

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT

LEGAL SECTION

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San Francisco, CA 94102
(415) 703-4150H. THOMAS CADELL, JR., *Chief Counsel*

February 3, 1994

Mark T. Bennett
Merrill, Schultz & Wolds, Ltd.
P.O. Box 87091
San Diego, CA 92138

Re: Ambulance Drivers and Attendants

Dear Mr. Bennett:

Labor Commissioner Bradshaw has asked me to respond to your inquiry regarding a client your firm represents. Your letter contains six questions which you wish addressed.

Question No. 1:

Is it necessary for the employer to obtain a separate written agreement meeting the requirements of section 2.40 (of the DLSE Enforcement Manual) from each employee if a provision modeled after section 2.40 is included in a collective bargaining agreement (covering the employees)?

Assuming that the collective bargaining agreement provides for premium wages for overtime work and a cash wage of at least \$1.00 per hour over the established minimum wage, there is no need to provide any separate written agreement. (See IWC Order 9-90, subd. 3(G)) In the event the CBA does not meet the minimum requirements set out in subd. 3(G), then a separate written agreement would be necessary.

Question No. 2:

In order to qualify for section 2.40's exemption from the payment of daily overtime, must the employer actually schedule meal periods and an uninterrupted sleeping period where the employer intends to treat every hour of a 24-hour shift as compensable working time?

There is no requirement in either the wage order or the DLSE enforcement policy which would require that the meal periods be "scheduled". However, the sleep period must be scheduled as required by the plain language of the IWC Order. (See IWC Order 9-90, subd. 3(H); see also 29 C.F.R. §785.21 for federal equivalent)

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Question No. 3:

If the answer to Question No. 2 is in the affirmative, must the employer keep records of the meal and sleeping periods scheduled and taken?

It doesn't matter whether the answer to question No. 2 is in the affirmative or not, the obligation to keep accurate records is always on the employer. (See Labor Code §1174, IWC Order 9-90, subd. 7(A)(3)) .

Question No. 4:

Must the company pay daily overtime to either the employee who is regularly scheduled to work a 24-hour shift, or to his replacement, if the shift is split for the convenience of the employee such that each employee works less than a full 24-hour shift?

Yes. There is no exception for paying less to employees who are authorized to hire their own replacement nor is there any exception for the payment of premium wages to the replacement worker.

Question No. 5:

In the circumstances described above, does the company have to pay daily overtime for the employee who extends his shift or to the employee who arrives for work late?

The IWC Orders only provide an exception for workers who are working during a "scheduled" shift of 24-hours. If an employee works past the "scheduled" 24-hour shift, he or she must be paid the appropriate overtime. In the case of the employee who is late, there is no reason to pay that employee a premium pay so long as the work he or she performs is completed within the "scheduled" 24-hour shift. However, any work by the tardy employee in excess of the "scheduled" shift would require premium pay.

Question No. 6:


Can the employees, through collective bargaining or individually, agree to waive their entitlement to receive overtime pay to which they would be otherwise entitled under state law?

No. The California overtime laws constitute minimum standards which may not be waived either by CBA or by individual agreement. (See *Massachusetts v. Morash* 490 U.S. 107, 109 S.Ct. 1668 (1989) for a detailed discussion of preemption of state laws by the NLRA)

I hope this adequately addresses the questions you asked in your letter of December 22, 1993. If you have any further questions please contact the nearest District office of the Labor Commissioner. The Deputy Labor Commissioner will be able to answer any of the above-types of questions.

Mark T. Bennett
February 3, 1994
Page 3

Yours truly,


H. THOMAS CADELL, JR.
Chief Counsel

c.c. Victoria Bradshaw