STATE OF CALIFORNIA GRAY DAVIS, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
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June 11, 2003

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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,

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c.c. Arthur Lujan, State Labor Commissioner
Sam Rodriguez, Chief Deputy Labor Commissioner
Anne Stevason, Chief Counsel
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