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March 23, 2009

VIA ELECTRONIC MAIL

Robert Roginson, Esq., Chief Counsel
Department of Industrial Relations
Division of Labor Standards Enforcement
320 West 4th Street, Room 430
Los Angeles, California 90013

Re: Request for DLSE Opinion Letter on Work-Schedule and Salary Reductions to Avoid Layoffs

Dear Bob:

I am writing to request a legal opinion from the Division of Labor Standards Enforcement on behalf of an employer covered by Wage Order 4 regarding the salary basis for payment of exempt employees. Specifically, our client seeks an opinion that an employer's reduction in the work schedule of exempt employees and a corresponding reduction in their salaries, intended to avoid or limit the need for job layoffs in difficult economic times, would be consistent with the salary basis test for exempt status under California law. For the purposes of this question, you may assume that the employer would maintain the salaries of affected employees at or above the minimum level required for the exemption.

Before making this request, we searched for relevant authority on the DLSE website, including the DLSE Enforcement Policies and Interpretations Manual, and found one legal opinion stating that such action would be inconsistent with the salary-basis test. *See* 02/27/02 response by H. Thomas Cadell, Jr., Attorney for the Labor Commissioner, to e-mail question posed Susan Waag (the "02/27/02 Opinion"). We believe the 02/27/02 Opinion was erroneously reasoned, and is not in alignment with the consistent view of the U.S. Department of Labor and the decisions of two federal appellate courts and one federal district court concerning the federal salary-basis test, which also is followed in California. Accordingly, we ask the DLSE to withdraw the 02/27/02 Opinion and replace it with a new opinion that affirms that reductions in work schedules and salaries taken to avoid or limit the need for job layoffs would be consistent with the salary-basis test.

We also represent that we are not seeking this opinion either in connection with anticipated or pending private litigation, or in connection with an investigation or litigation between a client or firm and the DLSE.

Question Presented

In order to avoid or limit the need for layoffs during difficult economic times, may an employer reduce the work schedule of an exempt employee from five days a week to four days a week, and correspondingly reduce the employee's salary by 20 percent or some other amount (while maintaining the salary at the minimum level required for the exemption), without violating the salary-basis test and thereby maintain the employee's exempt status under California law?

Facts.

We represent an employer that, like many other employers in California, is experiencing significant economic difficulty due to the severe downturn in the economy. The employer seeks to cut costs until business conditions improve. It already has conducted job layoffs, and is looking at cost-cutting measures besides layoffs.

The employer would like to reduce the number of its employees' scheduled work days from five days to four days per work week. As part of the proposed change, the employer would not pay non-exempt employees for the day they were not required to work, and would reduce the salaries of exempt employees by 20% or some other proportion. The employer does not want to violate the salary-basis test in these circumstances.

The employer views this measure as highly unusual and temporary, driven by the economic challenges that it faces. As soon as business conditions permit, the employer would restore both the full five-day work schedule and the full salaries of its exempt employees.

Prior Opinions of the DOL, Federal Courts, and the DLSE

In a series of letters, the U.S. Department of Labor consistently has opined that employer programs under which a *bona fide* reduction in salary (which still satisfied the minimum level required for the exemption) correlates with a reduced work-week schedule do not violate the salary-basis test under the Fair Labor Standards Act, as interpreted by 29 C.F.R. section 541.118. *See* DOL Op. Ltr., Nov. 13, 1970 (1970 WL 26462); DOL Op. Ltr., Nov. 29, 1974 (1974 WL 335601); DOL Op. Ltr., Apr. 30, 1975 (1975 WL 351785); DOL Op. Ltr., Mar. 4, 1997 (1997 WL 998010); DOL Op. Ltr., Feb. 23, 1998 (1998 WL 852696).

Two federal appellate courts and one federal district court have adopted the DOL's view that a reduction in salary corresponding with a reduction in work hours, if done infrequently and in response to business needs, does not violate the salary-basis test. *See Archuleta v. Wal-Mart Stores*, 543 F.3d 1226 (10th Cir. 2008); *In re Wal-Mart Stores*, 395 F.3d 1177 (10th Cir. 2005); *Capeci v. Rite Aid Corp.*, 43 F. Supp. 2d 83 (D. Mass. 1999).

The 02/27/02 Opinion took a different view of 29 C.F.R. section 541.118 (which, in the absence of specific language in the Wage Orders or the Labor Code, the DLSE follows in interpreting the California salary-basis test for the overtime exemption). The 02/27/02 Opinion found no exception in the regulation for an employer that reduces both the work schedule and the salary of an exempt employee in order to avoid or minimize job layoffs.

As the 02/27/02 Opinion was issued before the two *Wal-Mart* appellate decisions, it did not address either of them; the Opinion did cite to *Capeci*, but declined to follow the court's decision in that case. Instead, the 02/27/02 Opinion relied on *Dingwall v. Friedman Fisher Assoc., P.C.*, 3 F. Supp. 2d 215 (N.D.N.Y. 1998), which summarily concluded that a reduction in salary tied to a reduction in work hours necessarily violates the salary-basis test, regardless of the reason for the reductions. The *Dingwall* court made no mention of the situation, addressed by the DOL Opinion Letters, when an employer reduces work hours and related salaries as a less-drastic means than layoffs to cut costs. Indeed, the *Dingwall* court made no mention of the DOL Opinion Letters.

Discussion

The DOL Opinion Letters and the *Wal-Mart* and *Rite-Aid* decisions cited above recognize that 29 C.F.R. section 541.118 does not preclude a *bona fide* reduction in an employee's salary that is not designed to circumvent the salary-basis test. As the 02/27/02 Opinion recognized, in response to economic hardship, an employer may reduce an employee's salary prospectively and still maintain his or her exempt status so long as the reduced salary satisfies the minimum-salary requirement of the exemption. The only difference between a prospective salary reduction and the action proposed by the employer here is that the employer's plan would *benefit* the impacted employees. Under the employer's plan, in consideration of his or her reduced salary, the employee would get an extra day off which he or she could devote to a second job, volunteer work, caring for his or her family, or other personal pursuits. Nothing in 29 C.F.R. section 541.118 or common sense stretches the salary-basis test to preclude the employer from benefiting the employee in this manner rather than just cutting his or her salary.

Moreover, while California law may, of course, take a different direction from federal law when it comes to wage-and-hour enforcement, differences in the obligations imposed on employers should be based on express legislative or administrative direction that serves important public-policy interests. Here, neither the Legislature nor the Industrial Welfare Commission has directed that the federal salary-basis test should be administered

differently under state law. On the contrary, as noted above, the DLSE follows the federal regulation in administering the salary-basis test under state law. No public policy is served by permitting employers to cut salaries of exempt employees prospectively as a way to avoid or limit job layoffs, but not also letting them relieve the employees of a day of work in consideration of their salary reduction without ruining their exempt status. Instead, federal and state law should be interpreted uniformly in this regard.

Finally, because this question is of great interest to the employer community in California, as well as to employees, the DLSE's reconsideration of the 02/27/02 Opinion is warranted.

Conclusion

We believe that the DLSE should withdraw the 02/27/02 Opinion with respect to the question presented and issue a new opinion that provides the flexibility to avoid or minimize the need for layoffs by effecting cost savings through reductions in work schedules and associated salaries without converting exempt employees into non-exempt employees where all other requirements for the exemption are met.

Thank you very much for your attention to this matter. Please contact me if you have any questions.

Very truly yours,

Kirby Wilcox

M. Kirby C. Wilcox
of PAUL, HASTINGS, JANOFSKY & WALKER LLP

MKCW:dr

cc: Jeffrey D. Wohl
Maureen K. Bogue

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