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April 28, 1997

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Re: **Remuneration Requirements of Wage Orders**

Dear Mr. Simmons:

This letter is in response to your letter of January 3, 1997, wherein you ask for an opinion regarding the DLSE's enforcement policy with respect to the "remuneration" provisions of California law. I want to thank you for your patience in this matter. As I explained to you in our recent telephone conversation, this issue is of obvious concern to the Division and an opinion at this time required extensive review.

The term, "remuneration" is used in the Wage Orders in the applicability section. Typically, the language reads:

> "Provisions of Sections 3 through 12 shall not apply to persons employed in administrative, executive, or professional capacities. No persons shall be considered to be employed in an administrative, executive, or professional[1] capacity unless one of the following conditions prevails:
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> "1) The employee is engaged in work which is primarily intellectual, managerial, or creative, and which requires exercise of discretion and independent judgment, and for which the remuneration is not less than $1150.00 per month."

[1]Note that unlike the federal law, the California Orders do not require a specific remuneration for exemption from the "professional" exemption; nor do the Orders require any specific remuneration for the recently-adopted "learned and artistic" exemption.

DLSE has concluded that the IWC inserted the remuneration requirement in the Orders to insure that exempt workers were in situations which were compatible with the notion of the exercise of discretion and independent judgment. The federal regulations relating to the payment of salary, are based on the premise that a salaried status is consistent with the exempt categories since the hallmark of an executive or managerial employee is that such workers, exercising discretion and independent judgment, "must decide for himself the number of hours to devote to a particular task." The federal courts in explaining this rationale have stated:

> "In other words, the salaried employee decides for himself how much a particular task is worth, measured in the number of hours he devotes to it. With regards to hourly employees, it is the employer who decides the worth of a particular task, when he determines the amount to pay the employee performing it. Paying an employee by the hour affords that employee little of the latitude the salary requirement recognizes. Thus, a basic tension exists between the purpose behind a salary requirements and any form of hourly compensation." *Brock v. Claridge Hotel & Casino*, 846 F.2d 180, 184, cert. den. 488 U.S. 925. See also, *Abshire v. County of Kern*, 908 F.2d 483, 486 (9th Cir.1990)

Based on a recent examination of DLSE policy relating to the term "remuneration" as it is used in the IWC Orders, it was determined that the definition of the term should be revised. Henceforth, for purposes of the IWC Orders, the term remuneration will be consistent with the term cash wage in the form of salary:

> The "remuneration" requirement of the various Orders[2] is met when under the employment agreement the worker receives each week a predetermined sum constituting all or part of his compensation which predetermined amount is **not less than** the remuneration required by the specific Order the employee is subject to, multiplied by 12 and divided by 52. Such weekly sum shall not be subject to reduction because of variations in the quality of the work performed. The employee must receive his contractual salary in full for any week in which he or she has performed any work without regard to the number of days or hours worked. The employee need not be paid for any week in which he or she performs no work.

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[2]While some of the Orders require $1150.00 per month, the bulk of the Orders currently require a remuneration of only $900.00 to meet the exemption requirements.

> The employee will not be considered to be receiving the weekly remuneration if deductions are made for absences occasioned by the employer or by the operating requirements of the business. Accordingly, if the employee is ready, willing and able to work, deductions may not be made when work is not available. Deductions may be made, however, when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident. Deductions may also be made for absences of a day or more occasioned by sickness or disability (including illness or accidents covered by workers' compensation provisions of the law) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability.
>
> In order to make the DLSE policy compatible with the federal law, the DLSE will not allow deductions to be made from the remuneration paid to exempt workers for absences caused by jury duty, attendance as a witness, or temporary military leave[3]. However, the provisions of the federal regulations which purport to allow deductions for infractions of any rule are not compatible with California law and will not be allowed. (See Labor Code §§ 221 through 224 and cases cited)

The DLSE will utilize case law, both federal and California State, which defines the provisions of 29 C.F.R. § 541.118 which are both applicable and consistent with the California law.

As you know, the term "remuneration" as used in the California Wage Orders has historically been construed by both the Division of Industrial Welfare and the Division of Labor Standards Enforcement to include amounts received by employees "which need not be all in cash." (See Operations and Procedures Manual, § 10.60) Frankly, the reasons for this view are lost in antiquity; but that has been the view of the enforcement agencies since at least 1962. It is clear, however, that the remuneration amount was intended to correspond in some way to the salary-basis tests developed by the Secretary of Labor to determine the exemption status of professional, executive and administrative personnel under the Fair Labor Standards Act. (29 U.S.C. § 201, *et seq.*; see 29 C.F.R. §§ 541, *et seq.*)

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[3]This application of the law would not require an employer to pay the worker for time spent on jury duty, it would simply mean that, as is the case with the federal exemption at the present time, the exemption would be lost if the payment were not made.

The DLSE has taken the position in the old "Operations and Procedures Manual" at § 10.60, that the remuneration provided by the Orders:

> "is not subject to reduction because of variations in the quality or quantity of work performed. Any deductions for absences must be made according to a plan, policy or practice with respect to leave for illness or disability. If the employee is ready, willing and able to work, deductions may not be made. Where deductions are made because of lack of available work, it indicates that there was no intention to pay the employee on a regular basis appropriate to an exempt classification."

This statement is consistent with the views (indeed, the very language) of the DOL contained in the Code of Federal Regulations regarding the salary requirement of the regulations. (See 29 C.F.R. § 541.118)

This revised definition differs from DLSE's prior defintion in that:

1. There will no longer be an allowance for amounts not paid in cash.

   The provisions in the old Operations and Procedures Manual § 10.60 that allowed amounts received by employees to be in other than cash are no longer applicable. A change was deemed necessary since this interpretation of the term used in the IWC Orders and the policy resulting from that interpretation appear to be violative of the provisions of California Labor Code § 212(a) which requires that all wages must be in cash or a negotiable instrument payable in cash except for the limited exceptions found in § 213(a).

   In addition, inasmuch as the IWC has specifically exempted the administrative and executive employees from the provisions of Section 10 (meals and lodging), it cannot be argued that the Commission intended to view those criteria as a credit toward the "remuneration" above a cash salary[4]. The IWC Orders fail to provide any information regarding how the remuneration is to be construed.

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[4]The provisions of Labor Code § 1182.8 apply to "provisions of orders of... IWC...relating to credit or charges for lodging..." Since these individuals are exempt from Section 10, the provisions of § 1182.8 cannot apply.

2. The definition and its application will be more compatible with the federal standard of the weekly salary test.

The long-established DLSE policy (and that of the DIW before it) considered the requirements of the remuneration to be co-extensive with the "salary" requirement found in the federal regulations; the policy simply failed to state how this "salary" was to be construed in view of the fact that the remuneration could include amounts which need not be in cash. In retrospect, this interpretation of the term used in the IWC Orders and the policy resulting from that interpretation appears to be violative of the provisions of California Labor Code § 212(a) which requires that all wages must be in cash or a negotiable instrument payable in cash except for the limited exceptions found in § 213(a).

The IWC intended that the same rationale used by the federal government in requiring the salary basis for these exemptions be applied to the California Orders requirement of remuneration. But the *monthly* remuneration provisions are incompatible with the FLSA *weekly* salary tests. Prorating the monthly remuneration requirement will solve that problem without doing any harm to the concept.

Further buttressing the rationale for adoption of an enforcement policy consistent with the federal view, the IWC has recently announced that it is the intent of the IWC to make the IWC Orders more compatible with, though not exactly the same as, the federal Fair Labor Standards Act and the regulations used to enforce that law[5]. Such compatibility is designed to make it easier for employers to comply with the FLSA as well as the state law where the two laws can be made compatible. Adopting the approach used by the DOL would allow the remuneration provision to have a logical meaning which is consistent with the federal rules and which will allow the vast majority of employers to meet the requirements of both laws in this one area. Also, this can be accomplished without diminishing the rights of workers in this area.

The DLSE does not feel that requiring the computation of the monthly remuneration required by the IWC on a weekly basis would do any injustice to the position taken by the IWC, although this enforcement posture is at odds with the past enforcement policy of

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[5]The IWC's most recent changes do not make the California law entirely coextensive with the federal law, however. For instance, the definitions of "primary" which differentiates the IWC tests from those used by the Department of Labor remains as well as the definition of "hours worked" in most of the Orders.

DLSE and DIW. It should be noted, as you point out in your letter, that the application of the remuneration test has never presented any substantial issue from an enforcement point of view and there are no cases defining or delimiting the term. This is so, obviously, because almost every employer in California is subject to both the FLSA and the IWC Orders and, in order to meet the requirements for exemption under the FLSA, are required to meet the "salary test" as well as the "duties test".

Thus, the policy remains one of this administrative agency only and any change of the policy will affect no current case law. In addition, the dictionary definitions of the term "remuneration" neither state nor imply that the term is meant to mean anything other than the wage paid to a worker and the use of the term in the FLSA strongly implies that the term connotes payment of wages which is consistent with the view of wages in California law. (29 U.S.C. § 207(e)) In view of the proscription in Labor Code § 212(a) discussed above, and the lack of any dictionary meaning which would compel a different interpretation, there appears to be no rationale for continuing the present interpretation of the word "remuneration."

In response to the specific questions raised in your letter of January 3rd:

1. Is the "remuneration" standard under California law construed in precisely the same manner in which the salary basis requirements are construed under the FLSA so that there must be a fixed and determined sum paid each pay period (on a weekly or less frequent basis) that is generally not subject to reduction for portions of a week missed?

A. As outlined above, the remuneration standard cannot be construed in precisely the same manner as the FLSA requirements. For instance, the IWC Orders do not require a specific remuneration for either the Professional or the Learned and Artistic exemptions. Also, certain deductions which might be allowed under the federal regulations would not be allowed under current California law. While the DLSE enforcement policy will require that the remuneration be based on a weekly pay period, the provisions of Labor Code §§ 204, *et seq.* provide for the *time for payment* of wages in California. The actual payment of the wages can be made pursuant to that schedule.

2. If it is construed as a "fixed and determined" sum of money, can that fixed and determined sum be a <u>weekly</u> sum or must it be a monthly sum?

A. The sum must be fixed and determined and not less than the product of the following: The "remuneration" required by the applicable Order times twelve (12) divided by fifty-two (52). As an example, in Order 4-89, the $1150.00 is multiplied by 12 (months) which equals $13,800.00; that sum is divided by 52 (weeks) which provides a weekly remuneration of not less than $265.39.

3. If the term "remuneration" is construed by the DLSE as identical to a "salary" within the meaning of 29 C.F.R. § 541.118, what is the basis for that position?

A. As pointed out above, the DLSE construction is consistent with the federal "salary" It differs, of course, in amount required. We believe that the DLSE enforcement policy announced above is consistent with the intention of the IWC.

4. Can employees who are paid on an hourly salary basis ever satisfy the "remuneration" standards under California law and, if so, under what circumstances?

A. Since the Division policy has always prohibited a deduction for "variations in the ... quantity of work performed" individuals on hourly pay could never have meet the requirements of the remuneration test. They will continue to be unable to meet those requirements under the method adopted by the DLSE and announced herein.

5. Can the "remuneration" standard be satisfied under California law even if an employee's total compensation fluctuates from week to week, as long as the total remuneration paid (even if not guaranteed) always equals or exceeds $1,150.00 per month?

A. The new enforcement policy states, *inter alia*:

> "The 'remuneration' requirement of the various Orders is met when under the employment agreement the worker receives each week *a predetermined sum constituting all or part of his compensation* which predetermined amount is **not less than** the remuneration required by the specific Order the employee is subject to, multiplied by 12 and divided by 52." (Emphasis added)

As stated, the change is intended to be more consistent with federal law. For this reason, DLSE will adopt, where possible, the federal regulations at 29 C.F.R. § 541.118. These regulations provide that while the "pre-determined amount" may

be augmented (which augmentation would result in a "total" amount received which could fluctuate) the augmentation may not be inconsistent with the meaning of "salary." (See cases cited above) This new policy will result in some changes from the previous position taken by DLSE. For instance, the previous enforcement policy would have required an exempt worker who was only employed for a one-week period to be paid the full $1,150.00 required by Order 5-89 if the employee was to be considered exempt[6]. As you can see, the new enforcement policy will not always have this unusual result. (See answer to Question 11, below)

6. If an employee is guaranteed a minimum amount of remuneration of $1,150.00 per month, regardless of the actual hours worked during the month, can the employee be paid by the hour and satisfy the "remuneration" standard?

A. As outlined above, the rationale for the payment of a pre-determined amount for these exempt employees is partly supported by the conclusion that salaried employees who are exercising discretion and control, decides for himself how much a particular task is worth, measured by the number of hours he devotes to it. This concept is incompatible with the concept of hourly pay. While the federal circuits seem to be mildly split on this particular issue, the Ninth Circuit endorses this view.

7. Question 7, which implies an affirmative answer to question 6, is answered above.

8. Will the "remuneration" standard be satisfied if an employer pays an employee a specified hourly rate, such as $50.00 an hour, provided that the compensation arrangement contains a guarantee that the employee will receive at least $1,150.00 a month?

A. No. for the reasons set forth in answer to question 6, above.

9. Would the "remuneration" standard be met if the facts set forth in [question] 8 above applied, but the employee were guaranteed at least $265.38 per week rather than a monthly sum?

A. No. See answers to questions 6, 7 and 8, above.

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[6]Order 12-80 provides an "equivalent" to the monthly amount and is an exception to the above stated rule.

10. If the DLSE takes the position that a minimum guarantee (on a weekly or monthly basis) must exist, may an employer pay an employee who receives such a guarantee additional compensation on an hourly basis for extra work beyond a specified number of hours each day and/or each week without compromising the employee's exempt status?

A. This issue was raised and answered in a number of federal cases. The answer was that "[S]uch additional compensation for extra hours is...not consistent with salaried status." (*Abshire v. County of Kern*, 908 F.2d 483, 486 (9th Cir.1990), cert. denied, 498 U.S. 1068; *Thomas v. County of Fairfax*, 758 F.Supp. 353, 364 (E.D.Va.1991); *Banks v. City of North Little Rock*, 708 F.Supp. 1023 (E.D.Ark.1988) In *Brock v. Claridge Hotel & Casino, supra*, 846 F.2d 180, 185, the court noted that none of the three examples of allowable additional compensation under the federal regulations reach hourly compensation plans. DLSE feels that enforcement consistent with that of the federal government should be a goal wherever possible.

11. Is the $1,150.00 "remuneration" standard prorated if an employee begins employment or ends employment in the middle of a week or in the middle of a month? If so, how is the remuneration standard prorated under state law?

A. Unlike the old enforcement policy which would not allow for proration, the new policy provides for proration subject to the restrictions set forth at 29 C.F.R. § 541.118(a)(1) and (4). Absences of one day or more during periods of employment may result in pro-rated salary deductions as provided by 29 C.F.R. § 541.118(a)(2) and (3). The salary of an employee who begins or ends employment in the middle of a work week may be pro-rated in accordance with 29 C.F.R. § 541.118(c), with payment of the employee's salary for that week based on the ratio of the number of days actually worked to the number of work days that would have been worked had the employee worked the full week.

I hope this adequately addresses the issues you raised in your letter of January 3rd. Again, thank you very much for your patience in this matter and your continued interest in California labor law.

Yours truly,

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