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January 3, 2005

# The DLSE Issues "Final" Proposed Meal Period Regulations

## DLSE Characterizes Meal Period Payments as Penalties and Offers Employees the Flexibility to Eat When They Are Hungry

*By Kirby Wilcox and E. Jeffrey Grube*

Immediately after withdrawing proposed emergency regulations, the California Division of Labor Standards Enforcement ("DLSE") issued "final" proposed meal period regulations on Monday, December 20, 2004.

Through its proposed regulations, the DLSE clarifies its prior – often conflicting – enforcement positions on California's meal period requirements. The regulations closely track interpretations advocated for years by the employer community and, for the most part, effect a more rational set of rules that grant more meal-period flexibility to employers and employees alike.

Following the requirements of the Administrative Procedures Act, the DLSE will accept public comment on the proposed regulations until February 14, 2005, after which the Office of Administrative Law ("OAL") will consider the regulations for final approval.

In the meantime, the DLSE has indicated that the proposed regulations represent its enforcement position on California meal period law. To avoid internal inconsistencies, the DLSE has withdrawn four prior opinion letters that are contrary to its current enforcement position. The proposed regulations, therefore, have immediate importance to California employers, despite the fact that they do not yet have force of law.

We divide this Alert into two parts. First, we outline the proposed meal period regulations and identify their three key departures from the DLSE's prior interpretations of meal period law: (1) the meaning of "provide," (2) when meal periods must begin, and (3) the characterization of Labor Code § 226.7 payments as "penalties". Second, we discuss the consequence of the DLSE's withdrawal of its opinion letters regarding on-duty meal periods.

### I. THE PROPOSED MEAL PERIOD REGULATIONS CLARIFY THE DLSE'S PRIOR ENFORCEMENT POSITIONS IN THREE KEY AREAS

The proposed meal period regulations clarify (and in ways depart from) the DLSE's prior enforcement position on meal period requirements in three key areas: (1) they interpret an employer's duty to "provide" meal periods to mean "make available and afford the opportunity to take," rather than "ensure" as previously advocated by the DLSE and the plaintiffs' bar; (2) they allow employers and employees more flexibility on *when* employees can take their meals; and (3) they make clear that Labor Code § 226.7 payments are "penalties," not wages.

#### A. "Provide" Means "Provide," Not "Ensure"

California Labor Code § 512 says that "[a]n employer may not employ an employee for a work period of more than five hours per day without *providing* the employee with a meal period . . . ." (Emphasis added.) The proposed regulations define "providing" as follows:

(b) Requirement to Provide Meal Periods

(1) An employer shall be deemed to have provided a meal period to an employee in accordance with Labor Code Section 512 if the employer:

(a) Makes the meal period available to the employee and affords the opportunity to take it; and
(b) Posts the applicable order of the Industrial Welfare Commission; and
(c) Maintains accurate time records for covered employees, as required by the posted order.

(2) As a further precaution beyond the criteria required under (b)(1), an employer may inform an employee in writing of the circumstances under which he or she is entitled to a meal period in a way that permits the employee to acknowledge in writing that he or she understands those rights.

*8 Cal. Code Regs § 13700 (b).*

*Do employers face any liability when employees skip meals that employers provided them?*

No. The DLSE's definition of "providing" makes clear that "provide" does not mean "ensure." Employers will not be held to the DLSE's former strict liability standard. Employees may skip meals provided them under this definition, even without a mutual waiver, with no consequence to their employers.

*What happens if an employer satisfies only subpart (b)(1) (make available and afford the opportunity) of the DLSE's definition of "providing"?*

The regulations suggest that an employer must satisfy all three prongs of the "providing" definition in subpart (b)(1) to establish that it provided meal periods. But the DLSE also included subpart (b)(2), which allows an employer to offer written notice to its employees as additional evidence that it properly "provided" meal periods. The employer must have given the notice in a manner that allowed employees to acknowledge their understanding in writing. A fair reconciliation of (b)(1) and (b)(2) is that an employer *conclusively* satisfies its obligation if it satisfies each of the three prongs of (b)(1). Plaintiffs and employers may dispute whether (b)(2) offers employers an independent means to establish that they properly provided meal periods. Plaintiffs may contend that the language of (b)(2) does not suggest that it is a surrogate or substitute for all of (b)(1). They may argue that at most (b)(2) is a surrogate or substitute for the notice provision in (b)(1)(b). If a dispute emerges, employers will contend that (b)(2) can be a full replacement for (b)(1). A cautious employer would establish policies that comply with each element of (b)(1) to avoid this debate until the DLSE offers additional guidance.

## B. More Flexibility For Employers And, Especially, Employees On When Meal Periods May Begin

Labor Code § 512 is silent on when employers must provide meals to employees who are entitled to them. (DLSE "Initial Statement of Reasons," at 3-4.) It defines how long employees must work before *employees are entitled* to a meal, but it does not say when *employers must provide* the meal to which employees are entitled. *Id.* The proposed regulations highlight this dichotomy, but the DLSE has always recognized it.

The proposed regulations make no change to when employees are *entitled* to meal periods. The DLSE has long interpreted Section 512 to entitle employees to a meal period every time a work period exceeds five hours. That has not changed. What has changed is the DLSE's interpretation of when employers *must provide* meal periods to which employees become entitled.

In the past, the DLSE had required employers to ensure that employees began their meal periods no later than the end of any five-hour work period. The DLSE thereby required employers to provide meal periods *before the moment of entitlement.* Employees were not entitled to meal periods until they worked *more* than five hours, but the DLSE required employers to provide meal periods *by the end* of any five-hour work period. This placed employers in an untenable position when they could not predict when work periods would exceed five hours. To be safe, employers often provided meal periods to employees who were not entitled to them.

The DLSE now reverses the order of *entitlement* and the duty to *provide*, effecting a more-rational order of events. Employees still are *entitled* to a meal period when a work period exceeds five hours, but employers may provide the meal period at any time up to the end of the sixth hour (unless validly waived).

To demonstrate its interpretation of Labor Code § 512, the proposed regulations divide employee work days into three categories: six or fewer hours, more than six but not more than 10 hours, and more than 10 hours but not more than 12 hours.

### 1. Work Days Of Six Or Fewer Hours

Employers do not have to provide meal periods to employees who work five or fewer hours in a day. Employers must provide meal periods to employees who work more than five hours but not more than six hours in a day only if the meal period is not waived by mutual consent of the employee and the employer. Cal. Code Regs. § 13700(c)(1). This language tracks Labor Code § 512 verbatim.

*When must the first meal period begin if the employee works more than five hours and does not waive the meal period?*

The regulations do not specify *when* the meal period must begin for employees who work more than five and not more than six hours in a day and do not waive their meal periods. The DLSE makes clear, however, in its Statement of Reasons and in its discussion of work days of more than six but not more than 10 hours, that Labor Code § 512 does not mandate that meals begin within each five-hour work period. Thus, the DLSE has harmonized two portions of Section 512: the "five-hour rule" and the IWC's authority to regulate meals *after* the sixth hour of work. That is, employers may provide meals that begin after five hours but not later than the end of the sixth

hour. What remains is the need to harmonize an employee's right not to waive a meal period in a shift of six or fewer hours and an employer's right to set the meal at the end of the sixth hour – for example, when the shift ends. While it may seem incongruous to respond to a request for a meal by providing the meal as the day ends, the alternative is more so – making the employee stay at work for six and one-half hours to provide both a 30-minute meal period and the six hours' service that the employer needs. Under the "end-of-shift" approach, neither the employee nor the employer is disadvantaged. Therefore, it would appear that the only fair reading of the proposed regulations is that an employer complies with the proposed regulations if it provides the employee with a meal period that may begin no later than the end of the sixth hour *or when the employee leaves for the day*, whichever is earlier.

### 2. Work Days Of More Than Six But Not More Than 10 Hours

Employers must provide employees with a second meal period when the work period following the end of an employee's first meal period exceeds five hours. If an employee begins work at 8:00 a.m. and takes a first meal period from Noon to 12:30 p.m., the employer must provide a second meal period if the employee works past 5:30 p.m. (five hours after the end of the first meal period, even though the work day to that point has spanned only nine hours).

The new regulations depart from the DLSE's former enforcement position as to *when* employers must provide that second meal period. Whereas the DLSE in the past had required employers to provide meal periods that started no later than the end of the fifth hour within a work period, the new regulations allow employers to provide the meal period later – up to, and including,[1] the end of the sixth hour. In the example just stated, the employer would have to provide the employee with a second meal period, because the employee worked past 5:30 p.m., but the second meal period could begin as late as 6:30 p.m.

The new regulations grant *employees* even more flexibility in taking their meals when they want them. The proposed regulations make clear that "[i]f an employee requests a meal period to begin after the end of the sixth hour of work, an employer is not in violation of Labor Code 512 so long as the employee was afforded the availability and opportunity to take a meal period before the end of the sixth hour of work." Cal. Code Regs. § 13700(c)(2)(b). This means that employers have to "provide" meal opportunities that may begin no later than the end of any six-hour work period (absent valid waiver), but employees may choose to take later meals – or no meals – without consequence to their employers.

***May employees who work more than six but not more than 10 hours waive their second meal opportunity, and not take one at all?***

Labor Code § 512 states that, "if the total hours worked is no more than 12 hours, 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." A fair reading of Section 512 is that employees may waive their second meal period (if they did not waive the first meal period) regardless of how much time has passed from the end of the first meal period, as long as they do not work more than 12 hours in the day. The proposed regulations, however—via an example published within the regulations—suggest a different waiver rule for second meal periods when employees work no more than 10 hours. Cal. Code Regs. § 13700(c)(4). Example 3 reads:

> *A non-exempt employee begins work at 8:00 a.m. and is provided a meal period, which begins at 10:30 a.m. The beginning of the meal period ends the initial work period of that employee's work. Upon returning to work at 11:00 a.m., the employee commences a new work period. The employee then works until 4:00 p.m. If the employee continues work beyond this point, the employer is required to provide another meal period to the employee, as the work period will exceed five hours. However, if the employee's work will end by 5:00 p.m., the second meal period may be waived by mutual consent of the employer and the employee.*

This example implies that a waiver would not be allowed if the employee's work ended after 5:00 p.m., even if the employee's day ended short of Section 512's 12-hour rule. To be safe, employers should not accept waivers of second meal periods unless an employee is expected to work no longer than six hours after completing his or her first meal period.[2]

***When, if ever, must an employer provide a "second" meal period when the employee skipped his or her first meal period?***

The proposed regulations contemplate that employees may skip meal periods that employers provide. The question then arises: How do the five-hour *entitlement* rule and the six-hour provide rule apply to subsequent meal periods? The proposed regulations do not directly answer the question. One possible answer – which would be consistent with Section 512 and the proposed regulations – is that those employees are not entitled to any additional meal period. They did not work more than five hours after the end of any prior meal period (because they failed to take a prior meal period), and they did not work more than 10 hours in the work day (see discussion below of days that exceed 10 hours). Another possible answer could be that employees become entitled

to a subsequent meal period if they work more than five hours after the end of the previously *scheduled* meal period. Under this interpretation, employers would have to provide the subsequent meal period by the end of six hours after the end of the previously scheduled meal period. Take, for example, an employee whose shift starts at 8:30 a.m. If the employer provided a one-hour meal period to begin at (or by) 11:00 a.m., for example, and the employee voluntarily skipped it, then – under this alternative rule – the employee would be entitled to a subsequent meal period if he or she works past 5:00 p.m. (five hours after the scheduled Noon end of the employee's prior meal period), and the employer would have to provide it to begin no later than 6:00 p.m. Until the DLSE offers clarification, we recommend that employers take a cautious approach and "provide" a second meal period to any employee who skips his or her first meal period, should the employee work more than five hours after the end of the scheduled first meal period. That second meal period should begin no later than six hours after the end of the scheduled first meal period.

***When must an employer provide a second meal period when an employee's work day ends more than five hours but fewer than six hours after the end of his or her first meal period, and there is no waiver?***

An employer must provide a second meal to an employee (who is entitled to one and does not waive it) at any time up to the end of the sixth hour after the employee completed his or her first meal period. But what if the employee's work day ends before the end of the sixth hour? For the reasons we discuss above concerning work days of not more than six hours, we believe that the only fair reading of the proposed regulations is that employers must provide a second meal period at any time up to the end of the sixth hour after the employee completed his or her first meal period *or when the employee leaves for the day,* whichever is earlier.

### 3. Work Days Of More Than 10 But Not More Than 12 Hours

Employers must provide a second meal period to employees who work more than 10 hours, unless the employees work no more than 12 hours, there is no waiver of the first meal period, and the second meal period is waived by mutual consent between the employees and their employers. Cal. Code Regs. § 13700(c)(1). As with the proposed rules that apply to employees who work six or fewer hours, this language tracks Labor Code § 512 verbatim.

***How does the over-10-hour rule work in conjunction with the potential requirement to provide employees with second meal periods (depending on when they completed their first meal periods) when they work 10 or fewer hours?***

The 10-hour rule for second meal periods works independently from the five-hour rule explained above. Absent valid waivers, employers must provide employees with a second meal period when they work more than 10 hours *regardless* of how much time has passed since the end of the first meal period. An employee who started work at 8:00 a.m. and whose employer provided him or her with a timely first meal period but who voluntarily chose to take it late – for example, from 3:00 to 3:30 p.m. – must be provided with a second meal period if he or she works to 6:30 p.m., even though only three hours has passed since the end of the first meal period. Employees, therefore, are entitled to second meal periods when they work more than five hours after the end of their first meal periods *or* when they work 10 hours total in the day, whichever is earlier.

***When must the employer provide the second meal period (if not waived)?***

The regulations do not specify *when* the second meal period must begin for employees who work more than 10 and not more than 12 hours in a day and do not waive their second meal periods. The DLSE makes clear, however, in its Statement of Reasons and in its discussion of work days of more than six but not more than 10 hours that Labor Code § 512 does not mandate that meals begin within each five-hour work period. Similar to our conclusion above concerning work days spanning more than five but not more than six hours, the only fair reading of the proposed regulations is that an employer is in compliance if it provides the employee with a second meal period that may begin no later than the end of the sixth hour after the end of the employee's prior meal period or when the employee leaves for the day, whichever is earlier.

Take, for example, "John," whose work day started at 8:00 a.m. If he takes his first meal period from Noon to 1:00 p.m., he is entitled to a second meal period if he works past 6:00 p.m. (five hours after the end of his first meal period, even though fewer than 10 working hours in the day). John's employer must "provide" the second meal period by 7:00 p.m. to comply with the six-hour rule. If John took his first meal period late, though, from 3:00 p.m. to 4:00 p.m., he is entitled to a second meal period if he works past 7:00 p.m. (10 working hours in the day, even though fewer than five hours after the end of the first meal period). But John's employer need not "provide" the second meal period until no later than 10:00 p.m. (six hours after the end of his first meal period), or when John leaves for the day, whichever is earlier. This second scenario may sound odd at first – that an employer may "provide" a meal period up

to three hours after the employee becomes entitled to it. But it complies with the language and the spirit of the regulations. John *voluntarily* took a late first meal. He did not want to take his meal until 3:00-4:00 p.m. in this example. By adopting a six-hour rule for "providing," which means that John's employer has up to six hours after the end of John's first meal to provide another, the DLSE effectively balanced the need of employees to eat and the need of employers rationally to schedule work.

*When must an employer provide a "second" meal period when the employee skipped his or her first meal period?*

Employees who work more than 10 hours in a day are entitled to a "second" meal period – whether they took *or* voluntarily skipped the first meal period. But when must the employer provide it? How does the six-hour "provide" rule apply when employees skip their first meal periods? The regulations do not address this. One could read into the statute an 11-hour rule by assuming that the DLSE intends the timing of meal periods to follow entitlement by no more than one hour. That is, if five hours of work triggers entitlement to a meal period that must begin no later than the end of the sixth hour, then 10 hours of work triggers an entitlement to a meal period that must begin no later than the end of the 11th hour. Thus, an employer must provide a meal period to an employee who skipped his or her first meal period but who works more than 10 hours, by 11 hours into the work day. Or one could interpret the statute to require employers to provide second meals no later than six hours after the end of *scheduled* first meal periods, which could exceed an 11-hour rule. For example, an employer who scheduled a one-hour (skipped) first meal period to occur at (or by) 2:00 p.m. for a work day that started at 8:00 a.m. must provide the employee with a second meal period by 9:00 p.m. (six hours after the 3:00 p.m. scheduled end of the first meal period). The DLSE will have to offer clarification. Cautious employers will provide meal periods by the end of the 11th hour to employees who skip first meals and work more than 10 hours, given the unique character of the 10-hour rule.

*May employees waive second meal periods when they did not waive, but skipped, first meal periods?*

The regulations and Section 512 are consistent: An employee may waive the second meal period (depending on the length of the day or length of time from the end of the first meal period) "if the first meal period was not waived." The proposed regulations do not address waiver of second meal periods when employees *voluntarily* skip but do not waive first meal periods. A "waiver" occurs when an employee and employer mutually agree that the employee will forego a meal period. A "skipped meal period" occurs when an employee does not ask for waiver, but simply skips the meal provided. In those circumstances, the employee did not technically "waive" the first meal period. Therefore, under a strict reading of the statute and regulation, the employee *could* waive the second meal period (depending on the length of the day or length of time from the end of the scheduled first meal period) if he or she did not waive but skipped the first meal period that the employer validly provided.

*What happens if an employee works more than 12 hours in a day?*

The proposed regulations are silent on work days exceeding 12 hours. The proposed regulations and Statement of Reasons, however, generally require employers to "provide" meal periods to employees who work more than five hours in any work period, no later than the end of the sixth hour of the work period, unless the employee and employer mutually waive the meal period (presumably allowed only if no earlier meal period was waived). The regulations and Statement of Reasons also make clear that employers are not held to a strict liability standard. Employees may choose to start their meal periods after the end of the sixth hour of work at their discretion. Accordingly, employers should continue providing meal periods to employees who work more than 12 hours in a day, which are to begin (subject to the employee's discretion to take a later meal period) no later than the end of the sixth hour after the end of a prior meal period, every time a work period exceeds five hours. If an employee has skipped the prior meal period, the employer should provide the post-12-hour meal period no later than six hours after the end of the previously scheduled meal period, or at the end of the employee's work day, whichever is earlier.

*What rule applies when an employee's shift spans two work days?*

The regulations define "work period" as "that period of time during which an employee is subject to the control of the employer." Cal. Code Regs. § 13700(a). The regulations go on to state that a work period "begins at the time an employee begins work and ends at the time the employee either takes a meal period or stops work *for the day." Id.* emphasis added. An employer might argue that – by using the terms "for the day" – the DLSE is indicating that any work period must end either when the employee's work for the day ends, when the employee takes a meal, or when the employee's *work day* ends. This could mean that a new work period begins at the transition of one work day to the next. The DLSE likely did not mean for work periods to end and start again at, for example, midnight (or whenever the new work day starts), simply because an employee works the graveyard shift. We recommend that employers be cautious and count hours both before and after a new work day in determining the length of a work period that spans two days.

### C. Labor Code § 226.7 Premiums Are "Penalties"

Labor Code § 226.7 says that, "[i]f an employer fails to provide an employee a meal period or rest period in accordance with an applicable [wage order], the employer shall pay the employee one additional hour of pay . . . ." In the past, the DLSE released conflicting opinion letters regarding the nature of Section 226.7 payments. Although it initially characterized the payment as "penalties," the more recent letters characterize the payment as "wages" and thus subject to a three-year statute of limitations (or four years, if Business & Professions Code § 17200 applies). The DLSE now rejects its more recent prior opinion. The proposed regulations state that Section 226.7 payments are "penalties." Cal. Code Regs. § 13700(d). This means that the one-year statute of limitations of California Code of Civil Procedure § 340(c) governs claims for penalties under Section 226.7. Note also that under the Private Attorneys' General Act, Labor Code § 2699 (as amended in August 2004), employees may have to exhaust certain procedural requirements before they can sue for Section 226.7 penalties.

*Must employers self-assess penalties?*

In its Initial Statement of Reasons, the DLSE states that employers are to self-assess Section 226.7 penalties: "The one hour of pay penalty is more 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." Employers should consult counsel regarding the implication of this statement.

## II. WITHDRAWN OPINION LETTERS, AND ON-DUTY MEAL PERIODS

Along with the proposed regulations, the DLSE issued a memorandum to "All DLSE Staff" withdrawing its opinion letters of April 2, 2001, June 14, 2002, June 11, 2003, and November 3, 2003, which reflected some of the DLSE's expired views on meal period enforcement. The DLSE instructed its staff immediately to pull these letters from all enforcement manuals and to give the letters no consideration in any pending DLSE proceedings. Among those withdrawn is the DLSE's November 3, 2003 letter regarding on-duty meal periods, in which the DLSE opined that not even an employee who worked alone at a gas station, with no other employees on site, could take a valid on-duty meal period. The Wage Orders allow on-duty meal periods "only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to." The DLSE's November 3, 2003 letter virtually obliterated any chance that employers and employees could agree to on-duty meal periods. By withdrawing this letter, the DLSE opens greater possibility for valid on-duty meal periods in circumstances consistent with the Wage Orders. Employers still must be cautious, however. Not withdrawn is the DLSE's September 4, 2002 letter, which comments that a restaurant shift manager does not meet the test for a valid on-duty meal period. Even if the DLSE withdraws its September 4, 2002 letter, which we believe it may, employers would not be relieved of the obligation to comply with the Wage Orders. The benefit to employers from withdrawal of the letters is that they are no longer bound by the DLSE's former constrictive interpretation of allowable on-duty meal periods.

## III. CONCLUSION

The DLSE's proposed meal period regulations are a significant clarification by the DLSE on the mandatory nature of meals, flexibility in scheduling meals, and the "penalty" characterization of payments under Labor Code § 226.7. The proposed regulations will impact on-going, and deter prospective, meal and rest period litigation in California.

### Notes

1. The proposed regulations state both (i) that the second meal period "may begin before the end of the sixth hour of the work period" (Cal. Code Regs. § 13700(c)(2) (emphasis added)) and (ii) that "[a]n employer may not require an employee to begin a meal period after the end of the sixth hour of work" (Cal. Code Regs. § 13700(c)(2)(a) (emphasis added)). Read together, these provisions mean that an employer will suffer no consequence as long as it provides the second meal period no later than the end of the sixth hour.

2. We believe that an employer who accepts a second-meal waiver from an employee who works no more than 12 hours would be in compliance with the language of Section 512, even if the employee worked more than six hours after completing a first meal period. Section 512 provides employers with independent authority to accept such waivers, regardless of Example 3. We will ask the DLSE to clarify this Example during the period allowed for public comment.

*Please contact any of the following Paul Hastings employment lawyers should you have questions regarding the DLSE's proposed meal period regulations, or employment law in general.*


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