STATE OF CALIFORNIA

PETE WILSON, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
LEGAL SECTION
Van Ness Avenue, Ste. 4400
San Francisco, CA 94102

H. THOMAS CADELL, *Chief Counsel*

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Re: Belo Contracts

Dear Mr. Whelan:

This is in response to your letter of December 17, 1990, wherein you ask for guidance regarding guaranteed compensation contracts. As I discussed with you briefly in our telephone conversation of January 3rd, the DLSE which is the mandated enforcement agency for the Industrial Welfare Commission Orders has historically taken the position that these contracts, generally referred to as "Belo" contracts, do not meet the overtime requirements of the California Industrial Welfare Commission Orders.

As you know, the "Belo" contract type of payment has been recognized by the United States Congress since 1949. Congress adopted the language in 29 U.S.C. §207(f) with the express purpose of giving express statutory validity, subject to prescribed limitations, to a judicial "gloss on the Act" by which an exception to the usual rule as to the actual regular rate had been recognized by a closely divided Supreme Court. (See 29 C.F.R. §778.404, Purposes of Exemption") As the Department of Labor Regulation states, "The provisions of section 7(f) set forth the conditions under which, in the view of Congress, [guaranteed wage plans may be adopted]. Plans which do not meet these conditions were not thought to provide sufficient advantage to the employee to justify Congress in relieving employers of the overtime liability [of] section 7(a)."

Obviously, the Supreme Court's ruling in the original case of *Walling v. Belo*, 316 U.S. 624 (1942) does not interpret the FLSA as it stands today. Congress felt that the interpretation of the *Belo* court was less than satisfactory and reluctantly felt compelled to change the FLSA in response to that interpretation so as to limit the so-called Belo Contract exception. The same is true as to the Regulations adopted by the Department of Labor. Those regulations are based on a specific exception in the FLSA (§207(f)) which does not exist in the IWC Orders.

As I stated above, DLSE has historically refused to accept Belo plans, their federal acceptance notwithstanding. While it may be argued that by using a very narrow view, one can occasionally find that a variable hours for fixed pay plan will benefit one employee, in general the concept flies in the face of the very reasons that the IWC adopted premium pay for overtime.[1] The IWC is aware of the enforcement policy of the DLSE and, had they wished, could have amended the Orders to specifically allow a Belo Contract exception as did the Congress. The IWC has not done so.

Adopting a contract which provides for paying an individual on a regular basis to work overtime simply encourages the working of overtime. The system provides no penalty to the employer for employing the employee over eight hours in a day or forty hours in a week; in fact, the system encourages the employer to so employ the worker because the overtime has already been paid for.

I hope this adequately addresses the issues you raised in your letter of December 17th.

Yours truly,

H. THOMAS CADELL, JR.
Chief Counsel

c.c. James Curry
Karla Yates, Executive Secretary, IWC

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[1] Premium pay for overtime is the primary device for enforcing limitations on the maximum hours of work. The premium under California law, is, in fact, penal in nature, *Skyline Homes v. DIR* (1985) 165 Cal.App.3d 239 at 250, unlike the nature of the overtime premium under federal law. (See *Hays v. Bank of America* (1945) 71 Cal.App.2d 301.