STATE OF CALIFORNIA PETE WILSON, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
LEGAL SECTION
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MILES E. LOCKER, *Chief Counsel*

December 23, 1998

Leah E. Glynn
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15760 Ventura Boulevard, Suite 1510
Encino, CA 91436

Re: **Whether Time Spent Changing Into or Out of Required Uniforms Constitutes "Hours Worked" and the Effect of a Collective Bargaining Agreement on Determining "Hours Worked"**

Dear Ms. Glynn:

This is in response to your letter, dated December 11, 1998, in which you requested an opinion letter[1] from the Division of Labor Standards Enforcement as to whether time spent by employees of a theme park changing into or out of uniforms that they are required to wear and that are provided by the employer constitutes "hours worked" within the meaning of the applicable Wage Order.

The facts, as presented to my office in an earlier letter from your firm, are as follows: The employees are not allowed to take the uniforms home, and are required to pick up the uniforms from a central wardrobe facility, which is approximately an eight to ten minute walk from employee dressing rooms. The employees are required to wait on line, often with hundreds of other employees, to obtain their uniforms, and must then change into their uniforms before being allowed to clock in. During peak tourist periods, the wait to obtain uniforms may exceed a half hour. Employees are not compensated for any of this time prior

[1] The Division is authorized by statute to issue opinion letters as a means of providing guidance to the public on issues related to the interpretation or enforcement of Industrial Welfare Commission wage orders. (Labor Code §1198.4; *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571 ["agencies may provide parties with advice letters which are not subject to the rulemaking provisions of the APA."]; *Yamaha Corp. v. State Board of Equalization* (1998) 19 Cal.4th 1 [discussing the degree of deference to be accorded by courts to agency opinion letters interpreting statutes or regulations].)

to clocking in. At the end of their work shifts, employees go to a holding area, from which they are released at a set time. The employees remain on the clock for 12 minutes from the time they are released from this holding facility. However, after their release, the employees must change back out of their uniforms, walk back to the central wardrobe facility, wait on line and return the uniforms. The time spent engaged in these post-release activities far exceeds the 12 minutes of on-clock time.

As you are no doubt aware, after our receipt of this initial letter we received correspondence from the attorney representing this theme park, asserting that the employees in question are employed under a collective bargaining agreement ("CBA"), that these employees are exempt from the overtime provisions of the California Wage Orders in that under this CBA, they receive at least $1 an hour in excess of the state minimum wage and premium pay for overtime work, that there is a well established practice under the CBA with respect to the issue of compensability for uniform changing time, and that under the principles enunciated by the United States Supreme Court in Livadas v. Bradshaw (1994) 114 S.Ct. 2068, it would be inappropriate for the Division to render an opinion regarding the parties' obligations under this CBA.[2] In short, the employer's position is that "the obligations to compensate employees for working time derive entirely from the collective bargaining agreement and the well-established practices maintained pursuant to that agreement."

In its Livadas decision, the Supreme Court held that the Division has jurisdiction over claims that have an independent state law basis, notwithstanding the existence of a CBA with an arbitration clause. On the other hand, claims that are solely founded upon the CBA, that do not arise under state law, are outside the jurisdiction of the Division. The central inquiry under Livadas, therefore, is whether the claim being asserted is founded upon state law or upon the CBA.

Here, the question of what does or does not constitute

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[2] The employer's attorney also expressed disagreement with factual assertions set forth in your firm's initial letter, asserting that as a result of omissions or misstatements of material facts, the letter created a "distorted picture" that would render any opinion "flawed and unreliable." However, the employer's attorney failed to identify any specific omissions or misstatements, and while presenting certain supplemental fact, failed to present any facts contrary to those set forth by your firm. Consequently, we rely on the facts as portrayed in your firm's initial letter, and the supplemental facts that are summarized in this paragraph, as the basis for the opinion expressed herein.

"hours worked" is a function of state law. "Hours worked" is defined in the IWC Orders as "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so."[3] Of course, there are certain state laws that contain explicit and narrowly drawn opt-out provisions which allow the parties to a CBA to establish a different standard than that set out in the state law. See Livadas v. Bradshaw, supra, 114 S.Ct at 2082; NBC v. Bradshaw (9th Cir. 1995) 70 F.3d 69; and Rawson v. Tosco Refining Co. (1997) 57 Cal.App.4th 1520 [upholding the validity of the overtime opt-out provisions in the IWC Orders].

But there is no opt-out language in the definition of "hours worked." Thus, all activities that constitute "hours worked," within the meaning of the IWC orders, must be counted as time worked for compensation purposes, regardless of any contrary provisions or practices pursuant to a CBA. The question before the Division is whether the various activities related to changing into and out of required uniforms constitutes "hours worked." The Division is not being asked for its opinion, nor are we giving an opinion, as to whether such activities are compensable under the applicable CBA, as that question is both outside the Division's jurisdiction and not relevant to a determination of this employer's obligations under state law.

At the very least, the IWC Orders require payment of not less than the state minimum wage for "all hours worked."[4] Here too, there is no opt-out from the minimum wage. In the words of the U.S. Supreme Court, "FLSA rights take precedence over conflicting provisions in a collectively bargained compensation agreement." Barrentine v. Arkansas-Best Freight System, Inc. (1981) 101 S.Ct. 1437, 1445. The FLSA embodies "a policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act. Any custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights." Ibid. The IWC orders and

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[3] This is the general definition of "hours worked" found in all of the IWC orders. Employees who work in the health care industry and who are covered by Order 4 or 5, and employees required to reside on the employment premises covered by Order 5, are subject to special definitions.

[4] Of course, when a wage rate higher than the minimum wage is required pursuant to a CBA or other agreement, that higher wage rate must be used as the basis for any required compensation.

California's minimum wage law are founded upon this same policy.

The fact that the employees in question are covered by a CBA that contains overtime provisions that fall within the opt-out provisions of the IWC Order is of no consequence with respect to the determination of whether the activities related to changing into and out of required uniforms constitute "hours worked" so as to be compensable. If all hours worked, taken together, exceed the maximum number of non-overtime hours, then the employee would be entitled to overtime compensation for all overtime hours worked. These overtime hours must either be compensated at the rate required under the IWC order, or, if indeed the CBA's overtime provisions comport with the IWC's opt-out language, at the rate established by the CBA for such overtime work.

With these 'Livadas issues' out of the way, we turn to the question that prompted this opinion letter, namely, whether time spent changing into or out of uniforms, waiting to pick up or return these uniforms, and walking to or from the location where the uniforms are picked up or returned constitute "hours worked" within the meaning of the Industrial Welfare Commission orders. This is not a new issue for the Division. Attached hereto please find a copy of an Opinion Letter authored by former Chief Counsel H. Thomas Cadell, Jr., dated February 3, 1994, on the issue of compensable time. The analysis and conclusions reached in that letter accurately set forth the Division's enforcement position on this subject. Mr. Cadell's letter is particularly instructive on the differences between federal and state law with respect to the definition of "hours worked."[5]

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[5] As originally enacted, the Fair Labor Standards Act (29 USC §201, et seq.) did not contain a definition of "hours worked". The term was expansively defined by the U.S. Supreme Court in *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123* (1944) 321 U.S. 590 [all time spent in "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer"], and *Andersen v. Mt. Clemens Pottery Co.* (1946) 328 U.S. 680 ["all the time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace."] In subsequent amendments to the FLSA, Congress sought to restrict this definition of "hours worked." Thus, 29 USC §203(o) now defines "hours worked" to exclude "any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective bargaining agreement applicable to the particular employee." Likewise, the Portal-to-Portal Act, enacted by Congress in 1947, excludes certain "activities which are preliminary to or postliminary to" an employee's "principal activity or activities" from compensable time worked. (29 USC §254) But the IWC has never seen fit to restrict the state definition of "hours worked" in the manner that the Congress did in 29 USC §§203(o) and 254,

Under the IWC's definition of "hours worked", compensable time includes all time the employee is suffered or permitted to work, whether or not required to do so, and any other time the employee is subject to the control of the employer. In contrast to the federal test, it is only necessary that an employee be "subject to the control of an employer" to be entitled to compensation. Clearly, the time spent performing the above-described activities is time during which the employees are subject to their employer's control. The employees walk to and from the central wardrobe facility, wait on line, pick up and return their uniforms, and change into and out of those uniforms because they are directed to do so by their employer. Moreover, all of these activities are compelled by the necessities of the employer's business, and are performed primarily, if not exclusively, for the benefit of the employer. Consequently, all time spent performing such activities constitutes "hours worked" within the meaning of the IWC orders.

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: Jose Millan
Tom Grogan
Greg Rupp
Nance Steffen
Richard J. Simmons

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and thus, it would be improper to so limit the state definition of "hours worked." Rather, the Supreme Court cases that pre-date the Portal-to-Portal Act provide the best guidance for interpreting the IWC's definition of "hours worked."