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VIA FACSIMILE TO 916-322-1267
EMAIL TO sesmith@dir.ca.gov **AND OVERNIGHT DELIVERY**

Re: Comment Letter Regarding
Proposed Travel Expense Reimbursement Regulations

Dear Ms Smith:

Thank you for giving the California Employment Lawyers Association ("CELA") the opportunity to comment on the proposed Travel Expense Reimbursement regulations published by the California Division of Labor Standards Enforcement ("DLSE").

CELA is a statewide organization of more than 700 California attorneys who devote the major portion of their practices to representing employees in individual employment cases and class actions, including cases involving wage and hour and Labor Code violations. CELA provides continuing legal education and practice materials on employee representation, is active in legislative matters, and has appeared as amicus curiae in numerous landmark employment rights cases before federal and state courts. Through their cases, CELA's members have represented hundreds of thousands of working men and women in state and federal courts throughout California.

We want to begin by commending the DLSE on its efforts to bring clarity to travel expense reimbursement issues. While we will suggest improvements geared toward providing further clarity and fairness and reducing the number of disputes that will impose enforcement and dispute resolution obligations on the DLSE and the courts, we believe that the regulations as proposed represent an improvement over the current condition.

Our comments below correspond to the section numbers of the proposed regulations. We note that, in the published version of the proposed regulations, section "13702(b))" was followed directly by section "13702(g)." Where a comment is relevant to multiple sections, that comment will be set out at the first point of relevance and will be cross-referenced as appropriate later in the letter.

13700. Definitions.

13700(a): We believe that this section should address the consequences of an agreement that violates the proscription of the section's second sentence. Accordingly, we suggest that the following sentence be added at the end of the paragraph:

> "Any agreement that violates the preceding sentence is voidable at the option of the employee."

13700(b): Our chief concern is employees who are sent from their homes directly to far flung locations to perform their work. We propose that the final phrase be modified to read as follows:

> ". . . excluding mileage driven commuting between the employee's home and a facility owned or controlled by the employer that is the employee's regular place of work."

13700(e): Our concern is that, notwithstanding the phrase "and similar business-related expenses," there is a risk that the definition could be read with sufficient narrowness to deprive employees of reimbursement for legitimate travel expenses that they have incurred. Accordingly, we propose that the section be modified to read in its entirety as follows:

> "Other Travel Expenses. "Other Travel Expenses" include but are not limited to the costs of tolls, parking, rental vehicles, laundry, cleaning and pressing of clothing, mailing, telephone, shipping, transportation, and similar business-related expenses, incurred by employees in connection with business-related travel by employees."

13700 – additional desirable definitions: Two terms that could benefit from definition are "commuting" and "travel." We believe that defining those terms could reduce litigation and the risk of inconsistent standards of conduct. Accordingly, we propose the addition of the following paragraphs to the proposed regulations:

> **"Commuting.** Transportation by any means between the employee's residence and a facility owned or controlled by the employer that is the employee's regular place of work."

> **"Travel.** Transportation by any means in connection with the employee's work, so long as that transportation does not fall within the definition of 'commuting,' together with all of the employee's activities at the location to which the employee has been transported."

Another term that is used throughout the regulations is the term "necessarily" in the context of expenses "necessarily incurred" or money "necessarily expended" by employees. CELA is concerned that the term "necessarily" is likely to be a problem because the lack of uniformity of its meaning in ordinary English may encourage litigation in which some employers may seek an interpretation that is contrary to the intent of Labor Code section 2802. Specifically, we are concerned that, in the resolution of actual controversies, at least some employers will argue for so strained and literal an interpretation of the term

interpretation of the term as to eviscerate the rule. An employer might argue, for example, that it was not "necessary" for an employee in a company car five hundred miles from home to replace a broken seatbelt or a dangerously worn tire.

CELA believes that clarity could be added and a lot of unproductive litigation prevented by defining the term. Accordingly, we propose the addition of the following paragraph to the proposed regulations:

> **"Necessarily and Necessary.** In the context of money expended or costs incurred by employees or amounts to be reimbursed to employees, the terms "necessarily" and "necessary" mean that the money was reasonably expended or costs were reasonably incurred in view of the employee's work duties."

13700 – Interpretation. CELA believes that proposed regulations will be reflective of existing law and interpretations of the statute. Accordingly, it would be useful – whether as a subsection of section 13700 or as a new section – to state the following:

> "**Interpretation.** These regulations are reflective of the existing state of the law as interpreted by the Division of Labor Standards Enforcement."

13701. Mileage Reimbursement.

13701(a): CELA agrees that the Internal Revenue Service ("IRS") mileage rate is an appropriate starting point. We are concerned, however, that using that rate without modification is unfair in view of the reality that the costs of operating motor vehicles in California are higher than the national average. Higher insurance premiums, higher gasoline prices and smog compliance requirements are just three of the factors that contribute to the higher cost.

Thus, we believe that the per-mile reimbursement should be the IRS mileage rate multiplied by a "California mileage factor" – a number that would be determined by the DLSE annually and would reflect the ratio of the average cost of operating a motor vehicle in California to the national average. For example, if it costs ten percent more than the national average to operate a motor vehicle in California, the "California mileage factor" would be 1.10. Applying such a factor to reflect that cost difference would be fair to all parties. It also would be likely to eliminate a substantial amount of litigation by parties seeking to establish actual costs in excess of the IRS mileage rate, resulting in savings to the courts and state agencies.

To prevent any possible ambiguity, it should be made clear that the presumed reasonableness of the IRS mileage rate is subject to any rights to show that the actual cost mileage rate is the better measure. Because we will make the case that only employees should have the right to seek to deviate from the IRS mileage rate, we believe that section 13701(a) should begin with the following words:

> "Subject to section 13701([subsection number corresponding to employee's right to prove that actual cost mileage rate is higher than the IRS mileage rate]),"

13701(b) and (c). At first glance, it might appear fair to give both employers and employees the right to establish an actual cost mileage rate that differs from the IRS rate. In practice, doing so will have a

disparate impact and will be anything but fair. There are several reasons why this is so.

First, such a rule may be used by employers as a tool for intimidating employees by imposing intrusive and time-consuming discovery obligations on an employee who is seeking reimbursement. Employers generally have a number of employees. Bullying one employee who seeks reimbursement by requiring him or her to spend time and money obtaining and producing detailed automotive records, and/or by imposing those obligations on third parties by way of subpoenas, can pay dividends for the employer by dissuading other employees who hear the story from seeking reimbursement of money to which they are entitled as a matter of law. This gives the employer a significant incentive to litigate the "actual cost mileage rate" issue, even when the difference between that rate and the IRS rate is negligible or nonexistent.

The employee, in contrast, has only one employer. Thus, the employee has no parallel incentive that would lead him or her to litigate the actual cost mileage rate issue whether or not it is justified.

The one-way attorney fee shifting provided by section 2802 is helpful in this regard, but it is not sufficient. While attorneys' fees may be compensated, there is no compensation for the employee's time and inconvenience. Thus, the rule leaves employers in a position to intimidate employees out of claiming reimbursements that are owed, even if the employer ultimately must pay the employee's attorneys' fees.

Second, there is an asymmetry in the range of possible outcomes. There is only so much lower than the IRS mileage rate that the actual cost mileage rate for a vehicle can go. As a matter of mathematical certainty, it cannot go below zero. And as a matter of practicality, it will not get anywhere close to zero. Thus, giving an employer the right to litigate the actual cost mileage rate issue in a quest for a downward revision of a few cents a mile imposes substantial costs on the courts and/or the DLSE, all with very little change in ultimate outcomes. Thus, giving the employer the right to utilize the system's resources in this way is undesirable from the standpoint of judicial economy and the costs imposed on state agencies.

The same cannot be said of the right granted to employees by proposed section 13701(c). While there is only so much lower than 48½ cents a mile that the cost of operating a vehicle can go, the upward variability of costs is not similarly constrained. Thus, an employee who uses a large, specialized or other expensive-to-operate vehicle for the employer's benefit must be given the opportunity to recover the full costs of operation if the employee's statutory rights are to be vindicated.

For the above reasons, CELA believes that fairness and practicality require that section 13701(b) be deleted from the proposed regulations and that section 13701(c) remain unchanged.

13701(d): The proposed regulations include "lease payments" among the "expense items [that] shall be included in determining the cost of operation of an employee provided vehicle." We are concerned that this term will work to the disadvantage of employees who utilize other, non-lease means of financing the acquisition of their automobiles.

A lease and a loan are economic equivalents. A loan is just a lease of money. That is why consumer truth-in-lending protections applicable to loans for automobile financing also apply to automobile leases. There is no reason to favor employees who lease their cars over those who buy them. Thus, the rule should include "the interest portion of automobile purchase payments" in addition to "lease payments."

Similarly, there is no reason why employees who have substantial equity in their cars or own their cars outright should be treated less favorably than employees who are making car payments or automobile lease payments. To eliminate that potential unfairness to employees who own their cars or have equity in their cars, the actual cost method should include a component for compensation for that equity at a rate of return equal to average interest rates on loans for purchases of used automobiles.

Separate and apart from the lease payment/car payment issue, it occurs to us that “cleaning costs” should be included in the list set forth in section 13701(d). Additionally, “maintenance” should be added, as it is unlikely that there will be universal agreement that maintenance expenses are encompassed by the term “repairs.”

13701(e): We suggest that this section make it clear that it applies only when the employee chooses to seek actual cost mileage rate reimbursement pursuant to section 13701(c) for two or more vehicles. Thus, we propose that the section be amended to read as follows:

> “Where an employee uses more than one vehicle for work and seeks actual cost mileage rate reimbursement pursuant to section 13701(c) for more than one vehicle, the costs of operating each vehicle must be ascertained and the costs assessed proportionally, on a percentage basis, according to the use for work.”

13701(f), 13702(b)), 13703(h) and 13704(l): Each of these sections provides for a three-year record retention period. California Supreme Court precedent interpreting California’s unfair competition act (California Business & Professions Code sections 17200, et seq.) (the “UCA”), has established that employees’ Labor Code claims can form the basis for UCA claims. See Cortez v. Purolator Air Filtration Products Co. (2000) 23 Cal.4th 163. The statute of limitations under the UCA is four years rather than the Labor Code’s three years. Additionally, many cases may implicate rights under written contracts of employment, for which the statute of limitations is four years from the date of breach.

Thus, the recordkeeping period should be four years as an absolute minimum. Given that limitations periods sometimes are tolled, accrual of causes of action can be delayed, and DLSE’s investigative resources are not unlimited, a longer record retention period of five or six years probably is more practical.

Additionally, if the records are kept at a “central location in California,” they should be required to be

provided to the employee at the employer's facility closest to the employee's residence at the time of the request.

13701(h), 13702(h), 13703(j) and 13704(n): The second sentence of each of these sections as currently proposed allows the employer to utilize the employee's claim as the basis for reimbursement. We are concerned that a calculation error or a misunderstanding of legal rights to reimbursement on the part of an employee might lead to an employee submitting a claim for less than the amount actually owed by the employer. That would be unfair to the employee, in that employees are entitled to be paid but are not required to have expertise in their rights to payment under the Labor Code. Additionally, it would give rise to a conflict between the employer's apparent obligations under the regulation and the employer's obligations under Labor Code section 2802.

We propose that this issue be resolved by the addition of the underlined text below to the second sentence of each of the four sections as illustrated below for section 13701(h):

> "In the alternative, the employer may, along with the mileage expense payment, return a copy of the employee's mileage reimbursement claim, indicating thereon which mileage claims are being paid, which are being rejected, and any changes in the specific amounts paid for each mileage reimbursement sought; <u>provided, however, that the employer may not pay the employee less than the amount actually owed, even if the employee's claim or request seeks a lesser amount than is actually owed</u>."

13702. Employer Provided Vehicle Costs.

13702(b)): See the discussion of section 13701(f), above.

13702(h): See the discussion of section 13701(h), above.

13703. Payment of Per Diem Expenses.

13703(b): CELA is concerned that some readers of the regulations may attempt to interpret the list of types of expenses provided by section 13703(b) as exhaustive, and that such an interpretation would be contrary to the intent of Labor Code section 2802. Accordingly, we propose that the phrase "These expenses include" be modified to read as follows:

> "These expenses include <u>but are not limited to</u>"

and that the phrase "They also include" be modified to read as follows:

> "They also include <u>but are not limited to</u>".

Additionally, in order to eliminate a potential ambiguity, we propose that the phrase "transportation between places where meals are taken" should be modified to read as follows:

> "transportation to and from places where meals are taken".

13703(g): CELA is concerned about a serious problem in this section that, if not modified, may cause the regulations to contravene the letter and spirit of Labor Code section 2802. The section as currently proposed allows the employer to "require the employee to provide a receipt for each expense for which reimbursement is sought by the employee" in categories 13703(a) through (c).

But many of those expenses do not generate receipts. Bellhops do not give receipts for their tips, for example. Further, receipts can be lost, especially during the chaos that sometimes accompanies travel. Thus, the provision should make it clear that the employee is entitled to reimbursement even if he or she cannot provide a receipt, so long as the employee's inability to provide the receipt is reasonable. Accordingly, we propose that the following two sentences be appended to the end of this section:

> "Notwithstanding the foregoing, the employee is not required to provide receipts for items that do not customarily yield receipts (including, by way of example and not by way of limitation, cash tips, bus fares, postage stamps and inexpensive meals, including those purchased from vending machines). Further, the employee shall not be denied reimbursement for expenses not reflected in receipts so long as the employee proves or establishes by reasonable inference that he or she incurred the expense and that the expense is not unreasonable in view of the assigned travel and the employee's work."

13703(h): See the discussion of section 13701(f), above.

13703(j): See the discussion of section 13701(h), above.

13704. Other Travel Expenses.

13704(d): CELA proposes that, in the interest of clarity, the term "covered employee travel" be changed to read "employee travel."

13704(e): We propose that the following words be appended to the end of the section:

> "and other work-related mailing or shipping of documents or things."

13704(g): We propose modifying the phrase "baggage and sample or display material" to read as follows:

> "baggage, sample or display material and any other work-related documents or things".

13704(h): It occurs to us that the phrase "air, train, bus, car or boat" might not cover all of the possibilities, and might result in an employee being denied reimbursement for legitimate expenses by an employer that was so inclined. Thus, we propose changing that phrase to read

> "air, train, bus, car, boat or other means"

or, more simply,

> "air, water or ground transportation".

Additionally, for added clarity, we believe that the phrase "away from home" should be hyphenated.

Finally, we propose that the final sentence be changed to read as follows:

> "Transportation expenses between the employee's origination point and the destination where work is to be performed must be paid directly by the employer or reimbursed to the employee and shall include, without limitation, the costs of travel from and to the employee's home, place of business or lodging, and the airport."

13704(k): As with section 13703(g), CELA is concerned about a serious problem in this section that, if unmodified, may cause the regulations to contravene the letter and spirit of Labor Code section 2802. The section as currently proposed allows the employer to "require the employee to provide a receipt for each expense for which reimbursement is sought by an employee in sections (a) through (h) above."

But numerous expenses included in sections 13704(a) through (h) do not generate receipts. Tolls, parking meters, pay phones and stamps purchased from machines are examples that come to mind. Further, receipts can be lost, especially in the midst of the chaos that too often characterizes travel. Thus, the provision should make it clear that the employee is entitled to reimbursement even if he or she cannot provide a receipt, so long as the employee's inability to provide the receipt is reasonable.

Accordingly, we propose that the following two sentences be appended to the end of this section:

> "Notwithstanding the foregoing, the employee is not required to provide receipts for items that do not customarily yield receipts (including, by way of example and not by way of limitation, cash tips, parking meters, bus fares, postage stamps purchased from machines, bridge tolls, parking in self-service parking lots, and other machine purchases). Further, the employee shall not be denied reimbursement for expenses not reflected in receipts so long as the employee proves or establishes by reasonable inference that he or she incurred the expense and that the expense is not unreasonable in view of the assigned travel and the employee's work."

13704(l): See the discussion of section 13701(f), above.

13704(n): See the discussion of section 13701(h), above.

13705. Attorney Fees and Costs for the Administrative Process.

13705(a): We propose that "purpose" be changed to "purposes" and "attorney" be changed to "attorneys' ."

13705(b): In the interest of uniformity of application of the statute between court proceedings and Labor Commissioner hearings, we propose that this section be amended to read in its entirety as follows:

> "Attorneys' fees recoverable under Labor Code section 2802(c) for legal work performed during the administrative process shall be the fees that would be approved by a court in the same county if the underlying dispute had been decided by that court."

13705(c): In the interest of uniformity of application of the statute between court proceedings and Labor Commissioner hearings, we propose that this section be amended to read in its entirety as follows:

> "Costs recoverable under Labor Code section 2802(c) shall include those costs that would be recoverable in a court in the same county if the underlying dispute had been decided by that court."

Brief Comment Regarding DLSE's Initial Statement of Reasons

Finally, in its Initial Statement of Reasons, under the heading "Reasonable Alternatives to the Regulations and the Agency's Reasons for Rejecting those Alternatives," the DLSE states as follows:

> "The Labor Commissioner considered additionally authorizing employers to indemnify employees' travel expenses by paying higher base salaries and/or commission rates as a matter of contract. The Labor Commissioner rejected this option, however, because it is impossible to determine whether indemnification in the form of additional compensation would truly indemnify the employee for all necessary expenditures or losses."

CELA believes that the DLSE is on precisely the right track in this regard. Allowing the argument that an employee's salary, hourly rate or other compensation included reimbursement for anticipated expenses would eviscerate Labor Code section 2802, and ultimately would serve only to permit an employer to shift its business expense obligations to its employees.

We thank you once again for giving CELA the opportunity to comment on these important proposed regulations. We would welcome the opportunity to provide additional information or comment if you think it would be helpful.

Respectfully submitted,

Scot Bernstein
On behalf of
California Employment Lawyers Association