STATE OF CALIFORNIA Gavin Newsom, *Governor*

DEPARTMENT OF INDUSTRIAL RELATIONS
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July 26, 2019

George H. Soares
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1415 L Street, Suite 400
Sacramento, CA 95814

Re: Application of AB 1066's Overtime Phase-In to Sheepherders

Dear Mr. Soares:

Thank you for contacting the Labor Commissioner's Office on behalf of the California Wool Growers Association regarding the application of new agricultural overtime rules to sheepherders, which commenced on January 1, 2019 pursuant to AB 1066 (Chapter 313, Statutes of 2016, Labor Code sections 857-864). You have asked for the Labor Commissioner's interpretation concerning how to calculate overtime for sheepherders who earn a monthly minimum wage for all hours worked. (See Labor Code section 2695.2(a); Industrial Welfare Commission ("IWC") Wage Order Number 14 ("Wage Order 14") subd. 4(E), Cal. Code Regs., tit. 8, § 11140, subd. 4(E).)[1]

By way of background, we note that the Labor Code and Wage Order 14 contain specific provisions for sheepherders. Labor Code section 2695.2, subdivision (a)(1), which was enacted in 2001, provides that where a sheepherder is employed on a regularly scheduled 24-hour shift on a seven-day-a-week "on call" basis, an employer may, as an alternative to paying the minimum wage for all hours worked (the state minimum wage is set forth in Labor Code section 1182.12 and Wage Order 14 subd. 4(A)), instead elect to pay the sheepherder monthly minimum wage adopted by the IWC on April 24, 2001. This letter addresses the situation where the election under this section has been made, which we understand pertains to most, if not all, sheepherders in the state. The amount of this monthly minimum wage increases in tandem with the state minimum wage by applying the same percentage increase of the new rate over the previous rate to the minimum monthly wage rate. (See Lab. Code, § 2695.2, subd. (a)(2).) As the state minimum wage rates are currently staggered depending on whether the employer employs 26 or more employees or 25 or fewer employees, the current monthly minimum wage amounts for sheepherders employed on a regularly scheduled 24-hour shift on a seven-day-a-week "on call" basis are similarly dependent on whether the employer employs 26 or more employees or 25 or fewer employees, as provided in Wage Order 14 section 4(E).

[1] "Sheepherder" as defined under Wage Order 14 means "any individual who is employed to do any of the following: tend flocks of sheep grazing on range or pasture; move sheep to and about an area assigned for grazing; prevent sheep from wandering or becoming lost, or using trained dogs to round up strays and protect sheep against predators and the eating of poisonous plants; assist in the lambing, docking, and shearing of sheep; provide water or feed supplementary rations to sheep; or perform the work of a sheepherder pursuant to an approved job order filed under the provisions of Section 101(a)(15)(H)(ii)(a) of the federal Immigration and Nationality Act (commonly referred to as the "H-2A" program (see 8 U.S.C. Section 1101 et seq.), or any successor provisions." (Cal. Code Regs., tit. 8, § 11140, subd. 2(N).)

While we recognize there is no clear legislative history discussing sheepherders in the new overtime rules, the language of the statute itself now encompasses overtime for sheepherders. In order to compute the correct overtime rate it is necessary to harmonize the specific statutory and Wage Order 14 provisions regarding the monthly minimum wage for sheepherding work with the new overtime requirements in AB 1066. The Legislature intended the special sheepherder provisions to be "in addition to, and . . . entirely independent from, any other statutory or legal protections, rights, or remedies that are or may be available under this code or any other state law or regulation . . . ." (Lab. Code, § 2695.1, subd. (a).) When the Legislature enacted AB 1066 and mandated — notwithstanding any other provision of law — that *any person* employed in an agricultural occupation in California shall receive overtime compensation for work that is performed beyond the new overtime thresholds, this overrode sheepherders' historic overtime exemption in the Labor Code and under Wage Order 14. (See Lab. Code, § 860.) However, the Legislature did not specify how the new overtime rules would apply to sheepherders earning a monthly minimum wage. As explained below, the Labor Commissioner's Office has determined that the best way to apply the overtime phase-in to sheepherders earning a monthly minimum wage is to take into account both that the monthly wage is intended to constitute a minimum wage for all hours worked, and that sheepherders are now entitled to earn an overtime premium for hours worked in excess of the weekly phase-in thresholds.[2]

In California, as under the federal Fair Labor Standards Act ("FLSA"), overtime is computed based on the regular rate of pay. The Division of Labor Standards Enforcement ("DLSE"), directed by the Labor Commissioner, has taken the position that the failure of the IWC to define

[2] Labor Code sections 860 and 862 and Wage Order 14 section 3 set forth the overtime phase-in schedule for agricultural workers covered by Wage Order 14. For employers of more than 25 employees: Starting January 1, 2019, an employee shall not be employed more than nine and one-half (9½) hours per workday or fifty-five (55) hours per workweek unless the employee receives one and one-half (1½) times such employee's regular rate of pay for all hours worked over nine and one-half (9½) hours in any one workday or more than fifty-five (55) hours in any one workweek. Starting January 1, 2020, an employee shall not be employed more than nine (9) hours per workday or fifty (50) hours per workweek unless the employee receives one and one-half (1½) times such employee's regular rate of pay for all hours worked over nine (9) hours in any one workday or more than fifty (50) hours in any one workweek. Starting January 1, 2021, an employee shall not be employed more than eight and one-half (8½) hours per workday or forty-five (45) hours per workweek unless the employee receives one and one-half (1½) times such employee's regular rate of pay for all hours worked over eight and one-half (8½) hours in any one workday or more than forty-five (45) hours in any one workweek. Starting January 1, 2022, an employee shall not be employed more than eight (8) hours per workday or work in excess of forty (40) hours per workweek unless the employee receives one and one-half (1½) times such employee's regular rate of pay for all hours worked over eight (8) hours in any workday or more than forty (40) hours in any workweek and double the employee's regular rate of pay for all hours worked over twelve (12) hours in any one workday. For employers of 25 or fewer employees, the above-referenced overtime thresholds phase-in beginning January 1, 2022 through January 1, 2025. In addition, pursuant to Labor Code sections 861 and 862(b), other provisions of the Labor Code regarding compensation for overtime work, such as section 510, now apply to sheepherders. This includes section 510, subdivision (a)'s requirement that the first eight (8) hours worked on the seventh (7th) day of work in any one workweek be compensated at the rate of no less than one and one-half (1½) times the employee's regular rate of pay, and that any work in excess of eight (8) hours on any seventh (7th) day of a workweek shall be compensated at a rate of no less than twice the employee's regular rate of pay.

the term "regular rate" indicates the IWC's intent that California will adhere to the standards adopted by the U.S. Department of Labor for purposes of the FLSA to the extent that those standards are consistent with California law. (See, e.g., DLSE Enforcement Policies and Interpretations Manual ("DLSE Manual") § 49; DLSE Opn. Letter No. 2003.01.29, Calculation of Regular Rate of Pay (2003) pp. 2 fn.1, 3; *Huntington Mem'l Hosp. v. Superior Court* (2005) 131 Cal.App.4th 893, 902-903.) The FLSA defines "regular rate" as "all remuneration for employment paid to, or on behalf of, the employee[.]" (29 U.S.C. § 207(e).)

The monthly alternative minimum wage for sheepherders is a special minimum wage created by the IWC and the Legislature to compensate sheepherders whose employers elect to use it. The monthly alternative minimum wage compensates the sheepherder for up to 24 hours worked per day, seven days per week. In other words, the Legislature has provided us with the regular rate of pay for sheepherders under this provision. Therefore, the method to arrive at the hourly rate is to divide the weekly wage by 168 hours (24x7). This is an express exception to only using the non-overtime hours worked in a workweek to determine the regular rate of pay. As all hours worked have been paid at this special rate, in order to be compliant with the new overtime requirements for all agricultural workers, one half of that rate needs to be paid in addition to the special minimum wage as an overtime premium.

Using the current monthly minimum wage rate of $2,133.52 for an employer with 26 or more employees, we would multiply that amount by 12 to arrive at a yearly amount of $25,602.24, and divide by 52 to arrive at a weekly amount of $492.35 per week. This is the standard way in which a monthly salary is converted into a weekly salary, and the sheepherder monthly minimum wage is a monthly fixed sum akin to a monthly salary. (See DLSE Manual § 49.2.1.1; 29 C.F.R. § 778.113(b).)

We would then divide the weekly wage by 168 hours to arrive at the regular hourly rate of pay, $2.93 per hour. Although a regular rate of pay that is below the minimum wage would not typically be permissible, we recognize that the IWC and the Legislature have established a specific sheepherder monthly minimum wage for all hours worked on a regularly scheduled 24-hour shift on a seven-day-a-week basis, which results in a regular hourly rate of pay that is below the state minimum wage. In this situation, in order to provide the overtime premium, which is one and one-half times the regular rate of pay, we would then add one-half of the regular rate (half of $2.93 is $1.47) to each hour worked in excess of the overtime threshold, which is currently 55 hours per week for an employer with more than 25 employees. By subtracting 55 hours from the total weekly hours of 168, we arrive at 113 hours for which overtime pay is required.

Sheepherders are also now entitled to premium wages on the seventh day of work in a workweek, which includes one and one-half times the regular rate for the first eight hours on the seventh day of work and double the employee's regular rate of pay for all hours worked over eight hours on the seventh day of work in the workweek. (In addition, sheepherders will be entitled to double time after 12 hours on any workday in 2022 for employers with more than 25 employees, and in 2025 for employers with 25 or fewer employees.) Because sheepherders

working on a 24-hour schedule, seven days per week, would exceed the current overtime threshold of 55 hours before the seventh consecutive day of work, they will already be entitled to the half-time premium for the first eight hours on the seventh day, but they would also earn a double time premium (an additional $2.93 over the compensated regular rate of pay or special minimum wage) for hours worked over eight on that day. Since there are 16 hours over eight on the seventh day of work, this equals a total of $46.88 in double time pay (16 hours multiplied by $2.93). The remaining hours in the week for which sheepherders are owed the half-time overtime premium is 97 (113-16). Ninety-seven multiplied by $1.47 is $142.59. Therefore, the total weekly amount for overtime and double time premiums due a sheepherder by a large sheepherder employer in 2019 is $189.47. This is in addition to the regular rate of pay or special minimum wage.

You also inquired whether the costs associated with benefits that employers are required to provide under the H-2A program – the federal visa program that applies to foreign sheepherders working in the U.S. – would be added into the regular rate of pay. For example, under the H-2A program, sheepherder employers are required to provide meals and housing. (See 20 C.F.R. § 655.210, subds. (c) & (e).) Under the Labor Commissioner's long-established enforcement policy (which closely tracks the federal regulations in this regard), housing, meals, and other benefits are added to the cash wage paid for purposes of determining the "regular rate" of pay. (DLSE Manual § 49.1.2.2.) Similarly, under FLSA regulations, where payments are made to employees in the form of goods or facilities that are "regarded as part of wages," for example, where "an employer furnishes lodging to his employees in addition to cash wages," the reasonable cost or fair value of such facilities must be included in the regular rate. (29 C.F.R. § 778.116.)

However, 29 C.F.R. § 778.116 cross-references part 531 of the FLSA regulations, which interprets the FLSA provision that defines a wage to include the "reasonable cost" of "board, lodging, or other facilities" if the "facilities are customarily furnished by such employer" to its employees. (29 U.S.C. § 203(m).) Section 531.3, subdivision (d)(1) instructs that the cost of furnishing facilities that are "primarily for the benefit or convenience of the employer" will not be recognized as reasonable, "and may not therefore be included in computing wages." Where a facility is required by law to be provided to an employee free of charge, it primarily benefits the employer to provide it because the employer is not permitted to operate its business in violation of the law. Thus, these expenses may not be credited against the employer's wage obligation. (See, e.g., *Ramos-Barrientos v. Bland* (11th Cir. 2011) 661 F.3d 587, 596-598 [denying wage credits for housing required under the H-2A program[3]]; *Beltran v. InterExchange, Inc.* (D.Colo. 2016) 176 F.Supp.3d 1066, 1082-1083 [refusing to allow wage credits for room and board for *au pairs* as employers were required to provide room and board under State Department regulations]; U.S. Dep't of Labor, Wage and Hour Division, Opn. Letter (Aug. 19, 1997), 1997 WL 998029, at *1 [concluding that an *au pair* employer could not take wage credits for facilities it was required by law to provide].)

[3] The Eleventh Circuit permitted wage credits for meal expenses incurred during the workers' inbound travel to the employer's worksite because federal regulations deem meals to always be "regarded as primarily for the benefit and convenience of the employee." *Bland*, *supra*, 661 F.3d at p. 599. However, Wage Order 14 does not permit wage offsets for meals or lodging. (See Cal. Code Regs., tit. 8, § 11140, subd. 4(E)(3).)

Where an employer cannot take a wage credit for housing, meals, or other facilities that primarily benefit the employer, these amounts are therefore not used in computing wages – including computing the regular rate for overtime wages. (See 29 C.F.R. §§ 531.3(d) [facilities that are primarily for the benefit of the employer may not be included in computing wages] and 531.27(b) ["wages" refers to both minimum wages and overtime wages]; see also §§ 531.30 [the reasonable cost of board, lodging, and other facilities may be considered part of the wage paid to an employee only where the employee receives the benefit] and 531.32(c) [the cost of furnishing facilities that are primarily for the benefit or convenience of the employer will not be recognized as reasonable and may not therefore be included in computing wages].) For example, a federal district court interpreting California law held that because a meal program operated for the benefit or convenience of the employer, the value of the meals was properly excluded from the regular rate of pay. (See *Batres v. HMS Host USA, Inc.* (C.D.Cal. Sept. 25, 2012, No. SACV 10-1458) 2012 WL 13049884, at *3-5.) Another district court held that where housing was furnished primarily for the benefit of the employer, the value of that lodging should not be included in the regular rate. (See *Schneider v. Landvest Corp*. (D.Colo. Feb. 9, 2006, No. 03 CV 02474) 2006 WL 322590, at *28.) The U.S. Department of Labor recently stated in its Notice of Proposed Rulemaking regarding the federal regular rate regulations: "Facilities furnished for the employer's benefit do not qualify as wages or remuneration for employment and thus need not be included in the regular rate." (U.S. Dep't of Labor, Wage and Hour Division, Notice of Proposed Rulemaking, *Regular Rate Under the Fair Labor Standards Act* (Mar. 29, 2019) 84 Fed.Reg. 11888, 11895 fn.101.) In sum, because the housing, meals, and other facilities are required under the H-2A sheepherder regulations, they are primarily for the benefit of the employer and may not be included in the regular rate.

We note that the computation and analysis above apply only where the alternative monthly minimum wage is applicable for sheepherding work performed on a 24-hour, seven-day-a-week on-call basis. As such, this does not apply when a sheepherder performs any non-sheepherding agricultural or other work on any workday in a workweek, in which case the sheepherder is fully covered for that workweek by the provisions of the applicable wage and hour laws that apply to that work. (See Lab. Code, § 2695.2, subd. (a)(1); Wage Order 14, subd. 1(F).)

Thank you for your inquiry.

Sincerely,

Laura Moskowitz
Attorney for the Labor Commissioner