

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT

LEGAL SECTION

455 Golden Gate Avenue, 9th Floor
San Francisco, CA 94102
(415) 703-4863

MILES E. LOCKER, Attorney for the Labor Commissioner

September 4, 2002

Robert T. Cherry, Managing Director
Valley Employers Association
1300 East Shaw Avenue, Suite 125
Fresno, CA 93710-7903

Re: On-Duty Meal Periods

Dear Mr. Cherry:

This in response to your letter to the State Labor Commissioner, Arthur Lujan, dated April 4, 2002, in which you presented the following question, seeking clarification of the requirements for a permissible "on-duty meal period":

"The problem arises in the fast food industry where during many of the late night shifts the only person in charge of the restaurant is an hourly paid Shift Manager. Because this person must be available at all times to answer questions or solve problems it is not always possible for the employee to get an uninterrupted meal period of one-half hour. The employees do get to eat and are paid for all time including the time they are eating their meal. Under these circumstances, and with the agreement of the employee, can then employer have an On-Duty Meal Period arrangement with the employee?"

Industrial Welfare Commission ("IWC") Order 5-2001, which governs wages, hours and working conditions in the restaurant and fast food industry, mirrors Labor Code §512 in providing: "No employer shall employ any person for a work period of more than five hours without a meal period of not less than 30 minutes, except that when a work period of not more than six hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee." Subdivision 11(A) of IWC Order 5-2001 further provides: "Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an 'on-duty' meal period and counted as time worked. An 'on-duty' meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the

2002.09.04

parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time."

Thus, as a general rule the required meal period must be an off-duty meal period, during which time the employee: 1) is not required to work, 2) is not suffered or permitted to work, 3) is not subject to the control of the employer so as to be free to leave the employer's premises and attend to his/her own personal affairs, 4) for a minimum of thirty minutes. If any of these conditions are not present, the time, if any, during which the employee is permitted to eat his or her meal is considered on-duty time, which is treated as "hours worked" for which the employee must be paid at his or her regular rate of pay.

There are two types of on-duty meal periods: those that are permitted under the wage orders, and those that are not. In order for an on-duty meal period to be permitted under the wage orders, all three of the following requirements must be met:

1) the nature of the work must prevent the employee from being relieved of all duty during the meal period, 2) the employee and employer must have previously entered into a signed agreement authorizing an on-duty meal period, and 3) the signed agreement must expressly state that the employee may, in writing, revoke the agreement at any time. (If employees are represented by a collective bargaining representative, that representative is empowered to enter into or revoke such agreement on behalf of the represented employees. See *Porter v. Quillin* (1981) 123 Cal.App.3d 869.)

In determining whether "the nature of the work" prevents an employee from being relieved of all duty, the Division of Labor Standards Enforcement starts with the premise that the general requirement for an off-duty meal period is remedial in nature, and any exceptions to that general requirement must be narrowly construed, so as to avoid frustrating the remedial purpose of the regulation. The Division has always followed an enforcement policy that this determination must be made on the basis of a multi-factor objective test. 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

Robert T. Cherry
September 4, 2002
Page 3

rests on the employer for establishing the facts that would justify an on-duty meal period.

Applying this multi-factor test to the facts that you have provided, we note that despite your assertion that the hourly paid shift manager "must be available at all times to answer questions or solve problems," we cannot fathom why the other employees of the restaurant could not function in the absence of the shift manager for thirty minutes, so as to allow the shift manager to take an off-duty meal period. There is nothing that would appear so inherently complex about the running of a fast food outlet that would make the shift manager's presence utterly indispensable so as to preclude this manager from getting his or her well deserved, and legally required, off-duty meal break. You have failed to present any facts that would establish why no other employee could be trained to answer or resolve the "questions" or "problems" that may arise, or why any "questions" or "problems" that could only be answered or resolved by the shift manager could not wait for his or her return from an off-duty meal break. Finally, you do not suggest that the fast food being prepared and served would be destroyed or damaged as a result of relieving the shift manager of all duty for the length of his or her meal period. As such, we would conclude that the failure to provide this employee with an off-duty meal period violates the meal period requirements of IWC Order 5-2001, and that an on-duty meal period is not permitted.

Subdivision 11(B) of Order 5-2001 states: "If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the meal period is not provided." This extra hour of compensation is required for each day that an employee who is entitled to an off-duty meal period is employed without the required off-duty meal period.

Thank you for your interest in California wage and hour law. Please do not hesitate to contact us with any further questions.

Sincerely,

Miles E. Locker
Attorney for the Labor Commissioner

cc: Chuck Cake, DIR Director
Arthur Lujan, Labor Commissioner

2002.09.04

Robert T. Cherry
September 4, 2002
Page 4

Anne Stevason, Chief Counsel
Tom Grogan, Chief Deputy
Greg Rupp, Assistant Chief
Nance Steffen, Assistant Chief
Bridget Bane, IWC Executive Officer

2002.09.04