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Reference: Meal and Rest Period Payments

Dear _____ :

This is in reply to your e-mail of January 26, 2005 to the Internal Revenue Service (IRS) requesting advice concerning the Federal employment tax treatment of payments made by an employer to an employee for failure to provide the employee with a meal or rest period as required by California Labor Code section 226.7. Your email was forwarded from Helene Winnick, Special Counsel, Tax Exempt and Government Entities, to this office for a response. This response is an information letter intended to provide general guidance for your staff to use in answering inquiries on how to comply with the applicable Federal employment tax law and has no binding effect on the IRS.

You have asked, on behalf of the _____ whether a payment required to be made under section 226.7 of the California Labor Code (Labor Code) is a wage payment subject to the Federal Insurance Contributions Act (FICA), Federal Unemployment Tax Act (FUTA), and income tax withholding provisions of the Internal Revenue Code (Code).

Section 226.7 of the Labor Code provides:

Meal or rest period

- (a) No employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission.
- (b) 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.

Under a proposed regulation promulgated by the California Division of Labor Standards Enforcement (DLSE), any amount paid or owed by an employer to an employee under Labor Code section 226.7(b) for failing to provide the employee a meal period or rest period is a penalty and not a wage. Thus, the employer is not required to include the additional hour of pay required by section 226.7(b) in calculating wages for state employment tax purposes.

Generally, for FICA and FUTA purposes, the term “wages” means all remuneration for employment, unless specifically excepted. The provisions relating to the withholding of income tax contain a similar definition. None of the exceptions to the definition of wages for purposes of FICA, FUTA and income tax withholding are applicable to the additional hour of pay authorized by section 226.7(b) of the Labor Code. Additionally, the regulations that implement the Code provide that the name by which the remuneration for employment is designated is immaterial. See Employment Tax Regulations sections 31.3121(a)-1(c), 31.3306(b)-1(c), and 31.3401(a)-1(a)(2). Thus, the characterization of the additional hour of pay as a penalty by the proposed DLSE regulation has no bearing on whether the payment is wages for purposes of FICA, FUTA or income tax withholding.

Although the employees in this case may not perform services directly related to receipt of the additional hour of pay, the payment arises from the employment relationship and is analogous to the “idle time” payments made by the employer in Rev. Rul. 76-217, 1976-1 C.B. 310. Under the facts of that ruling, an employer paid its employees for a minimum number of hours each pay period whether the employees worked less than the minimum number of hours or performed no services at all. The ruling concluded that the idle time payments made to employees are remuneration for employment and are wages for purposes of FICA, FUTA and income tax withholding.

In conclusion, the additional hour of pay an employer must pay to an employee for failure to give the employee the required meal periods or rest periods is wages for purposes of the FICA, FUTA and income tax withholding provisions of the Code.

I hope that this information is helpful to you and your staff in responding to inquiries on how to comply with applicable law. If you have any questions, please contact me at (202) 622-6010 or _____ of my staff at (202) 622-0047.

Sincerely,

Catherine E. Livingston
Assistant Chief Counsel
(Exempt Organizations/Employment
Tax/Government Entities)