



PROBLEM PREVENTION BULLETIN ~ DECEMBER 2004

## Government Rescinds Emergency Meal Regulation Changes

□ *This bulletin will soon be available at the WAAG AND CO. website at [WaagandCo.com](http://WaagandCo.com) (click on "News", then click on "Bulletins").*

□ **Applies to:** All Non-Government Employers

□ **Synopsis:** Last week, WAAG AND CO. reported how the California Division of Labor Standards Enforcement ("DLSE") had issued emergency regulations to provide more flexibility in when non-exempt employees are required to take their meal breaks (Problem Prevention Bulletin, December 2004, "Major Changes in Meal / Rest Break Regulations"). Unless the Agency took other action, the emergency regulations were to go into effect on December 20, 2004. *In a surprise turn*, the Agency rescinded the emergency regulations and issued a statement that it intends to pursue the normal rule-making process for making the proposed regulations permanent without any intermediate emergency process.

□ **Take Action:** The most immediate impact for California employers is that they **must not** change their current practices of requiring their employees to commence their meal periods not later than the end of their fifth (5th) hour worked — whether the employees like it or not. If an employee fails to take the meal period by that time (even if the employee is just a minute late), then the employer must pay the employee an extra hour's worth of pay for the violation.

□ **"Wages" vs. "Penalty" Issue Remains:** Less clear is the impact of the rescission on the analysis of whether or not the extra pay is "wages" or a "penalty." As explained in WAAG AND CO.'s last bulletin, the Finding of Emergency made clear that the legislative intent behind requiring the extra payment was to levy a penalty on employers who violate the meal-break law. Rescinding the proposed emergency regulations does not impact the Finding of Emergency, nor can it alter the legislative history of the statute that created the payment. Although the DLSE had previously relied on one of its own staff opinion letters to interpret such extra payments as "wages," the stronger analysis would support the interpretation that the existing law has always been that the payments are "penalties."

Moreover, despite the DLSE's prior staff opinion letter declaring such payments as "wages," the Agency has issued a press release confirming that the "penalty" interpretation is more appropriate. The press release noted that the history of Labor Code section 226.7 clearly indicates that the payment was meant to be a penalty. Also, supporting the penalty definition are state regulations (Title 22 of the California Code of Regulations), which provide in part, that wages do not include penalties or damage awards paid by an employer to an employee for certain violations. Furthermore, minutes of the Industrial

### Action Notes:

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### Route to:

- HR Dept: \_\_\_\_\_
- Accounting Dept: \_\_\_\_\_
- Benefits Admin: \_\_\_\_\_
- Managers: \_\_\_\_\_

Welfare Commission confirm that the amount paid to an employee by an employer for violations of the meal period requirements were considered to be penalty amounts.

The main result of the “penalty” interpretation is that there would be a one-year statute of limitations on such claims, rather than allowing employees to go back three years in collecting such payments.

□ **What the Future Holds:** While the emergency regulations were rescinded, the Agency is proposing that the same substantive regulations be adopted as permanent regulations. The DLSE is scheduling three public hearings in different locations across the state at which the public may comment on the proposed regulations: In Los Angeles on February 4, 2005; in San Francisco on February 8, 2005; and in Fresno on a date to be determined. Those interested in commenting on the proposed regulations can obtain details regarding the time and locations of such hearings at the Agency’s website: [www.dir.ca.gov](http://www.dir.ca.gov). Comments may also be submitted in writing to the DLSE. The written comment period closes at 5:00 p.m. on February 14, 2005. All comments must be submitted in writing (by mail, fax or e-mail) and received by that time at the DLSE's office.

Submit comments to:

Allen Perlof, Senior Deputy Labor  
Commissioner  
Division of Labor Standards Enforcement  
9th Floor West  
P.O. Box 420603  
San Francisco, CA 94142  
E-mail: [dlsecomments@dir.ca.gov](mailto:dlsecomments@dir.ca.gov)  
FAX: (415) 703-4807

□ **Conclusion:** As always, WAAG AND CO. will keep you informed of significant developments.

*This bulletin is a general overview of the subject matter, and is not meant to provide professional opinions regarding any specific case, matter, or set of facts, or to substitute for the professional advice of Waag and Co. Instead, please contact Susan S. Waag, Esq. for additional information.*