

December 15, 2004

## Schwarzenegger Administration Proposes Emergency Regulations to Clarify Meal and Rest Period Rules

California requires employers to provide employees with unpaid meal periods and paid rest periods. Several important controversies have arisen under those requirements. On December 10, 2004, the California Division of Labor Standards Enforcement ("DLSE") filed emergency regulations with the California Office of Administrative Law addressing and clarifying those controversies.

### Statutory Penalties for Meal and Rest Period Violations

If an employer fails to provide employees with mandated rest or meal periods, the employer is required to pay one additional hour of pay at the employee's regular rate for each day that the rest period or meal period is not provided. Enforced through private class actions or private actions under California's Unfair Competition Law, those payments add up to very large amounts. Prior to these emergency regulations, the DLSE considered the payments to be wages. In the emergency regulations, the DLSE reverses its previous position, specifically stating the payments are penalties, not wages.

Treating the payment as a penalty will have a significant effect on pending and future litigation regarding meal and rest period violations. *First*, treating the payment as a penalty reduces the statute of limitations to one year. The statute of limitations on wages is three years. *Second*, as a penalty, the payment cannot be enforced under California's Unfair Competition Law. That law carries its own four year statute of limitations. *Third*, California imposes waiting-time penalties of up to thirty days additional compensation on employers that fail to pay terminated employees all wages due immediately upon termination. Only unpaid wages are subject to this penalty. If the payment for rest period and meal period violations is itself a penalty, not a wage, failure to make that payment upon an employee's termination will not subject an employer to additional waiting-time penalties. *Fourth*, employees successfully suing for unpaid wages are entitled to recover their

attorney's fees. Employees suing for unpaid penalties arguably are not.

### Satisfying Meal Period Requirements

Unlike previous interpretations, which placed the onus on the employer to require its employees to take meal breaks, the regulations now allow an employer to satisfy its obligation by making meal breaks available. Specifically, under the new regulations, an employer shall be deemed to have provided a meal period if it:

- ◆ Makes the meal period available to employees and affords them the opportunity to take it;
- ◆ Posts the Wage Order; and
- ◆ Maintains accurate time records for covered employees as required by the Wage Order.

An employer may prove compliance with the meal period requirement by informing an employee of the circumstances under which the employee is entitled to a meal period and having the employee acknowledge in writing that the employee understands those rights.

Prior to the emergency regulations, the DLSE interpreted the meal period requirements as meaning that a meal period had to commence no later than immediately following the completion of five hours of work. An employer would have been in violation if an employee began the meal period even minutes after the completion of five hours of work, even if the employee chose to do so.

The emergency regulations clarify that so long as the employer provides the meal period prior to the commencement of the sixth hour, an employee opting to take his or her meal period during the sixth hour does not place the employer in violation.

The gist of these clarifications clearly is to afford the employer and employee more flexibility in scheduling and taking meal periods without risking litigation.

## Do the Emergency Regulations Affect Pending Litigation?

As set forth in the DLSE's justification for implementation of emergency regulations, there are a large number of class action lawsuits pending in California alleging that the employer failed to provide meal and rest periods in accordance with the California law. Most, if not all, of these cases could be affected by these regulations. While the new regulation will directly affect DLSE enforcement of the meal period requirement, it will not preclude plaintiffs from asserting that the DLSE interpretation of the statute is incorrect. Ordinarily, the courts will defer to an enforcement agency's interpretation, but, as with any regulation, it is subject to challenge. Ultimately, the courts will have to decide what the Labor Code and Wage Orders require.

The DLSE's written statements supporting these emergency regulations demonstrate the DLSE intends them to clarify existing law. As a general matter, interpretations of existing law apply retroactively. Therefore, in addition to prospective litigation, the new regulations likely also will apply to all pending litigation. Employers who have suffered an adverse determination on any of these issues therefore should seek reconsideration of the adverse ruling.

According to the Department of Industrial Relations' press release, as emergency regulations, the new regulations will go into effect on December 20, 2004, following approval by the Office of Administrative Law. They will remain in effect for 120 days, during which time the public may comment. Thereafter, as finally approved or modified, they will remain in effect permanently.

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