STATE OF CALIFORNIA — PETE WILSON, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
LEGAL SECTION
455 Golden Gate Avenue, Room 3186
San Francisco, CA 94102
(415) 703-4159

H. THOMAS CADELL, JR., *Chief Counsel*

May 25, 1993

Re: **Payment Of Salary**

Your letter of March 2, 1993, addressed to Victoria Bradshaw, State Labor Commissioner, has been assigned to this office for review and response.

In your letter, you state that one of your clients, engaged in the garment industry, wishes to enter into a new employment agreement with non-exempt employees who are currently being paid in excess of $50,000.00 per year on a salary basis. You suggest an agreement which provides as follows:

> I understand and agree that the weekly minimum salary is based upon the following:
>
> 1. A regular 5-day work week of Monday through Friday;
>
> 2. A work day that may fluctuate between approximately 8 to 11 hours per day;
>
> 3. A regular hourly rate of pay of $20.00 per hour;
>
> 4. An overtime rate of $30.00 ($20.00 x 1.5) which shall be paid for all hours worked over 8 in a day or 40 in a work week, or for the first 8 hours worked on the 7th consecutive day during the same workweek;
>
> 5. An overtime rate of $40.00 per hour ($20.00 x 2), which shall be paid for all hours worked in excess of 12 in one day or in excess of 8 hours on the 7th consecutive day during the same workweek;
>
> 6. I will receive the appropriate overtime compensation for all overtime hours worked;

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7. I understand that if the Company's business is slow and I am not required to work as many hours as usual, I will still receive $1100 for that week. The Company may not offset any extra overtime earned in a busy week (i.e., any hours in excess of the 10 hours of overtime included in the calculation of my weekly salary) against my compensation for that slow week.

8. For example, if in a workweek, I work 10 hours a day, Monday through Friday, my compensation would be $1100.00 (40 hours @ $20.00 per hour = $800.00) + (10 hours @ $30.00 per hour = $300.00).

Your letter states that you found support for this type of arrangement in a letter written by the undersigned found in the publication *Practice and Procedure Before the California State Labor Commissioner*, (1990). I disagree.

The letter you cite to states, in pertinent part:

> The Division has approved agreements which specifically set out the hours per day and the days per week which the employee is expected to work and which specifically state the regular hourly rate of pay the employee is actually receiving. The Division will allow the employer to extrapolate those figures and state that the monthly salary is the sum of the weekly salary, times fifty-two and divided by 12. Any work in excess of forty in one week or eight in one day must be compensated at the applicable premium rate of either time and one-half or double the stated regular rate of pay.[1]

The agreement you submit <u>does not</u> meet these criterion. Your proposed agreement provides a "fluctuating" workweek of between "approximately 8 to 11 hours per day". The agreement must "specifically set out the hours per day and the days per week" which the employee is expected to work; not an approximation.

The example you give in the proposed agreement, coupled with the provisions of numbered paragraph 2 of that agreement clearly illustrates that the "regular rate" is not ascertainable from the terms of the agreement. If in a workweek the employee works 10 hours per day, five days per week, the compensation would be as you state: 40 hours @ $20.00 and 10 hours at $30.00. However, assuming California law allowed the type of *fluctuating* workweek your pro-

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[1] See letter dated June 7, 1989, at page III-20-1 of the publication *Practice and Procedure Before the California State Labor Commissioner*, (1990).

posed agreement envisions, if the employee worked a 3-day workweek, 11 hours per day and received $1100.00 the regular hourly rate would be $29.33 per hour, not $20.00 per hour. If the employee worked three 11-hour days and one 10-hour day the regular hourly rate would be $22.68 per hour not $20.00 per hour. Under the *Skyline Homes* decision, a fluctuating workweek is not allowed and only straight time wages may be counted in calculating the regular rate of pay. It is not permissible to "invent" a regular rate of pay.

An agreement which seeks to take advantage of the type of agreement discussed in the June 6, 1989, letter must not be based on any figure which is not fixed and certain.

For the reasons stated, the proposal you suggest in your letter of March 2, 1993, would not be allowed in California.

Yours truly,

H. THOMAS CADELL, JR.
Chief Counsel

c.c. Victoria Bradshaw