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March 8, 2005

Golden State Report

Legislative Update

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Dates to Remember:

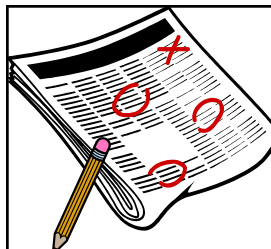
- April 29—Last day for Policy Committees to pass bills in House of Origin
- May 27—Last day for Fiscal Committees to pass bills in House of Origin
- Jun 22—CRA Member Dinner
- Jun 23—CRA Annual Meeting, Sacramento, CA
- Jun 25-28—Western States Retail Conference, Coronado Island, CA

REVENUES INCREASE: SLIGHTLY LESS PRESSURE ON BUDGET

Higher than expected revenue, particularly in income taxes and corporate taxes, has bolstered California's budget by \$2 billion, and the amount is expected to be revised upwards again in May.

ANALYST SEES IMPROVEMENT IN U.I. POSITION BUT STILL URGES CAUTION

The Unemployment Insurance Fund insolvency crisis has been averted for now by recent reductions in unemployment claims. As long as the economy remains healthy, the State will have sufficient revenues to pay required benefits. However, the Legislative Analyst, the Legislature's nonpartisan budgetary arm, stated: "A recession would quite likely plunge the system quickly into insolvency, resulting in interest cost on federal loans and the potential for higher taxes on employers. In order to put the UI system on solid financial ground,

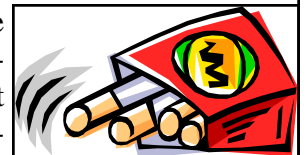


the Legislature must either reduce benefits, raise the tax base or some combination of benefit reductions and revenue increases."

The new estimates are that the UI fund will have a positive balance of about \$550 million (instead of the projected deficit of \$130 million) and at the end of this year, and \$880 million at the end of 2006 (as opposed to the projected \$600 million deficit).

STATE DEVELOPS TOBACCO TRAINING PROGRAMS FOR RETAIL EMPLOYEE USE

Employee training materials to prevent the sale of tobacco to minors have been developed by the Department of Health Services, per the requirements of Business and Professions Code Section 22974.8. This state law requires that training be provided to all licensed California tobacco retailers who have received a warning letter from the State Board of Equalization following a first conviction of the law which prohibits selling, giving, or furnishing tobacco products to minors. Information



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about their availability will be included in the BOE's warning letter sent to a retailer.

The training presentation and a clerk quiz have been posted on the DHS website at: <http://www.dhs.ca.gov/tobacco/html/publications.htm#STAKE>. You may download and disseminate these free materials as needed.

The training presentation, *Stop Tobacco Sales to Youth; California Retailers and Youth Tobacco Laws*, is divided into four sections: 1) tobacco use and purchase practices; 2) California state laws and their enforcement; 3) strategies for owners and managers to avoid tobacco sales to minors; and 4) a guide for clerks. The training is intended to be delivered by the employer.

Laws regarding the selling of tobacco products can be viewed at www.leginfo.ca.gov. Information may also be obtained from BOE (800-400-7115) or their website: <http://www.boe.ca.gov>. To obtain educational materials regarding tobacco sales to minors, please call the Stop Tobacco Access to Kids Enforcement (STAKE) Act, at (800) 527-5443. If you have questions about the training materials, please contact Nancy Guenther, DHS STAKE Act Coordinator, at (916) 449-5495.

BALLOT WARS, ROUND TWO

Are you confused about all the media coverage of the Governor's reform proposals and the possibility of a special election? Here's where we are so far:

It is generally accepted that the governor will call a special election, to be held on November 8th. However, it's not yet official. The deadline for signatures to be collected to put initiatives on the ballot is mid-April. For each initiative, approximately 600,000 valid signatures are required.

The Governor sees the special election as the opportunity to enact the "reforms" he cannot get through the Legislature. Turning **reapportionment** over to a



panel of judges: odds are high this will be on the ballot. The critical issue here will be whether the re-drawing of districts would take effect immediately or after the 2010 census. Public pension reform: odds are also high this will be on the ballot also. Changing public pensions from defined benefit programs to defined contribution programs will save local and government millions of dollars.

The details of a spending limit have not been finalized, but under consideration is some limit tied to growth in population and inflation.

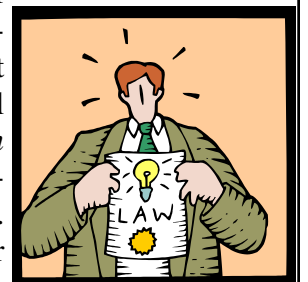
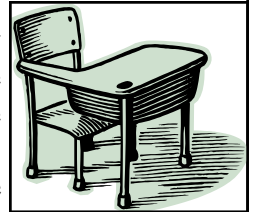
Education reforms: originally the Governor proposed merit pay for teachers and tenure reform. He appears to have backed off the merit pay issue, but some education-related reform may still be proposed.

If the special election does proceed, it will have a dramatic effect on the politics and atmosphere within the Legislature, in what was supposed to be a non-election year. The Governor wants to raise approximately \$50 million for his reform measure campaigns, and Labor has promised to raise "whatever it takes" to defeat his initiatives.

Aside from the Governor's measures, the ballot may be lengthy. Over **83** initiatives are now pending in various stages of the qualification process! For retailers, the biggest issues are a split roll property tax measure, prohibition on electrical direct access, creating a petroleum commission to regulate gasoline like public utilities, repeal of corporate tax preferences, and an increase in the minimum wage.

BILLS INTRODUCED IN THE ASSEMBLY

Nearly 2,800 bills were introduced by February 22nd, the deadline for introduction of new bills. Here are the Assembly bills introduced that affect employers and the retail industry. In the next *Golden State Report* we will summarize relevant Senate bills. Where you see a "Watch" or



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“Pending” position, it means we are in the process of analyzing the bill, or awaiting member feedback on it. If you have questions about any of these bills, please call the CRA offices at 916-443-1975 or email us at cra@calretailers.com. A “spot” bill means the bill only changes a word or two and will be significantly amended in the future. Remember that the status of these bills and CRA’s position are periodically updated on our website.

Assembly Bills

AB 20, Leslie: Provides that for lesser ADA complaints, can still sue for injunctive relief and get reasonable attorney fees, but no punitive damages. Position: **Support**.



AB 21, Levine: Prohibits a pharmacist from refusing to dispense contraceptives. Position: **Amend**-- no penalty if contraindicated or out of stock.

AB 48, Lieber: States intent of Legislature to increase current minimum wage of \$6.75. Position: **Oppose**.

AB 105, Cohn: Requires DHS to establish a voluntary food inspection program to place “California Choice Seal” on packages foods and restaurant entrees (no more than 35% calories from fat, no more than 10% of the fat be saturated, and no more than 35% sugar). Position: Pending.

AB 169, Oropeza: Increases the damages an employee may obtain if prevailing in a gender equity complaint, to add “an amount equal to double the balance of wages”. Position: **Oppose**.

AB 173, Houston: Absolves manufacturers/sellers of food and beverages from civil liability for claims of obesity. Position: **Support**.

AB 175, Calderon: Includes in the definition of gift certificates/gift cards those used by multiple sellers, thus requiring those cards be subject to the “no expiration date” law. Position: Neutral.

AB 283, Koretz: Requires pseudoephedrine-containing products only be sold in pharmacies by pharmacists and pharm techs; requires photo ID and log maintenance. Position: **Oppose Unless Amended**.

AB 288, Mountjoy: Current law requires condition

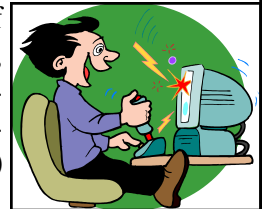
on Rx label if requested by patient and condition is on Rx; this bill requires Rx be labeled w/condition unless patient or physician requests it be omitted. Position: **Amend**.

AB 319, Chan: Prohibits manufacture and sale of children’s products containing phthalates and bisphenol-A, DEHP, DBP, BBT, DINP, DIDP, DNCP in excess of 0.1%. Position: **Oppose**.

AB 391, Koretz: Permits locked-out workers to receive unemployment benefits. Position: **Oppose**.

AB 417, Aghazarian: Spot bill re giving gifts in connection with sale of alcoholic beverages. Position: Watch.

AB 450, Yee: Prohibits sale of violent video games to minors, requires violent games to be labeled “not for sale to anyone under age 17”, and imposes \$1,000 penalty per violation. Position:



Oppose.

AB 465, Cogdill: Adds iodine and tincture of iodine to the list of transactions that must be reported; but still permits the sale by retailers of any betadine or povidone with iodine content not exceeding 1% in containers of 8 ounces or less, or any tincture of iodine not exceeding 2% in containers of one ounce or less sold over the counter. Position: Analyze possible impact on distribution facilities.

AB 515, Richman: Requires PUC to adopt rules for noncore customers to make an election as to providers. Position: Watch.

AB 522, Plescia: Spot bill re automated drug delivery. Position: Watch.

AB 548, Garcia: Back to school sales tax holiday for school clothing, footwear and supplies. Position: **Support**.

AB 569, Garcia: Requires vendors who sell food on school campuses to provide nutritional labeling on packaging, sign, or upon request. Position: **Amend**.



AB 575, Wolk: Electronic recycling bill to deal with leases of electronic equipment. Position: Watch.

AB 640, Tran: Permits employee, w/permission of employer, to adopt an alternative schedule providing

Legislative Update cont.

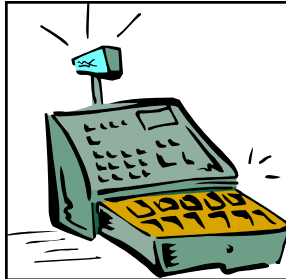
for up to 10-hour workdays and a 40-hour workweek. Position: **Support**.

AB 657, Karnette: Would require purpose of the drug to be on the prescription label unless the physician or patient requests it be omitted. Position: Watch.

AB 681, Vargas: Provides that the medical fee schedule in effect for workers comp shall be reduced 5% thru 2010. Position: Watch.

AB 695, Mullin: Requires posted return policy signage to contain a way for a customer to determine why an item was refused for return. Position: Pending.

AB 718, Calderon: Permits a business, which can already capture driver license data thru swiping, to capture it via keying in, typing in, etc. Position: **Support/Sponsor**.

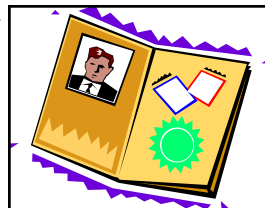


AB 744, Oropeza: Prohibits transfers of existing alcoholic beverage licenses in areas where a new license would not be permitted. Position: **Oppose**.

AB 753, Gordon: Makes it a misdemeanor for anyone to sell, furnish, or give alcoholic beverages to a minor. Position: **Support** as proposed to be amended.

AB 755, De La Torre: Provides that an employee working on a piece-rate basis who suffers injury as a result of the failure of an employer to pay required wages for rest periods is entitled to recover unpaid average piece-rate wages for each rest period in any pay period in which a violation occurs. (Attempts to make penalty be judged a “wage”) Position: **Oppose**.

AB 764, Calderon: Specifies that the new military IDs are sufficient proof of age for alcoholic beverage sales. Position: **Support**.



AB 768, Nation: Requires any touch screen device accessible to the general public, which “provides personal or public information” to be accessible to the visually impaired by an unspecified date. Position: Pending.

AB 875, Koretz: Requires DIR to develop reporting form for employers to report alternative workweek election results; and establish standards that will trig-

ger an audit and investigation of violations of employee wages, hours and working conditions. Position: Watch.

AB 889, Ruskin: Eliminates sunset date on scale fees, and provides unspecified increases. Position: **Amend**.

AB 904, Houston: Permits employee, with employer’s consent, to work up to 12 hours a day in a 40-hour workweek, provided the employee is guaranteed a base salary. Position: **Support**.

AB 968, Houston: Spot bill to exempt commissioned sales persons from the requirement for overtime pay, under certain circumstances. Position: Watch.

AB 1011, Matthews: Requires sellers and distributors of nonagricultural pesticides to register. Position: Watch.

AB 1028, Horton: Would allow a 6% corporate tax credit for property used in butchering meat and poultry. Position: **Support**.

AB 1049, Koretz: Prohibits sale of food and beverage packaging unless it’s labeled as to the disposal method of the packaging: Trash, Recycle or Compost. Position: Watch.

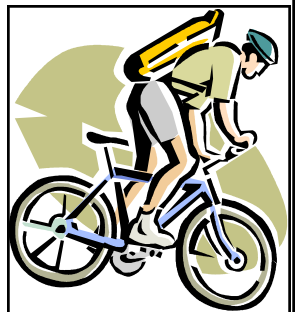
AB 1058, Koretz: Requires country of origin labeling on beef products. Position: **Oppose**.

AB 1065, Ag Committee: Imposes additional recordkeeping requirements on registered transporters of grease. Position: **Oppose**.

AB 1082, Ruskin: Established Telecommunications Consumer Bill of Rights as originally adopted, the reversed, by PUC. Position: **Oppose**.

AB 1093, Matthews: Deletes requirement that paid wages must be negotiable at an in-state bank. Position: **Support**.

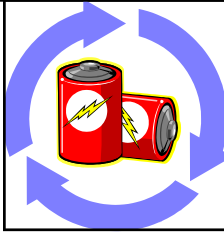
AB 1103, Karnette: Imposes \$7 per bicycle fee on each sale, to raise funds for block grants to local governments. Position: **Oppose**.



AB 1105, Mullin: Food establishments are already required to have toilet facilities for patrons; this bill also requires them to have a baby-changing facility. Position: Watch.

Legislative Update cont.

AB 1125, Pavley: Requires retailers to take back used batteries of a brand they sell, in-store for reuse or recycling. Position: **Oppose.**



AB 1126, Saldana: Increases range of permissible alcoholic beverage “offers in compromise” from \$750-\$3000, to \$1000-\$5000. Position: Neutral.

AB 1291, Pavley: Requires CalEPA to develop a State logo for food products that have been determined to be free of, or have acceptable levels of, toxic substances which could harm a child’s health. Position: Watch.

AB 1333, Frommer: Makes it unlawful to incompletely remove grease from a trap, or to deposit it anywhere other than at an authorized facility. Position: **Oppose.**

AB 1375, Nation: Imposes 2.5% tax surcharge on banks or financial corporations who extend consumer credit on “inequitable terms”. Position: Watch.

AB 1406, Karnette: Imposes \$10 fee on every intermodal freight container in any port in the State, to be used for port security purposes. Position: Watch.

AB 1415, Pavley: Prohibits sale of mercury-containing relays and switches; prohibits sale of jewelry containing total lead above 200 ppm. Position: Watch.

AB 1449, Bermudez: Makes it unlawful for an property owner, renter or lessee to permit graffiti on any property near a state highway; requires abatement of the graffiti w/in 10 days after discovery by owner, or 21 days after notice received from local government. Position: Watch.



AB 1489, Calderon: Permits use of tactile overlays for POS screens, to be in compliance with the access for visually impaired law. Position: Watch.

AB 1509, Garcia: Requires any bank offering a consumer credit card to offer the consumer the opportunity to have a photo on the card. Position: **Oppose.**

AB 1537, Bass: Revises calculations for issuing alcoholic beverage licenses in high crime area. Position: Watch.

AB 1548, Pavley: Permits counties to ban sale of rodent pesticides that contain anti-coagulants. Position: Watch.

AB 1593, Coto: Would require intent and a pattern of violation, as well as sufficient advance notice, of a WIC violation. Position: Watch.



AB 1631, Klehs: Eliminates penalty for underpayment of taxes for 2004 if underpayment was created or increased by a change in the law in that year. Position: **Support.**

AB 1641, Harman: Spot bill relating to “voluntary warranty purchases from electronic stores. Position: Watch.

AB 1644, De La Torre: Eliminates corporate tax exemptions. Position: **Oppose.**

AB 1670, Nation: Creates health care plan to: 1) require all residents to obtain minimum coverage; 2) establish purchasing pool; 3) provide subsidy to businesses who offer health benefits to employees making under 200% of the federal poverty level; 4) tax health care plans, to provide a funding source to cover the uninsured. Status: Introduced 2/22. Position: Watch.



AB 1678, Saldana: Requires cold ironing capability at all CA. ports. Position: Watch.

AB 1684, Klehs: Changes current law, where the pesticide mill tax is paid by the pesticide registrant or on the first sale in the state, to require retailers to pay the mill fee. Position: **Oppose/Amend.**

AB 1692, J Horton: Reimburses retailers 2% of sales taxes collected for the State. Position: **Support.**

AB 1700, Pavley: Prohibits confidential settlements and protective orders in litigation; changes law to state that evidence of a public danger obtained during a legal process is presumed to be public information even if it was not used in a court proceeding. Position: **Oppose.**

AJR 4, Tran: Requests the President and Congress to repeal the death tax. Status: Assembly Revenue and Taxation Com. Position: **Support.**

CRA Submits Testimony In Favor of Meal and Rest Break Regulations

CRA President Bill Dombrowski testified on March 2 at the last of three public hearings on the proposed changes to the Department of Labor Standards Enforcement's proposed meal and break regulations.

The DLSE can now forward the regulations "as is" to the Office of Administrative Law, which must approve the regulations for them to become effective, or, if DLSE wants to make any changes to the language, it can revise the proposed regulations and institute another, but abbreviated, public comment period.

CRA's testimony, reprinted below, focuses on the legal issue of the Department's *authority* to issue the regulations.

###

The California Retailers Association submits the following comments to the Division of Labor Standards Enforcement, regarding adoption of new Section 13700 to Title 8 of the California Code of Regulations. **We endorse such adoption.**

The California Retailers Association is a trade association representing major California department stores, mass merchandisers, supermarkets, chain drug and convenience stores, as well as specialty retailers such as auto, book and home improvement stores. Our members have more than 9,000 stores in California and account for more than \$100 billion in sales annually.

Introduction

The California Division of Labor Standards Enforcement has proposed a new regulation, Section 13700, to resolve ambiguities in the laws requiring employers to provide employees with meal periods and rest breaks. The DLSE is specifically authorized to promulgate this proposed regulation, which interprets Labor Code Sections 226.7 and 512 and the Industrial Welfare Commission Wage Orders. The Labor Code vests the DLSE with the authority to "promulgate all regulations and rules of practice and procedure necessary to carry out [the enforcement of state labor laws]." Lab. Code § 98.8. The California Supreme Court has held that Labor Code Section 98.8 empowers the DLSE to promote uniform enforcement of labor laws by promulgating regulations as long as the

DLSE follows the procedures outlined by the Administrative Procedure Act, Gov't Code § 11340 *et seq.* *Tidewater Marine Western, Inc. v. Bradshaw*, 147 Cal. 4th 557, 569-70 (1996). In *Westside Concrete Co. v. Department of Industrial Relations*, 123 Cal. App. 4th 1317 (2004), the Court of Appeals specifically confirmed that the DLSE could promulgate regulations pertaining to meal and rest breaks if it did so in accordance with the APA. The DLSE is now properly exercising its authority to create enforcement policies of general applicability through the APA process.

The DLSE Has Authority to Issue the Proposed Regulations

In *Tidewater*, the California Supreme Court held that:

The DLSE's primary function is enforcement, not rulemaking. Nevertheless, recognizing that *enforcement requires some interpretation and that these interpretations should be uniform and available to the public, the Legislature empowered the DLSE to promulgate necessary "regulations and rules of practice and procedure."*

14 Cal. 4th at 557, 569-70 (emphasis added).

The *Tidewater* Court did not limit the DLSE's power to promulgate "necessary regulations" only to those regulations needed to govern the DLSE's own operations. Rather, *Tidewater* involved regulations interpreting the IWC Wage Orders and their application to maritime employees in the Santa Barbara Channel. See *Tidewater*, 14 Cal. 4th at 568. It is clear from *Tidewater* that the DLSE is empowered to promulgate regulations that interpret the statutes and wage orders it enforces so long as it follows the APA's procedures.

California courts of appeal have followed *Tidewater*. In *Westside Concrete*, the court addressed the DLSE's authority to interpret wage order provisions

CRA Submits Testimony In Favor of Meal and Rest Break Regulations (cont.)

pertaining to meal and rest breaks. The court held that a DLSE opinion letter of “general application” was not entitled to deference by the courts, but it confirmed that “[t]o further its primary function of enforcing the state’s labor laws, *DLSE is vested with the authority to promulgate necessary ‘regulations and rules of practice and procedure.’* In adopting and enforcing such regulations, however, DLSE is subject to the requirements of the APA.” 123 Cal. App. 4th at 1325-26 (emphasis added). Similarly, the court has found that the DLSE’s interpretation of an IWC Wage Order exemption would have force and effect if promulgated in accordance with the APA’s procedures. *California School of Culinary Arts v. Lujan*, 112 Cal. App. 4th 16, 25 (2003).

Under *Tidewater* and *Westside Concrete*, the DLSE clearly has both the authority and the obligation to promulgate its proposed regulation on meal and rest periods, in accordance with the procedures of the APA. The regulations that an agency may promulgate pursuant to the APA are broadly defined to include “every rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.” *Tidewater*, 14 Cal. 4th at 571; *Westside Concrete*, 123 Cal. App. 4th at 1326.

The first characteristic of regulations subject to the APA is clearly satisfied since proposed Section 13700 is intended to apply, generally, to all California employers subject to the meal and rest period provisions of the Labor Code. The second requirement is also satisfied because the purpose of the proposed regulation is to implement enforcement guidelines for Labor Code Section 512 and to clarify the interpretation of Section 22637(b). Both of these statutes are labor laws enforced by the DLSE. (*See* Lab. Code § 95(a), authorizing the DLSE to enforce the provisions of the Labor Code and all state labor laws the enforcement of which is not specifically vested in any other officer, board, or commission). The DLSE states in its *Initial Statement of Reasons* that the specific purpose of the proposed regulation is to:

(1) establish criteria to determine if an employer has met the requirement for providing a meal period; (2) clarify that employees may choose to begin the initial meal period in a workday by the end of the sixth hour of the workday; (3) provide a definition of the term “work period”; and (4) clarify that the one hour of pay an employer must pay an employee for each workday in which a meal or rest period is not provided on accordance with the applicable IWC order is considered a penalty.

Thus, proposed Section 13700 implements and interprets laws enforced by the DLSE. Both characteristics of a regulation subject to the APA are therefore clearly satisfied by proposed section 13700.

Furthermore, the DLSE is rigorously following all the requirements of the APA. The APA requires that the agency seeking to adopt a new regulation (a) give the public notice of its proposed regulatory action; (b) issue a complete text of the proposed regulation with a statement of reasons; (c) give interested parties an opportunity to comment on the proposed regulation; (d) respond in writing to public comments; and (e) forward a file of all materials on which the agency relied in the regulatory process to the Office of Administrative Law. *Tidewater*, 14 Cal. 4th at 568. Accordingly, the DLSE issued a Notice of Proposed Rulemaking in the Notice Register, published a text of the proposed regulation, and prepared the *Initial Statement of Reasons*. All these documents are available in the DLSE’s rulemaking file, which is available for inspection and copying at the DLSE’s San Francisco office, and can also be accessed on the DLSE’s website. The DLSE also provided interested parties with several opportunities to comment on section 13700. The public was able to comment during the written comment period, closing on March 2, 2005. In addition, the DLSE scheduled three public hearings on the proposed regulation in February and March 2005 in San Francisco, Los Angeles, and Fresno. When the public comment period has closed, the DLSE will respond in writing to the comments,

Meal and Rest Break Regulations (cont.)

and forward the entire rulemaking file to the Office of Administrative Law.

The DLSE Regulations Are Necessary For The Uniform Enforcement of Meal and Rest Break Laws

Proposed Section 13700 is necessary to enforce IWC Wage Orders on meal and rest periods. The DLSE rescinded its opinion letters on the enforcement of meal period requirements because they were held to be regulations subject to the APA. *Westside Concrete* 123 Cal. App. 4th at 1326-27. Therefore, the DLSE currently has no general enforcement policy on the provision and time parameters of meal periods. This could result in confusion about when employees may take meal periods and when employers will be found to have fulfilled their obligations to provide meal periods. To promote uniform enforcement of the meal period laws, it is necessary that the DLSE establish rules of general applicability pursuant to the APA. Similarly, the DLSE had issued conflicting opinion letters on whether the one hour of pay required by Labor Code Section 226.7(b) is a wage or a penalty. To promote the uniform enforcement of this law, it is necessary for the DLSE to take a single position on this issue.

Conclusion

The DLSE is the state agency that enforces the Labor Code provisions on meal periods and rest breaks. It has the authority and the duty to promulgate general policies that predict how it will decide future cases that fall under its jurisdiction to enforce meal period and rest break laws, pursuant to the rulemaking procedures of the APA. *Tidewater*, 14 Cal. 4th at 574-75. Since the DLSE has been following the requirements of the APA, proposed Section 13700 is a regulation that the DLSE has the authority and the responsibility to issue pursuant to the Labor Code, the APA, and California case law.

The California Retailers Association urges adoption of the regulation.

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