STATE OF CALIFORNIA GRAY DAVIS, Governor

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September 29, 2000

Rita Dermenjian
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Re: **Whether Belo Contracts are Permissible Under California Law**

Dear Ms. Dermenjian:

This letter is intended to respond to your inquiry of September 14, 2000, asking whether "Belo-Type contracts or Guarantee Wage Contracts...are valid under California law."

In *Walling v. A. H. Belo Corp., supra*, 316 U.S. 624, 62 S.Ct. 1223, the U.S. Supreme Court refrained from rigidly defining "regular rate" in a guaranteed weekly wage contract that met the statutory requirements of section 7(a)[1] of the Fair Labor Standards Act for minimum compensation. In the *Belo* case the contract called for a regular or basic rate of pay above the statutory minimum and a guaranteed weekly wage of 60 times that amount. As the hourly rate was kept low in relation to the guaranteed wage, statutory overtime plus the contract hourly rate did not amount to the guaranteed weekly wage until after 54½ hours were worked. (316 U.S. at page 628, 62 S.Ct. at page 1225) The Court refused to require division of the weekly wage actually paid by the hours actually worked to find the "regular rate" of pay and left its determination to agreement of the parties. Where the same type of guaranteed weekly wages were involved, the Court has reaffirmed that decision as a narrow precedent principally because of public reliance upon and congressional acceptance of the rule there announced.

In the *Belo* case the Court upheld a dual payment system for irregular hours jobs that operated as follows: By the terms of the employment contract, there existed a specified regular rate wage

[1]Section 7(f) of the FLSA is referred to as the "Belo" provision because Congress added the provision in 1949 in response to two decisions of the Supreme Court, *Walling v. A.H. Belo Corp.*, 316 U.S. 624, 62 S.Ct. 1223, 86 L.Ed. 1716 (1942), and *Walling v. Halliburton Oil Well Cementing Co.*, 331 U.S. 17, 67 S.Ct. 1056, 91 L.Ed. 1312 (1947).

and overtime pay one and one-half times the regular rate. This regular rate and overtime would apply to a worker's hours if he worked more than 54 hours in a given week. If he worked 54 hours or less, a fixed amount would be paid that equalled the regular rate plus overtime for the 54 hours. (62 S.Ct. at 1225-26) As noted above, in 1949 Congress felt it necessary to specifically approve payment plans (for certain situations) which set a regular rate and guarantee a fixed rate that is never less than the regular rate plus overtime for the hours actually worked. See 29 U.S.C. § 207(f).

The California Industrial Welfare Commission never adopted any language which could be construed as approval of the position taken by Congress or the U.S. Supreme Court. As a matter of fact, in 1963, the IWC stated:

> "In defining its intent as to the regular rate of pay set forth in Section 3(a)(3)(A) and (B) to be used as a basis for overtime computation, the Commission indicated that it did not intend to follow the 'fluctuating work week' formula used in some computations under the Fair Labor Standards Act. It was the Commission's intent that in establishing the regular rate of pay for salaried employees the weekly remuneration is divided by the agreed or usual hours of work exclusive of daily hours over eight." (Findings, IWC, 1963)

Thus, of course, not only was the so-called fluctuating workweek method of calculation eliminated, but also the Belo Contract method which allows employers and employees to establish the "regular rate" of pay. Historically, in California, the regular rate of pay must be determined by use of objective criteria and may not be an artificial sum arrived at by "agreement" between the parties. With the recent enactment of AB 60 the Legislature specifically adopted the IWC approach at Labor Code § 515(d):

> "For purposes of computing the overtime rate of compensation required to be paid to a nonexempt full-time salaried employee, the employee's regular hourly rate shall be 1/40th of the employee's weekly salary."

Most important, unlike the federal statutory scheme, the California overtime laws rely upon a "penalty" to discourage the use of overtime. *Industrial Welfare Commission v. Superior Court* (1980) 27 Cal.3d 690, 713; *Skyline Homes v. Department of Industrial Relations* (1985) 165 Cal.App.3d 239, 249. In Belo contracts there is no penalty, simply an arrangement. Like the fluctuating workweek method of calculation, the more hours the employee works in a workweek under a Belo contract, the less per hour the individual is making.

In answer to your inquiry, Belo-Type contracts[2] are not allowed in California. This has been the law for many years. The addition of Labor Code § 515(d) simply codifies the rule.

Thank you for your interest in California labor law. If you have any further questions concerning this issue, please feel free to contact the undersigned.

Yours truly,

Miles E. Locker

MILES E. LOCKER
Chief Counsel

cc: Arthur S. Lujan, State Labor Commissioner
Thomas Grogan
Roger Miller
Greg Rupp
Nance Steffen
All DLSE Attorneys
Andrew Baron, IWC Executive Officer

[2]The term "Guarantee Wage Contracts" is unknown to this office. As applied to Belo contracts that must be a misnomer since the only thing a Belo contract guarantees is that the employer does not have to pay overtime to near-minimum wage workers unless they work more than 54½ hours a week.