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Scott Edward Cole

Matthew R. Bainer

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## COMMENT

# TO BE OR NOT TO BE A PENALTY: DEFINING THE RECOVERY UNDER CALIFORNIA'S MEAL AND REST PERIOD PROVISIONS

SCOTT EDWARD COLE AND MATTHEW R. BAINER\*

### INTRODUCTION

It's 3:45 p.m. on a Thursday and Employee 5301's eyelids are getting heavy.<sup>1</sup> Employee 5301, a company-employed security officer, has been at his post, without a break, for nearly seven hours now. The lunch that he quickly consumed around noon is starting to induce slumber, more than encouraging careful attention to protecting the assets of the mega-corporation that employs him. Pursuant to his employer's stated policies, Employee 5301 is only entitled to an "on-duty" meal period, meaning that he is forced to eat while manning his post. He is not permitted to make phone calls and the duration of his absence from his station is closely monitored if he uses the restroom, which he tries to avoid as much as possible. Beyond this, he is not permitted to leave his post for any per-

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\* Scott Cole & Associates, APC represents individuals in employment (wage & hour) class action litigation. Scott Edward Cole, Esq. is a graduate of the University of San Francisco School of Law and a member of the California State Bar and its Labor and Employment Law Section. Matthew R. Bainer, Esq., an associate with Scott Cole & Associates, APC, is also a graduate of the University of San Francisco School of Law and a member of the California State Bar and its Labor and Employment Law Section.

<sup>1</sup> "Employee 5301" here used as an anonymous pseudonym.

sonal reasons whatsoever and, in fact, has done so fewer than a handful of occasions during the four years he has been employed.<sup>2</sup>

Under particular provisions of California's Labor Code, enacted in 2000, the hypothetical employee discussed above is entitled to two ten-minute rest breaks and a continuous thirty-minute lunch break.<sup>3</sup> Otherwise, the employer owes this employee two hours of premium pay, at his regular hourly rate, for the time worked through these mandated breaks.<sup>4</sup> Recently, the meal and rest break provisions of California's Labor Code came under the spotlight due to a series of controversial proposed regulations.<sup>5</sup> In December of 2004, Governor Schwarzenegger's administration, through the Labor Commissioner's Department of Labor Standards Enforcement<sup>6</sup> ("DLSE") announced its intention to issue emergency regulations "interpreting" various portions of the meal and rest-break requirements.<sup>7</sup> One of the most significant proposed regulations is a "clarification" that the pay provided to employees under Labor Code Section 226.7 is a penalty rather than a wage.<sup>8</sup>

While this event may seem of minor significance to the untrained eye, the distinction between wages and penalties for employees who are denied their rest and meal periods is astronomical. As a penalty, aggrieved employees' claims for recovery are subject to a one-year statute of limitations.<sup>9</sup> As a wage,

<sup>2</sup> These facts are taken from the testimony of workers in a wage and hour class action filed by clients of the authors' law firm, and they are far from unique.

<sup>3</sup> CAL. LABOR CODE § 512 (West 2005); California Department of Industrial Relations, Industrial Welfare Commission (hereinafter IWC) Wage Orders at §§ 11 & 12 available at <http://www.dir.ca.gov/Iwc/WageOrderIndustries.htm>. (All wage orders, except, as noted in this article, share a common section 11. See e.g., IWC Wage Order No. 1-2001 through No. 17).

<sup>4</sup> CAL. LABOR CODE § 226.7 (West 2005). See *infra* notes 70-80 and accompanying text.

<sup>5</sup> CAL. CODE OF REGS. tit. 8 § 13700 (Proposed Draft 2004) available at <http://www.dir.ca.gov/dlse/MRPRegs.htm>.

<sup>6</sup> The DLSE is an administrative body, under the office of the California Labor Commissioner, charged with interpreting and enforcing California's Labor Laws. (Division of Labor Standards Enforcement (hereinafter DLSE), Enforcement Policies and Interpretations Manual [hereinafter Manual] (June 2002) available at [http://www.dir.ca.gov/dlse/DLSEManual/dlse\\_enfmanual.pdf](http://www.dir.ca.gov/dlse/DLSEManual/dlse_enfmanual.pdf)).

<sup>7</sup> CAL. CODE OF REGS. tit. 8 § 13700 (Proposed Draft 2004); the Labor Commissioner, and accordingly the DLSE, is authorized to "promulgate all regulations and rules of practice and procedure necessary" to carry out the enforcement of California's Labor Laws. CAL. LABOR CODE § 98.8 (West 2005).

<sup>8</sup> CAL. CODE OF REGS. tit. 8 § 13700(d) (Proposed Draft 2004).

<sup>9</sup> CAL. CODE OF CIV. PROC. § 340(b) (West 2005).

on the other hand, the period of limitations is four years.<sup>10</sup> By defining the pay due to an employee as a penalty, the probusiness Schwarzenegger administration will allow employers who have violated the meal and rest-break provisions for years to escape from up to three years of liability for their wrongdoings.<sup>11</sup> However, at the eleventh hour, the Schwarzenegger administration blinked and retracted its request for the promulgation of the proposed regulations under emergency procedures.<sup>12</sup> Consequently, the proposed regulations became open to public comment regarding their issuance.<sup>13</sup>

This article argues that the DLSE's proposed regulations are in fact a redefinition of the pay provided for under Section 226.7.<sup>14</sup> California Labor Code Section 226.7 was intended to, was explicitly drafted to, and in fact does, provide for a premium wage rather than a penalty.<sup>15</sup> Parts I and II provide a review of mandatory meal and rest periods.<sup>16</sup> Part III discusses the nature of the Section 226.7 pay provision, the DLSE's proposed regulations, and the DLSE's accompanying statement of reasons supporting these regulations.<sup>17</sup> Parts IV analyzes Labor Code Section 226.7 under the axioms of statutory interpretation, demonstrating that the DLSE's proposed regulations are not a mere clarification, but instead a complete change in the classification of the premium pay provided for under this statute.<sup>18</sup> Part V concludes the article with the authors' thoughts on the nature of these regulations, the intent behind their attempted promulgation, and the future of the meal and rest-break provisions.

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<sup>10</sup> Under California Business and Professions Code §§ 17200-17210, a party may seek restitution of property in an equitable suit under a four-year statute of limitations. CAL. BUS. & PROF. CODE §§ 17200-17210 (West 2005). The California Supreme Court has ruled that "wages" illegally withheld from an employee can be deemed property in which the employee has a vested interest and, accordingly, may be recovered as restitution under the Unfair Competition Law. *Cortez v. Purolator Air Filtration Products, Inc.*, 23 Cal. 4th 163, 168 (2000).

<sup>11</sup> CAL. CODE OF CIV. PROC. § 340 (West 2005); CAL. BUS. & PROF. CODE §§ 17200-17210 (West 2005); *Cortez v. Purolator Air Filtration Products, Inc.*, 23 Cal. 4th 163, 168 (2000).

<sup>12</sup> CAL. CODE OF REGS. tit. 8 § 13700 (Proposed Draft 2004).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*; CAL. LABOR CODE § 226.7 (West 2005).

<sup>15</sup> CAL. CODE OF REGS. tit. 8 § 13700 (Proposed Draft 2004); CAL. LABOR CODE § 226.7 (West 2005).

<sup>16</sup> See *infra* notes 19-69 and accompanying text.

<sup>17</sup> See *infra* notes 70-80 and accompanying text.

<sup>18</sup> See *infra* notes 81-117 and accompanying text.

## I. CALIFORNIA'S MEAL AND REST-BREAK REGULATIONS

## A. MEAL PERIODS REQUIREMENTS

With limited exceptions, California law requires an employer to provide any employee with a thirty-minute lunch period within the first five hours of work.<sup>19</sup> Moreover, an employer "may not employ" an employee beyond ten hours per day without providing that employee with a second meal period of another thirty minutes, with similar waiver provisions.<sup>20</sup> For nonexempt hourly employees, meal periods are unpaid breaks and need not be counted as hours worked so long as the employee is entirely relieved of all active or inactive work duties, the employee is free to leave his/her workstation, the period is uninterrupted<sup>21</sup> and of at least thirty minutes.<sup>22</sup>

The meal break requirements impose an affirmative duty on the employer to ensure that all employees do in fact take their meal breaks within the established time frame.<sup>23</sup> This provision is not unlike the prohibition against an employee accepting a level of compensation less than the applicable mini-

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<sup>19</sup> CAL. LABOR CODE § 512 (West 2005); *see also* IWC Wage Orders at § 11, establishing the same break requirements. Contrast, however, IWC Wage Orders No. 12, at § 11 [Motion Picture Industry], permitting six hours of work before a meal period and providing for additional interim rest periods for rehearsal and shooting of certain types of strenuous activity. Notably, there is no federal counterpart to California's meal and rest-period requirements under the Fair Labor Standards Act ("FLSA").

<sup>20</sup> CAL. LABOR CODE § 512 (West 2005); IWC Wage Orders at § 11; note that California Labor Code section 512 does not exclude any class of employee from its meal provision requirements, meaning that overtime exempt (salaried) employees would, at least at first glance, also be entitled to meal periods in accordance with that section. However, since the premium pay provision in California Labor Code section 226.7 for failure to provide the meal period only applies if the meal period is also required by an Industrial Welfare Commission Wage Order and since exempt employees are excluded under the Wage Orders, no premium pay is recoverable by exempt employees. *See* DLSE Manual, § 45.2.2 (June 2002).

<sup>21</sup> *See* Op. Letter, Department of Industrial Relations, DLSE (July, 12, 1996) available at [http://www.dir.ca.gov/DLSE\\_OpinionLetter.htm](http://www.dir.ca.gov/DLSE_OpinionLetter.htm).

<sup>22</sup> However, compare 29 C.F.R. § 785.19(b) (West 2005), which excludes meal periods from "hours worked" even if a health care industry employee is prohibited from leaving the employer's premises, in sharp contrast from California law. *See Brewer v. Patel*, 20 Cal. App. 4th 1017 (1994).

<sup>23</sup> According to the Division of Labor Standards Enforcement, Enforcement Policies and Interpretations Manual, the clear intent of the [Industrial Welfare Commission] is that the burden of insuring that employees take a meal period within the specified time is on the employer, in light of the language that "[n]o employer shall employ any person" beyond the prescribed time unless a meal period is taken. DLSE Manual § 45.2.1 (June 2002).

imum wage.<sup>24</sup> Unlike the rest-period requirement, discussed later in this article, which is best characterized as a “use it or lose it” provision, employers must ensure that their employees take all non-forfeited, mandated meal periods or face substantial liability to the employees, to the Division of Labor Standards Enforcement, or both.<sup>25</sup>

There are three exceptions to mandatory meal-period requirements.<sup>26</sup> The first exception to the meal-period requirement is in circumstances in which the work period does not exceed six hours.<sup>27</sup> In that instance, the meal period may be waived in its entirety by mutual consent of the employer and employee.<sup>28</sup> Although employers would be well advised to memorialize such agreements in writing whenever possible, neither the Labor Code nor the Wage Orders require such a writing.<sup>29</sup> A second exception involves the second meal period for work days exceeding ten hours.<sup>30</sup> In those circumstances, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived and only if the total hours worked is no more than twelve hours.<sup>31</sup> Again, this waiver may be by verbal agreement between the parties.<sup>32</sup>

The final exception to the mandatory meal break requirements, while appealing to many employers, almost inevitably leads to increased scrutiny. Section 11 of the IWC Wage Orders provides that, when an employer fails to relieve an employee of all duty in order to enjoy a thirty-minute meal period, the meal period shall be considered an “on duty” meal period and counted as time worked, yet the employer may be relieved

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<sup>24</sup> CAL. LABOR CODE § 1171 (West 2005).

<sup>25</sup> CAL. LABOR CODE § 226.7 (West 2005); CAL. LABOR CODE § 218 (West 2005).

<sup>26</sup> IWC Wage Orders at § 11.

<sup>27</sup> *Id.*; counsel representing unionized workers should also recognize a limited exception in Wage Order 1 for workers covered by a collective bargaining agreement (“CBA”). Beginning with Wage Order 1-2001, the IWC now allows parties to a CBA to “agree to a meal period that commences after no more than six (6) hours of work.” *See also*, CAL. LABOR CODE § 514 (West 2005), as amended, effective January 1, 2002 [repealing the statutory meal period exemption for unionized workers].

<sup>28</sup> IWC Wage Orders at § 11.

<sup>29</sup> *See* IWC Wage Orders and Cal. Labor Code.

<sup>30</sup> IWC Wage Orders at § 11.

<sup>31</sup> *Id.*

<sup>32</sup> *See* IWC Wage Orders and Cal. Labor Code (for lack of written agreement requirement).

of the premium pay otherwise associated with a violation.<sup>33</sup> This exception applies only where the job requirements render the allowance of a meal break a practical impossibility and where the employee knowingly and voluntarily consents to the "on duty" meal period in writing.<sup>34</sup> The written agreement must also state that the employee may, in writing, revoke the agreement at any time.<sup>35</sup> If any of these conditions is not met, the employer is required to compensate the worker for the thirty-minute meal period as well as the additional statutory amount.<sup>36</sup>

Under the third meal-break-requirement exception, the objective test for determining whether the nature of the work prevents the employee from being relieved of all duty turns on whether any employee would be prevented from being relieved of all duty based on the necessary job duties.<sup>37</sup> Additionally, employers should understand that, even if an employee is not required to perform actual work during the designated meal period, requiring that worker to remain on the premises will similarly violate the meal-period provisions and the meal period must be paid.<sup>38</sup> Moreover, the DLSE warned, in a September 4, 2002 Opinion Letter, that the on-duty meal period is not permitted simply because a duty-free meal period might result in inefficiency or employer inconvenience.<sup>39</sup>

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<sup>33</sup> IWC Wage Orders at § 11.

<sup>34</sup> IWC Wage Order at § 11 allows an "on duty" meal period "only when the nature of the work prevents an employee from being relieved of all duty" and when the parties agree, in writing, to an "on-the-job *paid* meal period." (Emphasis added).

<sup>35</sup> IWC Wage Orders §11

<sup>36</sup> *Id.*

<sup>37</sup> DLSE Manual § 45.2.3 (June 2002).

<sup>38</sup> *Bono Enterprises v. Bradshaw*, 32 Cal. App. 4th 968, 979 (1995).

<sup>39</sup> In this Opinion Letter, the DLSE set forth the multi-factor objective test of what would constitute a valid on-duty meal period as follows:

The factors that should be considered include the type of work, the availability of other employees to provide relief to an employee during a meal period, the potential consequences to the employer if the employee is relieved of all duty, the ability of the employer to anticipate and mitigate these consequences such as by scheduling the work in a manner that would allow the employee to take an off-duty meal break, and whether the work product or process will be destroyed or damaged by relieving the employee of all duty. The Division will conclude that an off-duty meal period must be provided unless these factors, taken as a whole, decisively point to the conclusion that the nature of the work makes it virtually impossible for the employer to provide the employee with an off-duty meal period. Finally, the burden rests on the employer for establishing the facts that would justify an on-duty meal period. Op. Letter, DLSE at 2-3 (Sept. 4, 2002).

## B. REST PERIOD REQUIREMENTS

Though never statutorily-formalized through memorialization within the Labor Code,<sup>40</sup> the rest-break requirements became mandatory under California law through their inclusion in the IWC Wage Orders.<sup>41</sup> Since provisions concerning waivers of rest periods are relatively scarce,<sup>42</sup> employers are required to authorize and permit ten minutes of “net rest time”<sup>43</sup> for every four hours of work “or major fraction thereof”<sup>44</sup> for all nonexempt employees.<sup>45</sup> Unlike meal periods, which demand that the employer police the taking thereof, an employer’s only obligation with regard to rest periods is that it “authorize and permit all employees to take rest periods,” pursuant to specific conditions concerning timing and duration.<sup>46</sup> If the employer allows rest breaks in accordance with the provisions of the Labor Code and IWC Wage Orders, the employee may nonetheless forego

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<sup>40</sup> In contrast to the meal break requirements specific inclusion in California Labor Code section 512. CAL. LABOR CODE § 512 (West 2005).

<sup>41</sup> IWC Wage Orders at § 11.

<sup>42</sup> Notably, IWC Order No. 16 permits parties to collective bargaining agreements a choice of opting out of the rest period provisions so long as the bargaining agreement provides “equivalent protection” for the employees. “Equivalent protection” has been held to mean that the CBA must contain the same substantive requirements regarding both the right to rest periods and the right to premium pay for rest period violations. (See CAL. LABOR CODE § 512 (West 2004); Op. Letter, DLSE (Sept.17, 2001). Section 17 of the Wage Orders provides for an exception to the rest period requirements “[i]f, in the opinion of the Division after due investigation, it is found that the 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 . . . .” Note that the exemption is at the discretion of the Division, must be in writing, and may be revoked after reasonable written notice is given. Section 17 of the Wage Orders further discusses the exemption application and posting procedures. Although similar provisions once existed for meal periods, no such exemptions for meal periods are included in post-2000 Wage Orders. See e.g., IWC Wage Orders available at <http://www.dir.ca.gov/Iwc/WageOrderIndustries.htm>.

<sup>43</sup> The DLSE has interpreted, in its February 22, 2002 Opinion Letter, that this “clear indication,” along with the plain language of Section 12 of the IWC Wage Orders, proves that there is to be one [net ten minute] rest period and not a series or succession of multiple rest periods equaling ten minutes in the aggregate. Op. Letter, DLSE (Feb. 22, 2002).

<sup>44</sup> The Wage Orders require every employer to authorize and permit all nonexempt employees to take rest periods, unless the employee’s total daily work time is less than 3 ½ hours. “Major fraction thereof” has commonly been interpreted as equaling at least 3 ½ hours, although the DLSE’s February 16, 1999 Opinion Letter states that the DLSE, in following the “clear letter of the law,” considers any time beyond 2 hours to constitute a “major fraction” of “four hours worked.” See e.g., IWC Wage Orders; Op. Letter, DLSE (Feb. 16, 1999).

<sup>45</sup> IWC Wage Orders at § 12; CAL. LABOR CODE § 226.7 (West 2005).

<sup>46</sup> IWC Wage Orders at § 12.



the rest break in part or in its entirety, without invoking the hour of pay remedy provided by Section 226.7.<sup>47</sup>

Since rest periods are counted as hours worked, an employer may not deduct from an employee's wages the time the employee is relieved from duty.<sup>48</sup> As with meal periods, an employer must allow the employee to be relieved of his or her work duties for the required period.<sup>49</sup> Unlike meal periods, since the employee is being paid for the rest period, the employee may be required to remain on the employer's premises during the rest period.<sup>50</sup> This does not mean, however, that the employee must remain at his or her post.<sup>51</sup>

Moreover, since each rest period must be comprised of a full and consecutive ten minutes, an employer is not permitted to include therein the amount of time that it takes to travel to or from the rest place and may not require the employee to use his or her rest period to travel to another facility to recommence work after the conclusion of the break.<sup>52</sup> Indeed, the DLSE has made clear that any separate use of restroom facilities by an employee or an employer's demand that the worker travel to or change from one work station to another to recommence work cannot be counted as an employee's rest period.<sup>53</sup>

## II. TIMING OF MEAL AND REST PERIODS

### A. TIMING OF MEAL PERIODS

Both the Labor Code and the Wage Orders require that the meal period be provided no later than at the end of the fifth hour worked if it is to be counted such that it relieves the em-

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> The IWC Wage Orders, at Sections 13(B), require that "[s]uitable resting facilities shall be provided in an area separate from the toilet rooms and shall be available to employees during work hours." The DLSE has interpreted this as a "clear indication" by the IWC that the rest period was to be available in a "rest area," if the employee so desired. *See e.g.*, IWC Wage Orders at § 13(B).

<sup>52</sup> Op. Letter, DLSE (Feb. 22, 2002).

<sup>53</sup> *Id.* Despite this prohibition, an employer can reasonably limit the amount of time that an employee is absent from his or her workstation by restrictions such as prohibiting an employee from extending a rest period by choosing to use the restroom during that time, thereby attempting to "piggyback" a paid rest period and a restroom break, to devise a break which then exceeds ten minutes in the aggregate. *Id.*

ployer of the premium pay requirement.<sup>54</sup> The DLSE, in applying this requirement, has opined that an employer is subject to the additional amount of pay if an employee is given a meal period at any time beyond the end of the fifth hour of labor.<sup>55</sup>

Specifically, Section 11 of each IWC Wage Order, except Wage Order 16, provides, absent a waiver, that a work period beyond five hours without a meal period is unlawful.<sup>56</sup> While there is little interpretive guidance from the DLSE on the timing of meal periods, one could argue that this is because the Wage Order provisions are clear on their face.<sup>57</sup> That same advocate could further argue that adhering to the requirements of the Wage Orders is a matter of remedial math; a worker simply cannot be required to work more than five hours without a meal period, unless the period is specifically waived.<sup>58</sup> Moreover, at least one DLSE opinion letter has argued that a rest period should precede *and* follow the meal period, lending further support to the argument that providing a meal period at the beginning or end of the shift is unlawful.<sup>59</sup> Although this DLSE Opinion Letter arguably dealt only with Wage Order 16, it seems clear that, since an employee cannot be compelled to take a meal period during the first or last three hours of a normal eight-hour shift, the meal period is, as a practical matter, the defining event that splits an ordinary eight-hour work day into two "work period[s]" for purposes of timing the taking of rest periods.<sup>60</sup>

## B. TIMING OF REST PERIODS

Similarly, California law requires employers to authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period in order

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<sup>54</sup> CAL. LABOR CODE § 512 (West 2005); IWC Wage Orders at § 11.

<sup>55</sup> Op. Letter, DLSE (Sept. 17, 2001). Employers should be aware that the time spent on a meal period at the outset of a day's work and, occasionally, the time spent thereon at day's end, may easily be judicially interpreted as reporting/standby time, for which special compensation rules apply.

<sup>56</sup> See IWC Wage Orders at § 11.

<sup>57</sup> *Id.*

<sup>58</sup> See *supra* notes 29-39 and accompanying text.

<sup>59</sup> Op. Letter, DLSE (Sept. 17, 2001) available at [http://www.dir.ca.gov/DLSE\\_OpinionLetter.htm](http://www.dir.ca.gov/DLSE_OpinionLetter.htm).

<sup>60</sup> *Id.*

to avoid the premium pay requirements.<sup>61</sup> The authorized rest-period time must be based on the total hours worked daily at the rate of ten minutes net rest time per four hours worked or major fraction thereof.<sup>62</sup> Accordingly, whereas the DLSE has indicated that employers are not required to affirmatively schedule rest periods, employers must nevertheless “authorize and permit” all employees to take them.<sup>63</sup>

As the language of the IWC Orders<sup>64</sup> reveals, the requirement that the timing of the rest periods be centered within each work period “insofar as [is] practicable” is a flexible standard.<sup>65</sup> The burden, however, remains on the employer to take all reasonable steps to ensure that the rest period falls as close to the prescribed period of the work day as possible.<sup>66</sup> Accordingly, this allowance does not permit such practices as combining or “piggybacking” rest periods or offering rest periods at day’s end;<sup>67</sup> the first rest break must *precede* the meal period and the second rest break must *follow* the meal period.<sup>68</sup> These instructions represent the DLSE’s general stance that the practices such as permitting employers to group meal and rest periods or shortening the workday by compelling a rest period at day’s end circumvent the purpose of the rest period, which is to refresh workers during the workday.<sup>69</sup>

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<sup>61</sup> IWC Wage Orders at § 12.

<sup>62</sup> *Id.*

<sup>63</sup> DLSE Manual § 45.3.

<sup>64</sup> IWC Wage Orders at § 12.

<sup>65</sup> *See e.g.*, Op. Letter, DLSE at 2 (Feb. 2, 2002).

<sup>66</sup> As the Labor Commissioner explains: “Obviously, the language contemplates that the IWC foresaw situations where the rest period could not practically be authorized in the middle of the work period; else there would be no reason for the use of the word “practicable.” There may be situations which arise when manning problems would make it impracticable to place the rest period in the exact “middle of the work period”; but the employer must then insure that it is, insofar as is practicable, near the middle of the work period.” DLSE Manual § 45.3 (June 2002); *See also* Op. Letter, DLSE (Feb. 2, 2002).

<sup>67</sup> “A rest period must be preceded and followed by some work.” Op. Letter, DLSE at 3-4 (Sept. 17, 2001).

<sup>68</sup> *Id.*

<sup>69</sup> However, IWC Order No. 16 states that rest periods can begin before the end of the first four hours, and that a meal period can begin right after the ten minute break. This may not be applicable to employees covered by other Wage Orders, particularly since Wage Order No. 16 sets forth more lenient terms due to the nature of work addressed by that Order (i.e., on-site occupations in construction, drilling, logging and mining, industries which would be more disrupted if such “piggybacking” was not allowed). Op. Letter, DLSE at 1 (Sept. 9, 2002).

## III. PREMIUM PAY REQUIREMENT OF MEAL AND REST PERIODS

## A. LABOR CODE SECTION 226.7

While spotting a violation of the meal and rest-period requirements may be relatively easy, the nature of the additional pay available for these violations is far from settled.<sup>70</sup> Yet, despite the recent debate over the issue of the applicable limitations periods for bringing such claims, the remedy articulated in California Labor Code §226.7 is clear:

If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided.<sup>71</sup>

The recovery set forth in Section 226.7 also applies to an employee who receives an illegal on-duty meal period.<sup>72</sup> Finally, the one hour of compensation is in addition to the pay required for the actual time the employee worked through the meal or rest period.<sup>73</sup>

The remedial provisions of the IWC Orders pertaining to meal and rest periods constitute daily violations, meaning that multiple failures to permit either form of break in any given day only permits recovery of one hour of compensation per day.<sup>74</sup> However, since the meal and rest-period provisions each contain a separate and distinct remedy, an employer that denies an employee both a meal *and* a rest period in a given day would thereby violate both sections of the applicable Order and, thus, be subject to both remedies, namely, two hours of wages.<sup>75</sup> Although no case authority yet exists on this point, the Labor Commissioner has opined that the additional hour of pay is an hourly, non-overtime rate that does not take into con-

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<sup>70</sup> See *supra* notes 19-69 and accompanying text.

<sup>71</sup> Notably, near-identical language appears in nearly all of the IWC Wage Orders. See IWC Wage Orders at §§ 11 & 12.

<sup>72</sup> CAL. LABOR CODE § 226.7 (West 2005).

<sup>73</sup> *Id.*

<sup>74</sup> See DLSE Manual § 45.2.8 (June 2002).

<sup>75</sup> See IWC Wage Orders at §§ 11 & 12.

sideration how many total hours the employee worked in the day.<sup>76</sup>

## B. THE DLSE'S PROPOSED REGULATIONS

The raging debate surrounding these regulations, brought into center stage by the DLSE's proposed regulations, surrounds the question of whether the "one additional hour of pay at the employee's regular rate of compensation" provided for in Labor Code §226.7 constitutes a penalty or a wage.<sup>77</sup> For aggrieved employees pleading §226.7 claims in their legal actions, the answer of this question is critical since the applicable statute of limitations and the ability to recover additional types of penalties turn on whether the nature of this provision is punitive or compensatory.

The current administration has firmly interjected itself into this debate by seeking to issue its proposed regulation, which unequivocally states:

an amount paid or owed by an employer to an employee under Labor Code Section 226.7 subdivision (b), for failing to provide the employee a meal or rest period in accordance with an applicable order of the Industrial Welfare Commission is a penalty, not a wage.<sup>78</sup>

Rather than framing this proposed regulation as a change in the currently-operative law, which would clearly lack any retroactive applicability and would be subject to both legislative and judicial review, the administration has framed this position as a mere "clarification" of the currently-operative language of Section 226.7.<sup>79</sup> In an accompaniment to the proposed regulations, the DLSE issued the following "Statement of Reasons" explaining its belief that the premium wage should properly be interpreted as a penalty:

The legislative history of Labor Code section 226.7 clearly indicates that the payment was meant to be a penalty. The

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<sup>76</sup> Op. Letter, DLSE at 6-7 (Oct. 17, 2003).

<sup>77</sup> CAL. LABOR CODE § 226.7 (West 2005).

<sup>78</sup> CAL. CODE OF REGS. tit. 8 § 13700(d) (Proposed Draft 2004).

<sup>79</sup> CAL. CODE OF REGS. tit. 8 § 13700, Statement of Reasons (Proposed Draft 2004).

payment provision of Labor Code section 226.7 was enacted as part of Assembly Bill 2509 of the 1999-2000 Regular Session of the California Legislature. The Assembly Floor Analysis of AB2509 as amended on August 25, 2000, demonstrates that the Legislature intended to create a penalty. Specifically, in the description of the Senate amendments to AB 2509, section 4 states that the amendments "Delete the provisions related to penalties for an employer who fails to provide meal or rest periods, and instead codify the lower penalty amounts adopted by the Industrial Welfare Commission." In enacting Labor Code section 226.7, the Legislature deleted the provisions specifying a higher penalty amount for meal and rest period violations and utilized a lower amount which was acknowledged as a penalty in the bill analysis.

In addition, the language of the payment provision ultimately enacted by the Legislature was taken largely from the Industrial Welfare Commission's Wage Orders. As of June 2000, minutes of the Industrial Welfare Commission demonstrate, the intent of the Commission in enacting that provision was that the one hour of pay be classified as a penalty.

Furthermore, it is not common usage that, in case of a labor violation, the remedy is to pay a "wage on a wage." Wages are paid based on work performed. In situations where an employee is entitled to the one hour of additional pay, the employee has already been paid wages for the missed rest period since rest periods are always on paid time; the employee has also already been paid wages for meal periods through which the employee worked. The one hour of pay penalty is similar to waiting time penalties, which are penalties calculated based on each individual employee's hourly wage, and to other provisions of the labor law where employers are to self-assess additional amounts as a penalty.<sup>80</sup>

#### IV. WAGES V. PENALTY: A QUESTION OF STATUTORY INTERPRETATION

In order to ascertain whether the DLSE's interpretation of Section 226.7 is correct, one first must identify the standard for statutory interpretation in California. The established process

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<sup>80</sup> Operative Section of DLSE "Statement of Reasons" reproduced herein for analytical assistance purposes. CAL. CODE OF REGS. tit. 8 § 13700, Statement of Reasons (Proposed Draft 2004).

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for determining statutory meaning is to proceed by, first, applying the actual plain language of the statute, second, ascertaining the intent of the Legislature in enacting the statute in a manner which effectuates a reasonable result in accordance with common sense and justice.<sup>81</sup> These analytical steps are to be conducted in order, such that the indisputable finding of one step negates the need to conduct any analysis under the later steps.<sup>82</sup> By subjecting the DLSE's position to the scrutiny of this test, it becomes clear that the interpretation of the recovery provided in Section 226.7 as a penalty is flawed.

#### A. THE PLAIN LANGUAGE OF SECTION 226.7 REVEALS THE CREATION OF A WAGE

Before any analysis into intent or reasonableness is performed, analysis of statutory meaning must first look at the plain language of the statute itself.<sup>83</sup> As the courts have eloquently explained, it is the final enacted text of the statute that has successfully "braved the legislative gauntlet."<sup>84</sup> Accordingly, this is the single most important piece of evidence available to the present analysis. Indeed, if there is no ambiguity in the language of the statute itself, the courts will simply presume that the Legislature meant what it said and enforce the black letter of the law as it stands.<sup>85</sup>

The language defining the premium pay established under Section 226.7 is clear and unambiguous in its meaning. The statute mandates that the employer "*pay the employee one additional hour of pay.*"<sup>86</sup> Given that the statute utilizes the word *pay* twice, as both a verb and a noun, one must apply the proper meaning of this term in both instances in order to obtain the proper interpretation of this statute.<sup>87</sup> Webster's Third New International Dictionary defines the verb "pay" as to "give [someone] money due for work, goods, or an outstanding debt"

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<sup>81</sup> *Halbert's Lumber v. Lucky Stores*, 6 Cal. App. 4th 1233, 1238-39 (1992).

<sup>82</sup> *Id.* at 1240.

<sup>83</sup> *Id.* at 1238.

<sup>84</sup> *People v. Snook*, 16 Cal. 4th 1210, 1215 (1997), (citing *Halbert's Lumber v. Lucky Stores*, 6 Cal. App. 4th 1233, 1238 (1997)).

<sup>85</sup> *Id.* at 1215.

<sup>86</sup> CAL. LABOR CODE § 226.7 (West 2005) (Emphasis added).

<sup>87</sup> *Duty v. Abex Corp.*, 214 Cal. App. 3d 742, 749 (1989).

and the noun “pay” as “money paid for work.”<sup>88</sup> By substituting the literal definitions of the word *pay* to the statute, and taking only slight and completely-nonpartisan artistic license in abbreviating language to eliminate superfluous verbiage, the statute would read:

If an employer fails to provide an employee a meal or rest period in accordance with an applicable Order of the Industrial Welfare Commission, the employer shall *give [the employee] money due for work* [consisting of] one additional hour of *money paid for work*.<sup>89</sup>

To this author’s eye, the plain meaning of the statute could not be clearer than, where an employee works through the meal or rest break, that employee is to be given premium pay in the amount of one hour of wages for that work performed.<sup>90</sup> Even the Schwarzenegger administration’s stated position concedes that “wages” are money given to employees in exchange for work performed.<sup>91</sup> As such, an application of the plain language of this statute dictates that the payment must be conceded to be a wage.<sup>92</sup>

The DLSE’s attempt to grapple with the plain language of the statute is less than convincing. The DLSE claims that the interpretation of the term “one hour of pay” as a “wage” is not “common usage” in labor violations.<sup>93</sup> The administration further claims this to be particularly true where the result yields additional compensation for work performed, despite the employee having already been compensated at his or her regular

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<sup>88</sup> WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1659 (Philip Babcock Gove, Ph.D ed., 1993).

<sup>89</sup> See CAL. LABOR CODE § 226.7 (West 2005); WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1659 (Philip Babcock Gove, Ph.D ed., 1993).

<sup>90</sup> CAL. LABOR CODE § 226.7 (West 2005); WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1659 (Philip Babcock Gove, Ph.D ed., 1993).

<sup>91</sup> “Wages are paid based on work performed.” CAL. CODE OF REGS. tit. 8 § 13700, Statement of Reasons (Proposed Draft 2004). Of note; the Webster’s dictionary also defines “wage” as “a fixed regular payment for work” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2568-69 (Philip Babcock Gove, Ph.D ed., 1993).

<sup>92</sup> See CAL. LABOR CODE § 226.7 (West 2005); WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1659 (Philip Babcock Gove, Ph.D ed., 1993).

<sup>93</sup> CAL. CODE OF REGS. tit. 8 § 13700, Statement of Reasons (Proposed Draft 2004) (describing the nature of paying a “wage on a wage”).



rate of pay for that service.<sup>94</sup> However, a review of similar legislation shows that the contrary is true.

The language and usage of the term “pay” in Section 226.7 are directly analogous to statutory language describing overtime wages.<sup>95</sup> In the overtime provisions, not only does the Legislature use the term “pay” to describe a wage,<sup>96</sup> but it specifically created a premium wage which provides additional compensation above the regular pay the employee has already received for that work.<sup>97</sup> In the case of an overtime wage, the employee has been paid at her or his normal hourly wage for all hours in which she or he performed work, yet still receives a “wage on a wage” by entitlement to the further compensation of an additional half hour of pay for all overtime hours worked.<sup>98</sup> For the same reason that the language of the overtime statute was intended to and has always been interpreted as premium pay, or a “wage,”<sup>99</sup> so should Section 226.7.

Conversely, when the Legislature has intended to create a penalty for violation of its Labor Code provisions, it has used clear language to communicate that intent by describing it as such. The Labor Code is replete with such examples: in Labor Code § 210, failure to make payments, the Legislature stated: “[employer] shall be subject to a civil penalty as follows . . . one hundred dollars for each failure to pay”; in Labor Code § 225.5, withholding of wages, “[employer] shall be subject to a civil penalty . . . [of] one hundred dollars”; Labor Code § 558, violations of labor chapter, “[employer] shall be subject to a civil penalty . . . [of fifty dollars].” In Section 226.7, it seems axiomatic that the Legislature considered and purposefully rejected language defining the recovery as a penalty. Indeed, the evidence overwhelming supports a conclusion that the plain language of Section 226.7 creates a premium wage to be paid to employees, not a penalty.

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<sup>94</sup> *Id.*

<sup>95</sup> CAL. LABOR CODE § 510 (West 2005).

<sup>96</sup> Specifically, the Legislature used of the term “one and one-half times the regular rate of *pay* for an employee” (Emphasis added) to describe the employees wages. CAL. LABOR CODE § 226.7 (West 2005).

<sup>97</sup> CAL. CODE OF REGS. tit. 8 § 13700, Statement of Reasons (Proposed Draft 2004).

<sup>98</sup> CAL. LABOR CODE § 510 (West 2005).

<sup>99</sup> See *Cortez v. Purolator Air Filtration Products, Inc.*, 23 Cal. 4th 163, 173 (2000).

## B. THE LEGISLATIVE HISTORY REVEALS AN INTENTION TO CREATE A WAGE

Normally, the unambiguous plain language of Section 226.7 would obviate the need for any additional analysis regarding the nature of the premium pay provision.<sup>100</sup> However, since the bulk of the DLSE's argument that Section 226.7 provides a penalty rests on its assertion that the legislative history of Labor Code section 226.7 clearly indicates that the payment was meant to be a penalty,<sup>101</sup> this article will provide further analysis into the question of whether the rationale provided by the DLSE supports its position.

The legislative history of Section 226.7 appears patently contrary to the DLSE's position. Specifically, that history reveals that the original draft of the Section 226.7 statute was amended as follows:

This bill would ~~make require~~ any employer that requires any employee to work during a meal or rest period mandated by an order of the commission ~~subject to a civil penalty of \$50 per violation and liable to pay~~ the employee ~~for twice the employee's average hourly or piecework~~ *one hour's pay for each workday that the meal or rest period is not provided.*<sup>102</sup>

Included in the original draft is commonplace legislative language indicating creation of a penalty: "subject to a civil penalty," and intended a set quantity for that penalty in the amount of \$50.<sup>103</sup> Equally apparent is that the Legislature specifically differentiated the penalty of \$50 from the liability to the employee for pay due to the employee in compensation for work performed.<sup>104</sup>

Despite originally containing language defining the liability for missed breaks as a "penalty," Assembly Bill 2509 was not ultimately passed in that form,<sup>105</sup> and, in interpreting the legislative intent behind the enactment of statutes, that kind of

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<sup>100</sup> *Halbert's Lumber v. Lucky Stores*, 6 Cal. App. 4th 1233, 1239 (1992).

<sup>101</sup> CAL. CODE OF REGS. tit. 8 § 13700, Statement of Reasons (Proposed Draft 2004).

<sup>102</sup> Original draft of AB 2509 (Cal. 2002) (Strikeouts and italics in original).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> CAL. LABOR CODE § 226.7 (West 2005).

evidence has always carried enormous weight.<sup>106</sup> California courts have long held that the rejection by the Legislature of a specific provision contained in an act as originally introduced is conclusive evidence that the act, as adopted, should not be construed to incorporate the original provision.<sup>107</sup> This position is in keeping with the statutory interpretation doctrine of “expressio unius est exclusio alterius,” meaning that the expression of one thing is the exclusion of another.<sup>108</sup> Here, the specific exclusion of the word “penalty,” and its replacement with the word “pay,” mandates a finding that the Legislature intended to create a wage, not a penalty.<sup>109</sup>

The DLSE's only evidentiary support to the contrary<sup>110</sup> is a comment taken from the Assembly Floor Analysis of AB 2509. There, the amendment to the bill was described as “[d]elet[ing] the provisions related to penalties for an employer who fails to provide meal or rest periods, and instead codify[ing] the lower penalty amounts adopted by the Industrial Welfare Commission.”<sup>111</sup> The DLSE concludes that this sole statement demonstrates an intent by the Legislature, as a whole, to establish a penalty rather than a wage.<sup>112</sup>

The problem with the DLSE's evidence is twofold. First, its presumption that the use of or allusion to the term “penalty” in minutes and analyses discussing the bill represent a specific attempt to differentiate the recovery as a penalty rather than a wage is unsupported.<sup>113</sup> In fact, there is no evidence that the use of the word “penalty” in these minutes and analyses was anything more than inadvertent use of the term in describing the larger recovery in comparison to the smaller recovery.<sup>114</sup> There exists no evidence that this single passage represented

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<sup>106</sup> *Beverly v. Anderson*, 76 Cal. App. 4th 480, 485-486 (1999), (citing *Rich v. State Board of Optometry*, 235 Cal. App. 2d 591, 607 (1965); accord, *California Mfrs. Assn. v. Public Utilities Com.*, 24 Cal. 3d 836, 845-46 (1979)).

<sup>107</sup> *Id.*

<sup>108</sup> *In re Christopher T.*, 60 Cal. App. 4th 1282, 1290 (1998); *United Farm Workers v. Agriculture Labor Relations Board*, 41 Cal. App. 4th 303, 316 (1995).

<sup>109</sup> Original draft of AB 2509 (Cal. 2002); CAL. LABOR CODE § 226.7 (West 2005).

<sup>110</sup> CAL. CODE OF REGS. tit. 8 § 13700, Statement of Reasons (Proposed Draft 2004).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

anyone's intent to define the premium pay as a penalty for purposes of identifying the nature of that recovery.

More problematic to the DLSE's conclusion is that its alleged evidence, assuming that the DLSE's interpretation of the analysis author's intent is correct, is directly contradicted by the specific language amendments made by the Legislature within the text of the bill itself.<sup>115</sup> While evidence of the beliefs of a single legislator or even a legislative committee is a factor in evaluating legislative intent, it is hardly conclusive, particularly when contradicted by evidence of the intent of the Legislature *as a whole*.<sup>116</sup> In such cases where there exists conflicting evidence of legislative intent, deference must always be given to that evidence which more strongly evidences the intent of the Legislature as a whole over evidence of the intent of any sub-unit of that body.<sup>117</sup>

## V. CONCLUSION

While it seems clear that the Schwarzenegger administration's proposed regulations constitute a flawed clarification of existing law, if indeed intended as a clarification at all, it is difficult to predict whether public outcry against these pro-business efforts will have any effect. What is evident is that, in California, the notion of workers' rights has its head positioned neatly upon a legal guillotine with the due process 'right to life' being circumvented by back-door politics and a conservative party agenda. The force with which the blade falls upon the block will assuredly taint California's reputation for progressive labor laws for years to come.

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<sup>115</sup> Original draft of AB 2509 (Cal. 2002).

<sup>116</sup> *In re Marriage of Bouquet*, 16 Cal. 3d 583, 588-89 (1976).

<sup>117</sup> *Id.* at 590-591.