

December 27, 2004

## Schwarzenegger Administration Withdraws Emergency Regulations Schedules Hearing On New Regulations, Regarding Meal and Rest Periods for California Employees

We recently reported that the California Division of Labor Standards Enforcement (“DLSE”) issued emergency regulations on meal-period and rest-break rules. These regulations would have recognized that the statute of limitations for meal-period and rest-break claims is just one year, not three years, that meals may be taken during more flexible periods, and that employers can comply with meal-period rules simply by making meal periods available, rather than guaranteeing that employees take them.

Apparently influenced by protests challenging the emergency nature of the proposed regulations, the DLSE has withdrawn them and has embarked on a more modest approach, which is to propose regulations to be issued through the normal notice-and-comment procedures.

We regard this as a positive development. First, it would have been hard to justify the proposed regulations as needed to address an “emergency.” That problem might have made the courts suspicious and rendered the new regulations more vulnerable to challenge. Second, the new proposed regulations are more fulsome and clearer than the proposed emergency regulations. Third, the DLSE has improved its explanation for the needed clarification by stating that the confusion in this area stems largely from the “underground regulations” that the DLSE had issued during the Davis administration. Further, consistent with this acknowledgement, the DLSE is now officially withdrawing the Davis administration’s various erroneous letter opinions to the effect that meal-period penalty pay was really a “wage.”

The practical result is that it will take a few weeks longer to complete the regulatory process, but any resulting regulation will be more resistant to judicial challenge.

The DLSE will conduct hearings on the proposed regulations in February. The proposed regulations address three subjects: (1) Whether the additional hour of pay for meal/rest period violations is compensation or a penalty. (2) When a meal period may be taken. (3) Whether an employer must require employees to take meal periods.

On the first issue — compensation versus penalty — the new regulations would simply recognize the reality that statutory mandates to pay fixed sums, which exceed actual losses, are penalties, thereby triggering a statute of limitations of one year, rather than the three- or four-year statutes of limitations otherwise applicable. Several trial court judges have concluded that the meal-period and rest-break penalties are wages. The proposed regulations will improve the chances of employers ultimately prevailing on that issue in the appellate courts.

On the second issue — when the meal period may be taken — the DLSE’s view should receive substantial weight, as neither the statute nor the IWC wage orders compel any particular answer. On this kind of issue, especially, courts are apt to defer to the interpretation of the enforcement agency, as expressed in properly promulgated regulations.

On the third issue — whether an employer can comply by making the meal period available to employees, affording them the opportunity to take it, posting the relevant IWC wage order, and maintaining accurate time records — the DLSE may see strong opposition. Again, the DLSE will be relying on its status as the enforcement agency and on the weight courts normally accord to properly issued regulations.

Organized labor and the plaintiffs’ bar will attempt to torpedo the proposed regulations in the administrative process. We encourage our clients to help the proposed regulations surmount this hurdle by submitting written comments in support of the proposed regulations. Written comments should be submitted no later than 5:00 p.m. on Monday, February 14, 2005, to

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The hearings will be held on Friday, February 4, 2005, at 9:00 a.m. in the Ronald Reagan State Building Auditorium, 300 South Spring Street, Los Angeles; on Tuesday, February 8, 2005, at 9:00 a.m. in the Hiram Johnson State Building Auditorium, 455 Golden Gate Avenue, San Francisco; and at a date and location to be selected in Fresno.

The hearings are likely to have something of a circus atmosphere. It will be more effective to present forceful comments in writing. It is important to recognize that one major aspect of the proposed regulations is to empower employees to choose when and whether to take their own meal breaks. Accordingly, employers would be doing a public service by identifying non-exempt employees who would be able and willing to offer their written comments in support of the proposed regulations.

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