Leach:

This is in response to your letter dated May 14, 1999 to Stephen Smith, the Director of the Department of Industrial Relations, on the issue of the legality of electronic itemized wage statements under Labor Code section 226. Initially, please accept my apologies for the delay in getting this response to you.

The particular question that you pose was initially presented to the Division of Labor Standards Enforcement ("DLSE") by a letter, dated August 4, 1998, from Roberta Romberg on behalf of ProBusiness Systems, Inc., a company that provides payroll services to other businesses. According to that letter, ProBusiness sought to establish a system of "paperless payroll services," at the option of its business clients, incorporating the use of electronic pay statements. The electronic form of the paycheck (or direct deposit advice) would include all of the information required by Labor Code section 226, and would be available to the employees through the web site on or before the pay date.

Specifically, ProBusiness proposed to set up a system that would represent each worker's paycheck electronically, with the electronic representation of each paycheck available from an Internet web site managed by ProBusiness as a service to its clients. According to this letter, the web site would be secure using industry standard security and encryption technology. Employee access would be controlled through the use of unique employee identification ("ID") and confidential personal identification ("PIN") numbers. So-called firewalls would be implemented to prevent unauthorized access to this information.

The letter further stated that the website would be accessible using properly configured web browsers, and that access would be available both through terminals located at the worksite and home computers, with minimum configuration requirements to be made available to employees to enable them to configure their home computers to allow for access. The service would be available for access 24 hours a day, seven days a week, with the exception of occasional downtime to permit standard system maintenance. At work, every employee would have access to either an individual or network printer, to enable each employee to obtain a printout of the electronic check image, at no cost to the employee.

The letter presented us with three questions. First, whether the proposed system described above satisfied the requirements of Labor Code sections 226 and 1174. Second, we were asked whether employers using this service could mandate the conversion to electronic pay statements and entirely eliminate paper versions of paychecks, direct deposit advices, and itemized wage deduction statements. Finally, we were asked whether compliance with these Labor Code provisions require employee access to a private or dedicated printer, as opposed to a network printer.

By letter dated November 10, 1998, DLSE staff counsel Michael S. Villeneuve answered the questions posed by Ms. Romberg's letter. To the extent that the proposal suggested that an employer could escape from the obligation to provide an employee with a hard copy of the itemized wage deduction statement, Mr. Villeneuve concluded that the proposal did not meet the requirements of Labor Code sections 226 and 1174. Specifically, Mr. Villeneuve wrote that an employer cannot "mandate conversion [to electronic representations] and eliminate the paper version entirely."

This lead to another letter to DLSE on behalf of ProBusiness, dated February 22, 1999, and authored by Kenneth B. Stratton. This letter stated that based upon the concerns expressed in DLSE's initial response, ProBusiness has revised its proposal to offer electronic itemized wage statements to its California clients. Under the revised proposal, employees who do not wish to receive their wage deduction statements via electronic representations will continue to receive such statements in their traditional, paper form. Likewise, any employee lacking free Internet access, or free access to both a computer terminal and a printer at the workplace will continue to receive paper itemized wage statements. Moreover, under the revised proposal every employee will always have the option of requesting paper paychecks and paper itemized wage deduction statements, and every employee may therefore switch back, at the employee's request, from electronic representations to traditional paper.

Also, under the revised proposal, ProBusiness will maintain on its website each employee's complete payroll information for more than one year, and a year-end summary for each employee for three years. Finally, according to this letter, ProBusiness' clients will maintain records of deductions from payment of wages "in ink or other indelible form" at central locations within the State of California for at least three years as required by Labor Code sections 226 and 1174.

This letter was followed by your letter, dated May 14, 1999, to Director Stephen Smith, in which you correctly note that under the revised proposal, "any employee who wishes to receive a paper itemized wage statement may do so."

Labor Code §226(a) provides, in relevant part:

"Every employer shall semimonthly, or at the time of each payment of wages, furnish each of his or her employees either as a **detachable part** of the check, draft or voucher paying the employee's wages**, or separately** when wages are paid by personal check or cash, an itemized **statement in writing** showing: (1) gross wages earned; (2) total hours worked by each employee whose compensation is based on an hourly wage; (3) all deductions; provided that all deductions made on written orders of the employee may be aggregated and shown as one item; (4) net wages earned; (5) the inclusive dates of the period for which the employee is paid; (6) the name of the employee and his or her

social security number; and (7) the name and address of the legal entity which is the employer.

The deductions made from cash payments of wages shall be **recorded in ink or other indelible form**, properly dated, showing the month, day, and year, and a copy of the statement, or a record of the deductions, shall be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California." (emphasis added.)

Labor Code §1174 requires employers, among other things, to "keep at a central location in the state or at the plants or establishments at which employees are employed, payroll records showing the hours worked daily by, and the wages paid to, employees employed at the respective plants and establishments, and which shall be kept in accordance with rules established for this purpose by the [Industrial Welfare] commission, but in any case shall be kept on file for not less than two years." Each of the Industrial Welfare Commission wage orders contains a section dealing with required payroll records, which states that "all required records shall be in the English language and **in ink or other indelible form**, properly dated, showing month, day and year, and shall be kept on file for at least three years at the place of employment or at a central location within the State of California. . . ." (see, e.g., IWC Order 4, para. 7, emphasis added.)

Applying the facts that have been presented to us to these statutory requirements, it is our conclusion that ProBusiness' proposal to provide employees with wage deduction statements in an electronic form, **as revised in accordance with the letter dated February 22, 1999**, meets the requirements of Labor Code sections 226 and 1174, subject to the guidelines discussed below.

The word "detachable" as used in Labor Code section 226 means that the wage deduction statement must be capable of being detached, disengaged or removed from the paycheck; that is, it must be capable of being made separate from the paycheck. The purpose behind this is quite simple - - it is intended to ensure that the required information will not be lost to the employee once the paycheck is deposited, and that the employee will have a simple way of keeping this information for his or her own records. The phrase "statement in writing," as used in section 226(a), "includes any form of recorded message capable of comprehension by ordinary visual means." (see Labor Code §8)

This definition includes electronic representations that are readable on a computer screen and printable by using an attached printer. The phrase "recorded in ink or other indelible form," found at Labor Code §226(a) and in paragraph 7 of the various IWC orders, means that these records, which must be kept on file by the employer for at least three years, must be maintained in a printed form, or in an electronic form that cannot be tampered with or altered once the information has been recorded, and that can be printed in an indelible format upon request of the employee or the DLSE. This conclusion is consistent with the obvious purpose behind the requirement of "ink or other indelible form," namely, to prevent an employer from altering previously generated records.

By letter dated July 26, 1995, the DLSE's former chief counsel, H. Thomas Cadell, Jr., concluded that the use of electronically generated and recoverable payroll data will satisfy the requirements of Labor Code §1174 if all of the following conditions are present:

1. The worker has personal access at all reasonable hours to a terminal, provided at the employer's expense, where the information may be accessed;

2. The terminal has a printer which may be used by the worker to produce a hard copy of his or her payroll records; and

3. The information available through the computer meets the requirements of section 1174 and the applicable IWC Order.

And of course, although not stated in the letter of July 26, 1995, the required records must be maintained by the employer for no less than three years, at the place of employment or at a central location in the State of California, and must be made available to the employee and to DLSE upon request.

These same criteria apply in determining the legality of electronic deduction statements under Labor Code §226. But section 226 differs from section 1174 in that it requires that the employer not only maintain certain payroll records (and make those records available to employees upon request), but also, that these records be **"furnished to", or provided to** each employee each time wages are paid. Again the purpose behind section 226 is to ensure that employees have the ability to maintain their own set of pay records. This purpose would be subverted by a denying employees the option of receiving a traditional paper wage deduction statement instead of an

electronic representation. Employees who are hesitant to use computers, or who have privacy concerns about electronic data, or who simply believe that their own record keeping needs would be better served by traditional paper wage deduction statements, must have the option, under Labor Code section 226, to receive the information in a non-electronic form. In that ProBusiness' revised proposal meets this concern, it does not run afoul of section 226.

However, there is one aspect of the revised proposal that must be modified. According to the February 22, 1999 letter, ProBusiness will maintain on its website each employee's "complete payroll information for more than one year," and "year-end summaries for each employee for three years." Employees who do not opt-out from the system of electronic wage statements may or may not choose to print each electronic statement at the time it is generated. Many employees may decide not to expend the time and energy (however minimal an amount that may be) needed to download and print the data each pay period, and instead, will rely on the data's accessibility in the computer system should they ever feel the need to later obtain a hard copy of prior wage deduction statements. Since this information is required to be maintained by the employer for at least three years, and since California law provides for a three year statute of limitations for actions based on statute, we believe that an employer who elects to comply with Labor Code §226 by offering electronic wage deduction statements must make **all** of the information required under that statute available to employees for downloading and printing for no less than three years; a "year-end summary" is not sufficient.

Finally, we do not believe that each employee must have access to his or her own personal, dedicated printer. However, certain privacy concerns do come into play. If printing of electronic data is to be accomplished through network printers, the employee must be situated close enough to the network printer to eliminate any risk that the data, once printed, can be taken by someone else. Also, the network printer (like the computer and the website) must be secure so as to prevent others from printing the employee's personal data. Furthermore, the network printer must be available for printing the wage deduction statement at all reasonable hours throughout the day with no more than a minimal delay, so that the employee is not discouraged from having the data printed.

We believe that ProBusiness' revised proposal, as modified by the above guidelines, meets the requirements of Labor Code

section 226, while striking a careful balance between employers' interests in seeking to take advantage of less expensive electronic methods of providing payroll data, and workers' interests in obtaining their payroll records in whatever manner that each worker finds to be most convenient and accessible.

Thank you for allowing us the opportunity to revisit this issue, and for your interest in California labor law.

Sincerely,

Miles E. Locker
Chief Counsel, DLSE

cc: Stephen Smith, Director, Department of Industrial Relations
Marcy Saunders, State Labor Commissioner
Rich Clark, Chief Deputy Labor Commissioner
Nance Steffen, Assistant Labor Commissioner
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MILES E. LOCKER, *Chief Counsel*

November 6, 1998

John Hoang Sarvey
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Re: **Employment Status of AmeriCorps Participants Under California Law**

Dear Mr. Sarvey:

This letter is in response to your request that the State Labor Commissioner review the opinion, initially expressed in a letter dated April 23, 1996 from former chief counsel H. Thomas Cadell, Jr. to James Phipps of the California Commission on Improving Life Through Service, that AmeriCorps "members" who work for private nonprofit organizations are not exempt from the minimum wage and overtime provisions of California's Industrial Welfare Commission ("IWC") orders.

Mr. Cadell's letter examined the issue of whether, as a matter of state law, AmeriCorps "members" are volunteers exempt from state wage and hour law, or whether they are employees within the meaning and coverage of the IWC orders. In reaching the conclusion that these "members" are employees, this opinion letter confined its analysis to state wage and hour law; that is, there was no discussion of whether the National and Community Service Act, 42 USC §12501, et seq., the federal law which created the AmeriCorps program, mandated a different treatment of these "members".

Insofar as the April 23, 1996 opinion letter discusses state wage and hour law, the conclusions expressed therein are accurate. The fact that AmeriCorps "members" receive payment (a monthly "stipend") for the work they perform for the nine to twelve month period of service with a private nonprofit organization, coupled with the fact that this organization pays the "members" (from funds received from AmeriCorps) and controls the hours and work performed by the "members" compels a finding, under California law, that these "members" are employees rather

than volunteers. And since there is no exclusion under the IWC orders for employees of private nonprofit organizations, these "members" are covered by state minimum wage and overtime provisions.

This, however, does not end our analysis. Since the AmeriCorps program is based on federal law, we must determine whether the federal law preempts application of state wage and hour law as to these AmeriCorps "members". The case of Pacific Merchant Shipping v. Aubry (9th Cir. 1991) 918 F. 2d 1409, 1415, teaches:

> "To decide whether a federal statute preempts state law, 'our sole task is to ascertain the intent of Congress.' [cite omitted] Federal law preempts state law if (1) Congress expressly so states, (2) Congress enacts comprehensive laws that leave no room for additional state regulation, or (3) state law actually conflicts with federal law. [cites omitted] States however, possess broad authority under their police powers to regulate the employment relationship to protect resident workers. [cite omitted] Thus, in addressing the preemption question before us, 'we start with the assumption that the historic powers of the States were not to be superseded by [federal legislation] unless that was the clear and manifest purpose of Congress."

Using that analysis, the Pacific Merchant Shipping court concluded that California could apply its state overtime laws to seamen, despite the fact that the federal Fair Labor Standards Act expressly excludes seamen from its coverage. More recently, in Californians for Safe & Competitive Dump Truck Transportation v. Mendonca (9th Cir. 1998) 152 F.3d 1184, the court held that a federal law which expressly prohibited states from enforcing any law related to the prices, routes, or services of motor carriers did not preempt California's application of the prevailing wage law as to dump truck transportation.

We have carefully reviewed the National and Community Service Act to ascertain congressional intent as to whether state wage and hour law is preempted by the federal law. There is no question that under this federal law, AmeriCorps members are considered to be volunteers, not employees. 42 USC §12511 defines various terms used in the Act, and states that "[f]or purposes of this subchapter" an AmeriCorps "participant shall not be considered to be an employee of the program in which the

participant is enrolled." This is not a global definition of the term AmeriCorps "participant"; that is, it only defines the term "for purposes of this subchapter" of the Act. It cannot be said that this definition expressly preempts state wage and hour law as it does not mention state law in any way. Had Congress intended to expressly preempt state wage and hour law, it could easily have done so by enacting language making AmeriCorps participants volunteers for state wage and hour purposes, or prohibiting states from applying state wage and hour law to AmeriCorps participants.

Turning to other provisions found in the National and Community Service Act, 42 USC §12594(b) provides for federal assistance to programs using AmeriCorps participants to cover payroll "taxes imposed on an employer" by the Internal Revenue Service arising out of the program's use of such participants. Indeed, AmeriCorps participants are subject to both federal and State of California personal income tax withholding. This provision of the Act evidences a congressional intent, at least for this purpose, to treat these participants as employees, and to treat the nonprofit organizations as their employers. Likewise, 42 USC §12631(a) provides that for purposes of the Family and Medical Leave Act "the participant shall be considered to be an eligible employee of the service sponsor."

In view of the areas in which the Act does treat AmeriCorps participants as employees, it is difficult to argue that the federal law implicitly preempts state wage and hour regulation. The fact that the Act establishes a monthly stipend for program participants does not necessarily lead to a conflict with state law. The monthly stipend will be enough to satisfy the requirements of state wage and hour law if, based on the number of hours worked by the participant, there are no state minimum wages or overtime wages owed. Alternatively, if the participant's hours are such as to create minimum wage or overtime liability, there is nothing in the Act that would prohibit the program from providing the participant with the required additional compensation. Furthermore, we were unable to find anything in the extensive legislative history which indicates a "clear and manifest" congressional intent to exclude these participants from state wage and hour law coverage.

There is another reason for our reluctance, as a state administrative agency, to refuse to enforce state wage and hour provisions as to AmeriCorps participants. Article III, Section 3.5(c) of the California Constitution provides that an administrative agency has no power "to declare a statute

unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that enforcement of such statute is prohibited by federal law or federal regulations." Labor Code §1185 provides that the IWC's wage orders "shall be valid and operative". Labor Code §1193.5 provides that the Division of Labor Standards Enforcement, the agency that is headed by the Labor Commissioner, shall administer and enforce the IWC orders concerning minimum wages and overtime. Labor Code §90.5 specifically charges the Labor Commissioner with the duty to "vigorously enforce minimum labor standards", including sections 1197 (dealing with minimum wages) and 1198 (dealing with overtime). Absent an appellate decision holding that federal law preempts our enforcement of these California statutes as to AmeriCorps participants, it is our duty to enforce the state law; to do otherwise would run afoul of Article III, section 3.5 of the California Constitution.

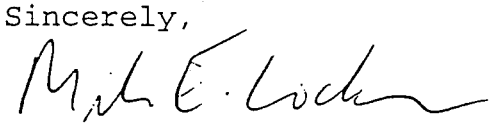
Please be assured that we understand the difficulties that may be faced by AmeriCorps programs stemming from the application of state wage and hour law. These organizations perform valuable services to the public at large, and program participants derive substantial benefits from their involvement that far transcend the rewards of a paycheck. It would be a terribly unfortunate consequence of our mandate to enforce state wage and hour law if any of these organizations were to limit or discontinue their use of AmeriCorps participants. With that in mind, we would suggest that perhaps the best way to address this problem would be through legislative change. The federal law could be amended to expressly exempt AmeriCorps participants from state wage and hour law. Alternatively (and probably more feasibly), a state law could be enacted to expressly exempt AmeriCorps participants from coverage of the IWC orders. We would certainly be willing to provide assistance in drafting such narrowly tailored legislation, and in supporting its passsage. Finally, you have the option of bringing a court action for declaratory relief to challenge our enforcement position. The drawback to that option, of course, is the unlikelihood of a court viewing this issue any differently than we do.

Finally, you have asked whether AmeriCorps programs may have certain participants' positions classifed as exempt based on the nature of their responsibilities and supervision. There are three basic exemptions from overtime under the IWC orders - -the executive, administrative and professional exemptions. Both the executive and administrative exemptions will not apply unless, as a threshold matter, the employee receives a salary of at least

$1,150 per month. It is my understanding that the monthly "stipends" paid to AmeriCorps participants fall substantially below that. In contrast, the professional exemption does not contain a minimum remuneration requirement. However, the professional exemption only applies to employees who are either licensed by the State of California in one of the following professions: law, medicine, dentistry, pharmacy, optometry, arcghitecture, engineering, teaching, or accounting; or to those employees who are engaged in an occupation "commonly recognized as a learned or artistic profession."

Thank you for your interest in California wage and hour law. Please feel free to contact this office with any other questions.

Sincerely,



Miles E. Locker
Chief Counsel

cc: John Duncan
Jose Millan
Tom Grogan
Greg Rupp
Jerry Simpson
Nance Steffen
Meredith Drake
Maria Vail

STATE OF CALIFORNIA PETE WILSON, Governor

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

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

May 25, 1993

Re: **Payment Of Salary**

Your letter of March 2, 1993, addressed to Victoria Bradshaw, State Labor Commissioner, has been assigned to this office for review and response.

In your letter, you state that one of your clients, engaged in the garment industry, wishes to enter into a new employment agreement with non-exempt employees who are currently being paid in excess of $50,000.00 per year on a salary basis. You suggest an agreement which provides as follows:

I understand and agree that the weekly minimum salary is based upon the following:

1. A regular 5-day work week of Monday through Friday;

2. A work day that may fluctuate between approximately 8 to 11 hours per day;

3. A regular hourly rate of pay of $20.00 per hour;

4. An overtime rate of $30.00 ($20.00 x 1.5) which shall be paid for all hours worked over 8 in a day or 40 in a work week, or for the first 8 hours worked on the 7th consecutive day during the same workweek;

5. An overtime rate of $40.00 per hour ($20.00 x 2), which shall be paid for all hours worked in excess of 12 in one day or in excess of 8 hours on the 7th consecutive day during the same workweek;

6. I will receive the appropriate overtime compensation for all overtime hours worked;

1993.05.25

7. I understand that if the Company's business is slow and I am not required to work as many hours as usual, I will still receive $1100 for that week. The Company may not offset any extra overtime earned in a busy week (i.e.; any hours in excess of the 10 hours of overtime included in the calculation of my weekly salary) against my compensation for that slow week.

8. For example, if in a workweek, I work 10 hours a day, Monday through Friday, my compensation would be $1100.00 (40 hours @ $20.00 per hour = $800.00) + (10 hours @ $30.00 per hour = $300.00).

Your letter states that you found support for this type of arrangement in a letter written by the undersigned found in the publication *Practice and Procedure Before the California State Labor Commissioner*, (1990). I disagree.

The letter you cite to states, in pertinent part:

> The Division has approved agreements which specifically set out the hours per day and the days per week which the employee is expected to work and which specifically state the regular hourly rate of pay the employee is actually receiving. The Division will allow the employer to extrapolate those figures and state that the monthly salary is the sum of the weekly salary, times fifty-two and divided by 12. Any work in excess of forty in one week or eight in one day must be compensated at the applicable premium rate of either time and one-half or double the stated regular rate of pay.[1]

The agreement you submit <u>does</u> <u>not</u> meet these criterion. Your proposed agreement provides a "fluctuating" workweek of between "approximately 8 to 11 hours per day". The agreement must "specifically set out the hours per day and the days per week" which the employee is expected to work; not an approximation.

The example you give in the proposed agreement, coupled with the provisions of numbered paragraph 2 of that agreement clearly illustrates that the "regular rate" is not ascertainable from the terms of the agreement. If in a workweek the employee works 10 hours per day, five days per week, the compensation would be as you state: 40 hours @ $20.00 and 10 hours at $30.00. However, assuming California law allowed the type of *fluctuating* workweek your pro-

---

[1] See letter dated June 7, 1989, at page III-20-1 of the publication *Practice and Procedure Before the California State Labor Commissioner*, (1990).

posed agreement envisions, if the employee worked a 3-day workweek, 11 hours per day and received $1100.00 the regular hourly rate would be $29.33 per hour, not $20.00 per hour. If the employee worked three 11-hour days and one 10-hour day the regular hourly rate would be $22.68 per hour not $20.00 per hour. Under the *Skyline Homes* decision, a fluctuating workweek is not allowed and only straight time wages may be counted in calculating the regular rate of pay. It is not permissible to "invent" a regular rate of pay.

An agreement which seeks to take advantage of the type of agreement discussed in the June 6, 1989, letter must not be based on any figure which is not fixed and certain.

For the reasons stated, the proposal you suggest in your letter of March 2, 1993, would not be allowed in California.

Yours truly,

H. THOMAS CADELL, JR.
Chief Counsel

c.c. Victoria Bradshaw

STATE OF CALIFORNIA PETE WILSON, Governor

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

May 17, 1993

Re: **Vacation Pay Policy**

Your letter requesting guidance in developing a vacation pay policy which will meet the requirements of *Suastez v. Plastic Dress-Up Co.* (1982) 31 Cal.3d 774, has been assigned to this office for review and reply.

The policy you attached provides:

1. Vacation does not accrue during the first year of employment.

2. After having completed one year of continuous service, full time employees will be entitled to one week of vacation. The employee may take the one week of vacation at any time during the second year of employment. [If] The employee does not complete his or her second year of employment, the one week of vacation will be prorated based on the number of days worked during the year. If an employee has taken vacation in excess of this prorated amount, the excess will be deducted from his or her final paycheck. <u>An employee may not accrue additional vacation until the one week of vacation is taken.</u>

The policy provides that in subsequent years the same policy will apply (i.e., the employee may take the vacation he or she is earning <u>that</u> year and that no further vacation may be accrued until that vacation is taken.)

Essentially, the policy provides that an employee would <u>never</u> accrue the vacation he or she is earning until after the year in which it was to be taken. The employee who hesitates to take unaccrued vacation time and waits until the vacation is fully vested would be penalized because that employee would lose at least one week of accrual toward the succeeding year's vacation.

"Use it or lose it" vacation provisions are not allowed. *Henry v. Amrol, Inc.* (1990) 222 Cal.App.3d Supp. 1. As the Labor Commissioner recognized in 1986, there might be valid reasons for having a cap on vacation benefits, but as the Commissioner noted in Interpretive Bulletin 86-3*, page 3:

> "However, a variant of a "use it or lose it policy" which would be acceptable to the Labor Commissioner is a policy under which once a certain level or amount of accrued vacation or vacation pay is earned but not taken, vacation or vacation pay no longer accrues until vacation is taken. Such provisions, in effect, are a ceiling on the amount of vacation or vacation pay that can accrue without being taken. The time periods involved for taking vacation must, of course, be reasonable. If implementation of such a policy is a subterfuge to deny an employee a vacation or vacation benefits, the policy will not be recognized by the Labor Commissioner."

The "cap" is designed to assure that an employer's liability for vacation wages does not become overbearing.

In defining "reasonable" in this context, the Labor Commissioner has taken the position that a worker must have at least nine months after the accrual of the vacation within which to take the vacation before a cap is effective. This reasonable time allows an employee to take fully vested vacation at convenient times to both the employee and the employer without forcing an employer to accrue a large vacation pay (or time) liability.

Your letter states that you do not believe that the policy you propose is a subterfuge. We believe that it is clearly intended to thwart the *Suastez* doctrine; in that respect it is a subterfuge.

I hope this adequately addresses the issues you raise in your letter. Thanking you for your interest in California labor laws.

Yours truly,

H. THOMAS CADELL, JR.
Chief Counsel

c.c. Victoria Bradshaw

*The above referred "Interpretive Bulletin" may not be valid. Refer to discussion of Interpretive Bulletins at page 2 section 0.1.4.3 of the Polices and Interpretations Manual.

STATE OF CALIFORNIA PETE WILSON, Governor

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

February 16, 1993

Re: **Vacation Pay Accrual v. Cap**

The State Labor Commissioner, Victoria Bradshaw has asked me to respond to your letter of December 23, 1992, regarding the above-referenced subject.

Your letter contains an attachment setting out a proposed vacation policy which provides that:

> "Vacation days not used in the calendar year they were accrued will be carried over to the following year. However, the maximum number of vacation days that can be accumulated in a year is the amount set forth in the vacation eligibility schedule minus the amount carried over from the prior year."

Your letter does not mention whether a worker taking the unaccrued vacation time off during the year who does not complete the time necessary to accrue the full time taken off will be docked for that unaccrued vacation from the employee's final pay? Assuming that the policy you propose does provide that the employer would withhold any unaccrued vacation taken by the employee from the employee's final pay, the vacation policy does not meet the requirements of the law as the Labor Commissioner has interpreted that law.

As you may know, the statute in question provides that the Labor Commissioner is to apply the principles of equity and fairness in resolving any disputes arising under Labor Code §227.3. The Labor Commissioner, in an interpretive bulletin* issued in 1986 allows a "cap" to be placed on vacation pay, but "the time periods involved for taking the vacation must, of course, be reasonable."

*The above referred "Interpretive Bulletin" may not be valid. Refer to discussion of Interpretive Bulletins at page 2 section 0.1.4.3 of the Polices and Interpretations Manual.

Assuming that the policy provided that the employer would recover the unaccured vacation from the final pay, an employee under your policy who was employed from January 1, 1993, through December 31, 1993, would be required to take his or her fully accrued vacation in January of 1994 in order to earn any more vacation credits.

Obviously, employees who live from paycheck to paycheck could not afford to risk the loss of wages due at termination and would not, as a result, take the vacation until it is fully accrued. Additionally, employees with children in school would be rather reluctant to take vacations in the middle of the winter. However, under the policy you propose, a working mother who started in January would be forced to take her fully-accrued vacation in January of the following year in order to avoid the loss of future vacation benefit accrual.

Under this type of policy, there is no time allowed the employee to take the fully accrued vacation, let alone a reasonable time within which to take the time without risking the loss of future vacation credits. What this policy, in fact, provides is a Hobson's choice for the employee:

> Either take the chance that the employer will not lay you off or discharge you within the period of time necessary to accrue the vacation and take unaccrued vacation time which is subject to recovery by the employer from the final pay; or wait until the vacation promised is fully accrued and take the time off at that time (whether the time is convenient or not to the worker's vacation plans) to avoid losing future vacation credits.

I am sure that your client is solely interested in assuring itself that there will be no "growing liability" for accrued vacation benefits. Although I am sure it was not designed to do so, this plan would be neither equitable nor fair. If you look simply at the results of the plan, it appears to be designed to deprive workers of future vacation benefits, although that was not the design.

There are many plans available which will protect the employer from a "growing liability" which employers may face when employees fail to take vacation time off. The policy you propose is not one of the those plans.

A plan which provided that the employee has a minimum seven-month period in which to take vacation accured in the past year would be appropriate. The failure to take the accrued vacation within that period of time would result in no further vacation being accrued from that point on. That would allow the employee a "reasonable time" to take the vacation and would protect the employer from accruing a large vacation benefit liability.

I hope this adequately addresses the issues you raise in your letter of December 23rd. I believe this letter clearly sets out the position which the California Labor Commissioner will take in this matter. However, if you have any further questions, please contact the undersigned.

Yours truly,

H. THOMAS CADELL, JR.
Chief Counsel

c.c. Victoria Bradshaw
Deborah Granfield, Esq.

STATE OF CALIFORNIA PETE WILSON, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
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30 Van Ness Avenue, Ste. 4400
San Francisco, CA 94102

H. THOMAS CADELL, *Chief Counsel*

April 11, 1991

Re: **Alternating Workweek**

This letter is in response to yours of March 26th and confirms our telephone conversation of yesterday regarding this subject.

In response to your questions, I must advise you that the Division would not accept an alternating workweek which made use of a "regular schedule" which exceeded 40 hours in a week. Consequently, the proposed work schedule you submitted would not be permitted.

In our telephone conversation we also discussed the possibility of adopting an alternating workweek schedule which has a varying number of hours or days in succeeding weeks so long as the schedule is "fixed" and repeated. For instance, I suggested that under Order 1[1] it would be possible to adopt a work schedule which provided for four ten-hour days in one week followed by four nine-hour days and one four-hour day in the following week. The workweeks would repeat thereafter. This would be acceptable since the schedule meets the requirements of the Order and allows the employee to make plans based upon the schedule. As you indicated you understood, the Division requires that the "regular schedule" must specify the days of the week and the hours of the day.

The last question you ask in your letter of March 26th is divided into two parts. In answer to that part of your question regarding whether work performed on an unscheduled workday must be compensated at premium rates, the answer is yes. For instance, in the case of a four/ten workweek which called for the worker to work on Tuesday through Friday, any work performed on any other day would have to be compensated at time and one-half for the first

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[1] It must be borne in mind that Order 1-89 unlike the other orders, requires that the workweek be 40 hours and that the daily work hours not exceed ten nor be less than four.

eight hours and double time thereafter. This would be so regardless of the fact that the employee did not work the 40 hours in the scheduled workweek. In response to the second part of question 3, since Order 1-89 requires a 40-hour week as a condition of adoption of an alternative workweek, that part of the question is moot. However, if we were not talking about Order 1-89, and a regularly scheduled workweek provided for four nine-hour days (a thrity-six hour workweek) any hours in excess of nine in any one day or on any fifth, sixth or seventh day would have to be compensated at premium rates.

The Division has taken the position that the adoption of the alternative workweek creates an exception to the employer's obligation to pay daily overtime. As with any exception to remedial legislation, this must be narrowly construed. The DLSE has concluded that the IWC, in effect, required a trade-off for exemption from the overtime requirements after eight hours. The trade-off is strict compliance with the language of the Orders read in light of the stated basis for the exceptions. Interpretive Bulletin 89-3 explains the Division enforcement policy in detail.

I hope this adequately addresses all of the questions you raised in your letter and in our telephone conversation. If you have any further questions please feel free to give me a call.

It was good to hear from you. It has been some time since our appearance in the Fourth District Court of Appeal. I'm glad to see that you have continued your interest in labor law.

Yours truly,

H. THOMAS CADELL, JR.
Chief Counsel

c.c. James Curry, Acting Labor Commissioner
Richie Jenkins, Sr. Deputy, San Bernardino
Gaylord S. Grove, Sr. Deputy, San Diego
Ed Voveris, Regional Mgr., South

STATE OF CALIFORNIA PETE WILSON, Governor

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H. THOMAS CADELL, *Chief Counsel*

February 25, 1991

Re: Application of Statute of Limitations To Vacation Benefits Under Labor Code §227.3

The Acting Labor Commissioner, James H. Curry, has asked me to respond to your letter of February 6, 1991, regarding the above-referenced subject matter.

I realize that your letter declared the urgency of the situation your banking clients were facing, but your question involved a review of the Division's policy. The agency's concern, of course, is that both the employer community and employees may rely on the enforcement policy promulgated by the State Labor Commissioner. Finality and consistency are important aspects to be considered in this regard.

On the other hand, the courts are, in the last analysis, the final judge of the meaning of the statute. The agency must, then, insure that its interpretation meets the criteria which the courts will utilize.

The provisions of Labor Code §227.3 provide:

> Unless otherwise provided by a collective bargaining agreement, whenever a contract of employment or employer policy provides for paid vacations, and an employee is terminated without having taken off his vested vacation time, all vested vacation shall be paid to him as wages at his final rate in accordance with such contract of employment or employer policy respecting eligibility or time served; provided, however, that an employment contract or employer policy shall not provide for forfeiture of vested vacation time upon termination. <u>The Labor Commissioner or a designated representative, in the resolution of any dispute with regard to vested vacation time, shall apply the principles of equity and fairness.</u> (Emphasis added)

1991.02.25

In your letter of February 6th, you cite to the Labor Commissioner's Interpretive Bulletin 87-7*, which states that for enforcement purposes, the Division of Labor Standards Enforcement will apply the statute of limitations twice: once at the outset of the review of the claim to limit the time within which the claim may be brought after termination, and again to limit the time — measured from the date of termination backward — the liability of the employer exists. Both applications of the statute of limitations are to be based on whether the vacation contract (or policy) involved was written or oral. (e.g., two years or fours years.)

The Interpretive Bulletin notes that the Labor Commissioner, pursuant to the dictates of the statute, is to apply the principles of equity and fairness in enforcing the statute. While it may be argued that the words "equity" and "fairness" are ambiguous terms in this context, the Legislature must have intended that the phrase have some meaning. Since it is the Labor Commissioner to whom the mandate is given, it must be that the Legislature intended that the Labor Commissioner's view was to be given great weight. If, then, the Labor Commissioner's view is not clearly arbitrary or capricious, that view should be adopted by the courts.

It is necessary, therefore, that we look at the rationalé the Labor Commissioner used to establish this enforcement policy.

It should be noted at this point that vacations policies are not designed to simply give the worker additional wages. Vacations inure to the benefit of both the worker and the employer. The employer expects that the added benefit will result in the employee taking the time off and returning rested and prepared for work. The employee, of course, enjoys the benefit of the free time.

The Interpretive Bulletin states that "the statute of limitations begins to run as the vacation is earned or at the point when the employee is eligible to take the vacation." In other words, if the vacation policy provided that the employee earns one-half day of vacation credit for each month of employment without any further condition, the prorated vacation benefit would be subject to the statute of limitation as the vacation benefit is vested[1] because,

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[1] The vacation is accruing, of course, on a daily basis, but for practical purposes, the employee could not take any vacation until at least one day is vested. Absent any condition which would preclude the worker from taking the vacation as it accrues, under the DLSE policy the statute of limitations would begin to run on the accrual of one day of vacation.

(continued...)

*The above referred "Interpretive Bulletin" may not be valid. Refer to discussion of Interpretive Bulletins at page 2 section 0.1.4.3 of the Polices and Interpretations Manual.

without any further limitation, the employee would be entitled to take the vacation at that time.

In your letter you seem to draw a distinction between "vacation pay" and "wages", and this may explain your concern with the rationalé employed by the Labor Commissioner. As the Supreme Court said in *Suastez*, vacation benefits are simply deferred wages. In the opinion of the Labor Commissioner, claims for recovery of those "wages" are subject to all of the same liabilities and defenses any other wage claims enjoy.

As an analogy, the Interpretive Bulletin quite correctly points to a claim of wages which the worker contends remains unpaid.[2] The Bulletin uses an example of an employer who refuses to pay certain claimed wages. As the Bulletin points out, the wage claim is subject to the defense of the statute of limitations. Since there appears to be no reason that vacation wages are to be treated different from any other wages, it is only reasonable, concludes the Bulletin, that the same application of the statute of limitations should be used. Since the right to the vacation under the employment contract or policy (and thus, the recovery of the vacation wages) was available to the worker, the worker's failure to take that vacation time should not result in added wages without the return of the *quid quo pro* to the employer of a rested worker.

However, as the Bulletin points out, if the employer policy has any rule which is inconsistent with *Suastez*, or if the employer precludes the employee from taking vacation within the applicable statute of limitations, the statute is tolled as to recovery of those wages.

You ask in your letter about the waiver of those vacation benefits which might be vested. We will put aside for the moment the discussion regarding the statute of limitations and assume that the statute does not apply.

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[1](...continued)

[2] For purposes of illustration, assume that en employee is hired at the rate of $10.20 per hour under the terms of a written agreement. Through an error, the employee recieves only $10.00 per hour for the first ten hours he is employed by the company. The employee discovers the error three years later. Under these circumstances the employee's action to recover the unpaid wages would be subject to the defense of the statute of limitations.

It remains the considered opinion of the Labor Commissioner that Labor Code §206.5 clearly precludes an employer from requiring a release of any wages earned unless payment of the wages has already been made. Earned vacation wages would be no exception to this rule. Voluntary waivers under section 206.5 may, of course, be subject to review to determine the facts surrounding the alleged waiver. An action euphemistically referred to as "voluntary" that is actually the result of an indirect threat to one's job security, will not meet the requirements of section 206.5. Additionally, as you point out, there would have to be some consideration for the waiver to be valid under established contract law principles.

I hope this adequately explains the Division's enforcement policy as reflected in the language of Interpretive Bulletin 87-7.

Yours truly,

H. THOMAS CADELL, JR.
Chief Counsel

c.c. James H. Curry

STATE OF CALIFORNIA

GEORGE DEUKMEJIAN, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
GOLDEN GATE AVENUE
SAN FRANCISCO, CALIFORNIA 94102

ADDRESS REPLY TO
P.O. BOX 603
San Francisco CA 94102

IN REPLY REFER TO:

Legal Section

August 31, 1988

RECEIVED
SEP 1 1988
Labor Standards Enforcement
Administrative Office
San Francisco

Re: Request for a Legal Opinion

In belated response to your letter of March 31, 1988, seeking an opinion as to whether an employer's policy which provides accrual of vacation pay only on hours in excess of 1,400 per year, please be advised that such a policy would not, in the opinion of the Division, meet the requirements of accrual set out in the case of Suastez v. Plastic Dress-Up Co. (1982) 31 Cal.3d 774.

Frankly, I think the policy you submit is a subterfuge to avoid the pro-rata vesting requirements of Suastez. Since the normal work year is approximately 2080 hours, I believe that beginning accrual at 1400 hours is simply too late in the year. In effect, full time employees are earning a full year of vacation entitlement in the last 600 hours of the year. The unfairness of this can be seen in the situation of an employee who works 1 1/2 years, takes no vacation and is then terminated. The employee is clearly a full-time employee but would only receive vacation pay for one year.

I do think you can distinguish between parttime and full-time employees but not in such a way that so obviously discriminates against full-time employees who do not reach the 1400-hour mark. They have been denied their pro-rata vesting rights guaranteed by Suastez. It is also possible that some lower hourly figure would be acceptable as a cutoff, but 1400 hours is simply too great, especially in your client's situation where the cutoff of hours do not appear to have a reasonable relationship to the length of time the seasonal employees work.

Because the policy violates Suastez, we would ignore it and the employer would be obliged to provide pro rata vacation pay to any terminated employee who has worked less than 1,400 hours in any one year.

If you have any questions regarding this issue, please feel free to contact the undersigned.

Yours truly,

H. Thomas Cadell, Jr.

H. THOMAS CADELL, JR.
Chief Counsel

c.c. Lloyd W. Aubry, Jr.

STATE OF CALIFORNIA

GEORGE DEUKMEJIAN, Governor

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GOLDEN GATE AVENUE

SAN FRANCISCO, CALIFORNIA 94102

August 31, 1988

ADDRESS REPLY TO:
P.O. BOX 603
San Francisco, CA 94102

IN REPLY REFER TO:

Re: Advisory Opinion

In response to your letter of July 22, 1988, regarding the provisions of subdivision 3(B) of Order 4-80, it is the opinion of the Division that the exemption from the overtime requirements requires "a regulary scheduled week of work." The Division's interpretation of a "regularly scheduled week of work" requires that the schedule be fixed and certain.

While this doesn't mean that the schedule has to be the same each week, it does mean that there must be a predetermined schedule. For instance, the "regularly scheduled workweek" could be one that provided for alternating four-day and three-day weeks. The employee must, of course, receive at least two consecutive days off during each week.

However, it is not possible to determine from the proposed agreement you submitted whether the schedule your client intends to use would be constant. The agreement would appear to allow the employer to set the "regularly scheduled workweek" on a weekly basis. Such a schedule would not be allowed as it would not be "regularly scheduled."

It seems to me that this provision must be interpreted narrowly. Employees should have a definite idea what their schedules will be when they sign the petition giving up overtime after 8 hours per day. This appears to me to be the trade-off the IWC is allowing. The IWC is currently considering greater flexibility in scheduling and your client may wish to provide testimony on that issue.

In any case, if you will so word the agreement to preclude the use of a workweek which is not "regularly scheduled," the Division would have no problem with the concept.

I am sorry that I cannot be of more assistance to you at this time. If you have any questions concerning this matter please feel free to contact me.

Very truly yours,

Lloyd W. Aubry, Jr.
State Labor Commissioner

LWA:rl

DLSE 905

1988.08.31

STATE OF CALIFORNIA

GEORGE DEUKMEJIAN, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS

DIVISION OF LABOR STANDARDS ENFORCEMENT

525 GOLDEN GATE AVENUE

SAN FRANCISCO, CA 94102

ADDRESS REPLY TO:

P.O. BOX 603

San Francisco, CA 94102

IN REPLY REFER TO:

March 28, 1988

This is in reply to your letter of February 29, 1988 regarding the method of calculating wages (including overtime) due employees who, in addition to their hourly salary, earn commissions.

The basic method is to add the overtime rate of earned commissions for each work week to the total hourly wages, and commissions.

In your example number 1, there would be overtime based on commissions as the number of hours worked exceeded eight on two days. The overtime due on the commissions is calculated by dividing the total number of hours worked into the amount of commissions, then dividing by two, then multiplying by the number of overtime hours worked.

Example:

38 hours at 6.00 = 228.00
2 hours at 3.00 = 6.00
Commission Overtime
*2 hours at .48 .96

Pay first week 234.96

Pay second week 240.00

Commissions
First and second weeks 75.28

Total due for the
two weeks 550.24

*In week # 1 and 2 Total Hours 78
Commissions 75.28
75.28 - 78 = .96 regular hourly rate of commissions
.96 - 2 = .48 overtime rate
2 hours overtime at .48 = .96
Total due commissions 75.28 plus .96 = 76.24

State and federal regulations require overtime to be calculated on a weekly basis (state also on a daily basis). Therefore, your payroll procedures should be corrected to reflect when commissions are earned during each work week. Failure to record when commissions are earned may result in claims that all the commissions were earned during overtime periods. If the employer does not have accurate records as required by regulation, such claims may be allowed.

I hope this is responsive to your questions, if not please let me know.

Very truly yours,

Lloyd W. Aubry, Jr.
State Labor Commissioner

LWA/st

STATE OF CALIFORNIA

GEORGE DEUKMEJIAN, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS

DIVISION OF LABOR STANDARDS ENFORCEMENT

525 GOLDEN GATE AVENUE

SAN FRANCISCO, CALIFORNIA 94102

(415) 557-3827

ADDRESS REPLY TO:

P.O. BOX 603

San Francisco, CA 94101

IN REPLY REFER TO:

January 14, 1987

This is in reply to your letter of December 19, 1986, and your telephone conversation with my deputy, Al Reyff, requesting an opinion concerning Contel Service Corporation's vacation plan in view of the Suastez decision and our Interpretive Bulletin No. 86-3.*

The following is my opinion concerning the application of your firm's vacation plan as described in your letter.

a. & b. Based on the wording of your current plan, the Division would find that persons who are hired between January 2 and the end of the year would be entitled to a pro rata share of one week's vacation pay if they were to terminate prior to December 31. In other words, we would find that your agreement provides one week for the first year of employment or a fraction thereof. The problem we have concerns the overly-lengthy cutoff dates that determine if an employee earns vacation regardless of the time worked whereas the Suastez decision states that vacation accrues continuously.

c. Based on the analysis set forth above, the conditions set forth in c. would be violative of the Suastez decision. These employees would accrue vacation as they work and, once vacation has accrued, it cannot be forfeited. In other words, employees who work during their second year would be entitled to a pro rata rata share of two weeks' pay.

*The above referred "Interpretive Bulletin" may not be valid. Refer to discussion of Interpretive Bulletins at page 2 section 0.1.4.3 of the Polices and Interpretations Manual.

d. The restrictions under d. would also be violative of Suastez as an employee would be losing vacation accrued during the year if it were not taken. Giving employees the option to exchange vacation pay for other employee benefits would not effect the right to accrued vacation pay even if there are IRS regulations controlling the amounts that can be used to acquire other employee benefits. These problems can be obviated by requiring employees to take their vacation before the end of the year or paying employees for any unused vacation.

The difficulties we see with the company's policy in relationship to California Labor Code Section 227.3, the Suastez decision and our interpretive bulletin are:

1. The arbitrary qualifying dates during the first year of employment are too long and unreasonably disqualify persons from accruing vacation pay because of the time of hire in the calendar year.

2. The advancing of vacation on a specific date, with the understanding that the vacation would be earned during the year and then placing forfeiture restrictions if an employee terminates prior to completion of a certain period, violates the "use it or lose it" provisions of the Suastez memo. Even if there is a policy of granting vacation on a prospective basis, the right to vacation or pay in lieu, thereof accrues as the employee earns the vacation.

It is my suggestion to design your policy to permit vacation after specific lengths of service with the condition that employees who terminate would receive the pro rata share of the vacation schedule that applies to them. A plan of this type would avoid the possible problems with the practice of advancing vacation noted above (see also Interpretive Bulletin No. 86-3, paragraph 7, footnote 2), but would not preclude the practice if instituted in accordance with the guidelines in the Suastez memo.

I hope this is responsive to your questions; if not, please let me know.

Very truly yours,

Lloyd W. Aubry, Jr.
State Labor Commissioner

LWA:sw

Enc.

STATE OF CALIFORNIA

GEORGE DEUKMEJIAN, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS

DIVISION OF LABOR STANDARDS ENFORCEMENT

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[illegible] FRANCISCO, CALIFORNIA 94[illegible]

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ADDRESS REPLY TO:

P.O. BOX 603

San Francisco, CA 94101

IN REPLY REFER TO:

January 13, 1987

This is in reply to your letter of December 29, 1986, regarding pro rata vacation pay for seasonal agricultural workers.

The answer to your question concerning a vacation policy with a provision that no vacation is earned during the first 1000 hours of employment is as follows:

1. An employer is not required to prorate vacation pay if employment terminates prior to completion of 1000 hours (see Interpretive Bulletin No. 86-3*, paragraph 7 a)).

A pro rata share of vacation pay would be due on termination for work after 1000 hours provided, of course, (under the employer's policy) vacation begins to accrue after 1000 hours.

I hope this is responsive to your question; if not, please let me know.

Very truly yours,

Lloyd W. Aubry, Jr.
State Labor Commissioner

LWA:sw

Enc.

*The above referred "Interpretive Bulletin" may not be valid. Refer to discussion of Interpretive Bulletins at page 2 section 0.1.4.3 of the Polices and Interpretations Manual.

1987.01.13