STATE OF CALIFORNIA PETE WILSON, Governor

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DIVISION OF LABOR STANDARDS ENFORCEMENT
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January 7, 1993

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Re: **Exempt Employees - "Salary Basis Test"**

Dear Mr. Cochran-Bond:

The Labor Commissioner has asked me to respond to your letter of November 2, 1992, which was received in this office by Facsimile on December 7, 1992.

In your letter you discuss the use of the federal "salary basis test" which is utilized by the U.S. Department of Labor to determine exemptions under the Fair Labor Standards Act and the applicability of that test to California overtime requirements. You correctly point out in your letter that there is no equivalent test under state law. Thus, the result of the *Abshire* case does not affect the enforcement of the California Industrial Welfare Orders. Having said this, however, we feel that an explanation as to why this is so is in order.

We feel that your letter raises questions which many California employers have puzzled over. This is particularly true since the adoption by the IWC of the "Learned and Artistic" exemption in some of the Orders. For that reason, the Division will use your letter as a vehicle to clarify the position of the Division of Labor Standards Enforcement regarding exemptions.

The question of the applicability of the federal caselaw (and in some instances, the federal regulations[1]) dealing with the issue

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[1] In the case of *Alcala v. Western Ag Enterprises* (1986) 182 Cal.App.3d 546, the court noted that California's overtime laws are "closely modeled after (although they do not duplicate) section 7(a)(1) of the Fair Labor Standards Act." The court noted that when California laws are patterned on federal statutes and that the federal court authorities interpreting those federal statutes provide persuasive guidance to state courts. However, the same court noted that "federal guidelines" (i.e., regulations) may not be considered definitive. See discussion of this issue, *infra*.

of administrative, managerial and professional exemptions to the California IWC Orders is frequently encountered. As we will explain, the federal law differs substantially from the state law in this area. However, we must emphasize that, of course, the California employer must, however, comply with the more stringent law.

Applicable Language

Federal Law

The Fair Labor Standards Act provides, at 29 U.S.C. §213(a)(1), that the minimum wage and overtime provisions of the Act (29 U.S.C. §§ 206 and 207) do not apply with respect to:

> Any employee *employed in* a bona fide executive, administrative, or professional *capacity* (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor], subject to the provisions of subchapter II of chapter 5 of Title 5, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities)..."

State Law

The California Industrial Welfare Commission Orders (Section 1(B)(1))[2] provides the following exemption for administrative, executive or professional employees:

> (A) Provisions of Sections 3 through 12 shall not apply to persons employed in administrative, executive, or professional capacities. No person shall be considered to be employed in an administrative, executive, or professional capacity unless one of the following conditions prevails:
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> (1) The employee is engaged in work which is primarily

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[2] There are fifteen separate Orders and these orders do not always follow the exact numerical order from one to another.

> intellectual, managerial, or creative, and which requires exercise of discretion and independent judgment, and for which the remuneration[3] is not less than ($900 or $1150) per month...

As you can see, the language of the FLSA differs substantially from that of the IWC Orders. The FLSA simply requires that the employee be "employed in the capacity" of an executive while the IWC Orders require that (in addition to the salary [remuneration] test [$900 or $1150]) the person be "engaged in work which is primarily[4] intellectual, managerial, or creative, and which requires exercise of discretion and independent judgment." However, probably the most important feature of the FLSA which sets it apart from the provisions of the IWC Orders is the fact that Congress allowed the Secretary of Labor to "define and delimit" the terms used[5]. In California, on the other hand, the IWC has defined the terms and the

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[3] The term used by the IWC to define the amount the employee must be compensated in order to qualify for the exemption is "remuneration". Historically, the DIW (the predecessor agency mandated to enforce the IWC Orders until consolidated with DLLE in 1975) and DLSE have construed the use of this word to mean that the Commission did not intend to set a "salary" which must be paid in cash, but intended to include all wages and benefits not required by law. As an example, if an employee receives a salary of $600.00 per month in cash wages and the use of an apartment which has a value of $600.00 per month, the employee would meet the "remuneration" test. (If the employee is a resident apartment manager, consideration must be given to the provisions of Labor Code §1182.8.)

[4] Section 2 of the IWC Orders defines the word "primarily" to mean "more than one-half". Note that the word "primary" is used in the federal regulations but is not defined. The federal courts have defined "primary" for purposes of the federal regulations according to its dictionary definition as "principal" or "chief" and held it did not seem appropriate to attach a time criterion to the word as the regulations had done.

[5] The Commission has provided permission to the DLSE to follow the rules adopted by the Secretary of Labor in one area. The IWC in the orders promulgated since July of 1988 has chosen to add the category "learned and artistic" to the list of exempt occupations as an adjunct to the "professional" exemption which already existed. The Commission noted in its "Statement of Basis" that the addition of this language [learned and artistic] "would permit, but would not be limited to, use of the federal guidelines for purposes of interpretation" of the category [professional]. The "learned and artistic" category has nothing to do with the managerial category, however, and the IWC has not provided for the use of the federal "guidelines" in other than the "professional/learned and artistic" category.

provisions of Labor Code §1198.4 simply provide the Division with the authority to interpret the orders for enforcement purposes. (See, *Skyline Homes, Inc. v. Department of Industrial Relations* (1985) 165 Cal.App.3d 239, 249)

The Federal Enforcement Policy

In response to the directive of Congress contained in section 29 U.S.C. §213(A)(1), the Department of Labor has promulgated regulations at 29 C.F.R. §541 et seq. which "define" the terms executive, administrative and professional and "delimit" those terms. For instance, the federal regulations begin by describing an individual "employed in a bona fide executive...capacity" as one:

> (a) Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department of (sic) subdivision thereof; ...

The federal regulations contain both a "long test" and a "short test" for determining the exempt status of workers. The "long test" has a threshold salary requirement ($155.00 per week) and has three requirements in addition: (1) the employee must have authority to hire or fire (or their recommendation in this regard must be given weight); (2) they must customarily and regularly exercise discretionary powers, and (3) they must not devote more than 40 per cent of their time to activities not "closely related" to their management duties. The short test looks initially to an enhanced salary requirement (at least $250.00 per week) and requires only that (1) the "primary duty" of the employee be managerial, and (2) the employee must regularly direct the work of at least two other employees. Under this test the allocation of the employee's time is not in issue.

The use of the differing criteria depending on the amount of the salary paid was a decision made by the DOL based upon enforcement costs.[6] On the other hand, the IWC has no salary test (only a "remuneration" test) in the Orders, and DLSE has not been given discretion to set a salary test as has the Department of Labor.

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[6] The court addressed this issue in another case involving the same employer: Donovan v. Burger King 675 F2d 516, 520 (2nd Cir.1983) and held that "where salary is low and a substantial amount of time is spent on non- exempt work, the inference that the employee is not an executive is quite strong and the savings in enforcement costs afforded by the mechanical test may offset whatever is lost in accuracy in aberrational cases."

Therefore, it is impossible to utilize the federal regulations to determine whether one is exempt under the IWC Orders. However, even if we were not faced with the problem of the salary test to determine which criteria should be used, the primary consideration under either federal test is the "primary duty" of the worker while under the IWC Orders the emphasis is upon the type of work the employee is "engaged in".

The "primary duty" test as defined by the federal courts is best summed up by the language in *Donovan v. Burger King,* 672 F.2d 221, 226 (1st Cir.1982), which held that "an employee can manage while performing other work, and [that] this other work does not negate the conclusion that his primary duty is management." That same court, *Donovan v. Burger King* 672 F.2d at 226, stated that "one can still be 'managing' if one is in charge, even while physically doing something else." (See also *Guthrie v. Lady Jane Collieries, Inc.* 772 F.2d 1141, 1145) The *Burger King* court also concluded that the use of the word "primary" in the federal regulations was misleading for the reason that the dictionary definition of "primary" is "principal" or "chief" and it did not seem appropriate to attach a time criterion to the word as the regulations had done. (*Burger King, supra*, 672 F.2d at 226)[7]

The IWC Orders

Unlike the federal regulations which look to the "primary duty" of the employee, the IWC Orders emphasize the type of work the employee is "**primarily engaged in**". In addition, the IWC adopted a definition of the word "primarily" to mean "more than one-half the employee's work time". While the IWC did not define the term engage in, the dictionary definition is: "[T]o involve oneself or become occupied; (American Heritage Dictionary, New College ed., p. 433) Thus, the term "primary duty" used by the federal government in the enforcement of the Fair Labor Standards Act has no relationship to the term "engaged in" used by the DLSE in enforcing the IWC Orders.

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[7] Even the federal regulations make it clear that "time" is not the only standard which may be used to determine "primary duty". The regulations set out a very broad meaning (in fact, subjective), of the term "primary duty" which discusses an employee who spends more than 50 per cent of his time in "production or sales work" but, while so engaged, supervises other employees and does other managerial work. (29 C.F.R. §541.103) As will be explained later, the DLSE policy is to give credit for all time spent in managerial work; but not to credit time toward managerial time when the actual work the employee is "engaged in" at the moment is production or sales.

As the federal courts have pointed out, an employee whose "primary duty" is management may "manage" "even while physically doing something else" and such an arrangement would not be inconsistent with the federal regulations. On the other hand, one may not be "engaged in" activities which are, for instance, managerial, as required by the IWC Orders, while at the same time "doing something else"; for it would be impossible "to involve oneself or become occupied" with managerial work while performing other duties. In other words, the IWC Orders require us to ascertain the type of work the individual is actually doing (e.g., "managerial" or "production or sales") and count the time on either side of the ledger.

The Division takes the position that any time related to management which may be logically separated from production or sales time must be counted toward the managerial duties of the employee. Managerial duties must include supervision of at least two other employees with either the concomitant right to hire and fire or the right to recommend hiring and firing where such recommendation is given serious consideration. The "management" employee must regularly exercise discretion and, unlike the federal regulations, must also exercise independent judgment.[8]

Discretion implies that one has a choice to make but does not mean that the employee must enjoy the right to deviate from policies or procedures which allow for some discretion. However, if those policies and procedures so tightly control the manager's ability to make independent judgments, the manager will not be exempt.

Management duties may vary in specifics depending on the industry or the job classification, but they must include the above cited minimums. Some examples of management duties which DLSE will accept are:

> Interviewing and selecting employees, training employees; setting of rates of pay and hours of work; directing the work of employees; maintaining production of sales records; appraising work performance; recommending changes in status; handling complaints; disciplining employees; planning work schedules; determining techniques to be used; apportioning work among workers; determining the type of materials, supplies, machinery or tools to be used; controlling the flow and distribution of materials, merchandise or supplies, and providing for the safety of the employees and their property.

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[8] The federal regulations require the exercise of "independent judgment" in order to qualify for exemption as an administrative employee, but, unlike the IWC Orders, there is no requirement that the employee exercise "independent judgment" to qualify for the executive (managerial) exemption.

The above list is not inclusive or exclusive. It must also be noted that one may be employed to perform some of the above while not employed as a manager or supervisor. For instance, some of the duties described above may be done by employees with no supervisory authority, such as personnel specialists or expediters. While those employees may (or may not) meet the criteria for exemption as administrative employees, they would not be exempt under the executive classification.

Any time the employee is "engaged in" such management duties must be counted. For instance, if the employee is employed as a manager of a shoe store, there are instances where the manager may, as a training tool, involve himself in the sale process. Such time should be counted toward managerial duties if, and only if, the trainee is not engaged in sales to another customer or other activities at the same time. If the sales work is truly training, the trainee should obviously be attentive to the training. The trainee would learn little if he were engaged in another sale to another customer at the same time. Such work would not be training, but the manager would be "engaged in" sales work.

The same situation could very well occur in almost any work setting. Explaining or demonstrating the work process to a single worker or a group of workers whose attention is directed to the demonstration would constitute training which may be a part of management duties.[9]

Any time taken away from production or sales work and devoted to any managerial work (no matter how short the time span may be) is considered managerial work and must be counted. However, the employee may not be "engaged in" two jobs at once. Thus, a worker employed in a manager position who simply answers a question while continuing to perform production or sales work is not "engaged in" managerial duties, but is "occupied or involved in" production work. On the other hand, the time that such an employee clearly disengages from the production or sales work to "engage in" managerial duties will be counted toward managerial duties.

Each particular situation must be decided on its own facts and this letter is designed to explain the overall policy of the DLSE in this regard. The important thing to remember is that the federal caselaw which interprets the Act (not the federal regulations or the federal cases interpreting those regulations) may be used as authority in construing the IWC Orders. (*Alcala v. Western Ag Enterprises* (1986) 182 Cal.App.3d 546) Since the federal cases in

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[9] If the employee is engaged as a trainer, however, such duties are simply part of the job classification and may not be counted toward managerial duties unless the other criteria involving supervision are present.

this area such as *Donovan v. Burger King, supra*, are not construing the Act, but are construing the regulations, they are **not** on point. Additionally, it must be made clear that imposition of any "salary test" other than the "remuneration" test found in the Orders, is beyond the jurisdiction of the DLSE and, thus, is beyond the jurisdiction of the California courts.

Administrative Employees

Again, in determining the exemption status under the administrative category, the key phrase is "engaged in" and not, as under the federal regulations, "primary duty" (29 C.F.R. §541.2(a)). With this exception, the DLSE accepts the general definition of "administrative duties" set out by the DOL at 29 C.F.R. §541.2. Generally, administrative work must be nonmanual, related to management policies or general business operations of the employer or the employer's customers and must involve the customary and regular exercise of discretion and independent judgment. The Department of Labor's regulations discuss the administrative exemption in detail at 29 C.F.R. §541.201 through §541.208 and the DLSE adopts those definitions. However, it must be noted that certain of the regulations not contained within the above cited sections are inconsistent with the IWC Orders and cannot be relied upon. For instance, §541.211 through 541.214 discuss the salary test requirements which the DOL has adopted for determining whether to use its "short test" or the "long test". Also, the language of §541.215 in not consistent with the IWC Orders because the Orders do not address "academic administrative personnel" and, under the IWC Orders, the "profession" of teachers is subject to different rules and definitions. (For instance, see IWC Order 5-89, Section 1(B)(2) and Section 2(N) defining the word "teaching".)

"Titles" may be used by some employers to designate workers as administrative employees who are then paid on a "salary" basis without regard to overtime. However, it is important to ascertain the duties of the worker (and not simply the title) for purposes of categorization. For example, an assistant to a low level manager may have duties which require the exercise of little or no independent judgment or discretion. Such employees are simply carrying out day-to-day routine functions. On the other hand, an administrative assistant to a top level manager of a large firm may deal with line managers on an equal footing and be involved in framing and carrying out policy matters of significance. It is important to distinguish between these two examples for purposes of determining exemptions.

Professional Employees

The IWC has adopted nine specific professions, licensed or certified in California, which are exempt. The DLSE policy had historically been that only the professional listed in those nine licensed or certified professions could be considered for that exemption. For instance, only doctors, not nurses or other health care workers could be included; and only lawyers, not court reporters or other legal support personnel could be included in the exemption.

However, the IWC has now adopted the "learned or artistic" category in Orders 4, 5, 9 and 10. The IWC in its "Statement of Basis" in those Orders indicated that the DLSE would be permitted to use, but not be limited to the use, of the Federal Regulations for purposes of interpretation. The DLSE has decided to use these guidelines which are applicable and consistent with the IWC Orders. (See Interpretive Bulletin 89-2). The guidelines which may be used are contained at 29 C.F.R. §541.302 through §541.308. Where the regulations are inconsistent with the IWC Orders, however, they cannot be utilized. (For example, §541.304 dealing with the term "primary duty" which, as discussed above, is inconsistent with the term "engaged in" used in the IWC Orders, and §541.309, et seq. which deal with non-exempt work and salary tests[10])

The "learned or artistic" category is designed to broaden the "professional" exemptions available under the IWC Orders. The intent was to exclude those employees in work classifications not in need of the protections offered by the Orders, without requiring a listing of each such classification.

Use of the Federal Regulations

As detailed above, the federal regulations may only be relied upon when either the IWC has approved such use, and/or the DLSE policy has approved such use.[11] The federal regulations, in many

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[10] One of the most striking examples of the difference between the IWC Orders and the enforcement of the federal Fair Labor Standards Act is the fact that there is no "remuneration" or salary test for the professional employee exemption under the IWC Orders while under the regulations adopted by the Department of Labor to enforce the FLSA there is a salary test for professional status which is actually higher than the salary test for executive and administrative.

[11] As noted above, the IWC in its Statement of Basis has specifically authorized (but not required) the DLSE to adopt the "federal guidelines" (regulations) for purposes of enforcement of the newly adopted "learned

instances, actually involve new laws which the FLSA authorizes the Secretary of Labor to enact. Examples are the definitions of executive, administrative and professional which add salary tests not contained in the FLSA. Obviously, the State of California does not contemplate deferring its law-making authority to the U.S. Secretary of Labor; however, if the federal regulations were required to be followed, that would be the result.[12] A recent development is the amendment of the Fair Labor Standards Act which provides that the Secretary of Labor is directed to adopt regulations which would exempt computer programmers from the overtime requirements of the Act if the regular hourly wage paid to the computer programmers is at least six and one-half times the federal minimum wage. This provision obviously has no effect in California inasmuch as the law does not permit the DLSE to adopt any such "salary test".

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and artistic" category. In addition, the DLSE has adopted the language used in some of the Regulations adopted by the DOL where, and to the extent, that such language is appropriate. However, as explained above, while some of the criteria contained in the Regulation may be helpful, other portions of the Regulation would not be appropriate because it is based upon provisions in the FLSA which are not contained in the IWC Orders.

[12] There is one instance where Division policy has historically recognized that a portion of the IWC Order was closely patterned on a federal regulation and the DLSE adopted an enforcement policy which reflected that fact. Section 3(G) of Order 9 provides:

> "The daily overtime provision of subsection (A) above shall not apply to ambulance drivers and attendants scheduled for twenty-four (24) hour shifts of duty who have agreed in writing to exclude from daily time worked not more than three (3) meal periods of not more than one hour each and a regularly scheduled uninterrupted sleeping period of not more than eight (8) hours. The employer shall provide adequate dormitory and kitchen facilities for employees on such a schedule."

In the case of *Monzon v. Schaeffer Ambulance Service, Inc.* (1990) 224 Cal.App.3d 16, the Second District Court of Appeal in what must be described as an unusual reading of the law, agreed with the DLSE that the law was "patterned" on the federal law, but disagreed with the Division's position that the clear language of the order required that the agreement to exclude the sleep time must, under the California law, be in writing. As the dissent points out, the court's decision "overlooks the well-settled, common-sense principle that federal interpretations of the federal labor laws are not controlling in any sense where, as here, the language and intent of the IWC Orders differ in language and intent from the federal statutes and regulations." (Citing to *Skyline Homes, Inc. v. Department of Industrial Relations* (1985) 165 Cal.App.3d 239.

Again, the Division emphasizes that the California employer must comply with the more stringent law, federal or state, in this area. As you can see, there are times when the federal law may impose a greater burden on the employer than does the California law. In those instances, compliance with the federal law and regulations is required.

We hope that this explanation is of assistance to you and your client. If you have any further questions, please contact the nearest District office of the Division of Labor Standards Enforcement District office.

Yours truly,

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