STATE OF CALIFORNIA PETE WILSON, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
LEGAL SECTION
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H. THOMAS CADELL, JR., *Chief Counsel*

June 17, 1994

Jan Gabrielson Tansil, Esq.
O'Brien, Watters, Davis & Piasta
3510 Unocal Place, Suite 200
Santa Rosa, CA 95402-3759

Re: **Regular Rate of Pay**

Dear Ms. Tansil:

Labor Commissioner Victoria Bradshaw has asked me to respond to your letter of April 4, 1994, seeking an opinion regarding the compensation method set out in the attachments to your letter.

Initially, I feel that it is necessary to explain that California law (and federal law) which requires the payment of a premium for overtime is premised on the finding by the legislative bodies that such a premium encourages the production of jobs. *Industrial Welfare Commission v. Superior Court* (1980) 27 Cal.3d 690, 712. The wage received for the overtime work must be based on a premium of the regular rate of pay received by the worker. The premium is designed to be a "penalty" *Skyline Homes v. Dept. of Industrial Relations* (1985) 165 Cal.App.3d 239, 249 (quoting *IWC v. Superior Court, supra.*) Thus, to allow a compensation method which does not evidence a correlation between the regular rate and the rate paid for overtime hours -- a rate which is a "premium" of the regular rate -- would defeat the purpose of the legislation. Also, of course, the premium must be at least in the percentage set out in the applicable law (i.e., time and one-half or double time).

Second, it is necessary to address the use of the term "possible discretionary bonus" in the compensation package you have submitted. Neither California nor the federal government would consider the amount you classify as a "discretionary" bonus to be in that category. (See 29 C.F.R. § 778.112(b)); the DLSE's enforcement policy, which is very similar to the federal, is set out in CALIFORNIA EMPLOYMENT LAW, *Wilcox*, Mathew Bender, Vol. I, § 3.08[2][h] and § 3.09[1][a] and [b]) Clearly, a policy which sets out the amount and the fact that such a bonus is possible does not fit the description of a discretionary bonus as defined. The fact that one receives the bonus one week and does not receive the bonus the next week does not qualify the bonus as "discretionary." The fact that the employees are aware of a potential bonus is determinative under the circumstances you submit. (See CALIFORNIA EMPLOYMENT LAW, *Wilcox*, Mathew Bender, Vol. I, § 3.08[2][h][ii])

We will assume that the "hourly rate" you intend is that rate shown in the sub-column under "Hourly Rate" directly under the column "Hours Worked ≤ 40". However, this hourly rate appears to rely upon the number of days the individual works and the gross revenue produced (by the individual?). The individual, under this arrangement, would not know what the regular hourly rate of pay was until he ascertained the number of days he or she worked and the gross revenue produced. Thus, this is not a "regular rate of pay". This is simply a piece rate or commission-type rate.

The plan is clearly based on a piece rate or commission, not an hourly rate, and although you couch the amount received for hours in excess of forty in terms of "commission" this is not a sales commission under California law. *Keyes Motors v. DLSE* (1987) 197 Cal.App.3d 557. These workers, according to your description, provide goods and services and we assume they are not engaged "principally" in sales. Although it is not clear, your analysis may rely on the exemption for sales positions found in the provisions of IWC Order 4, section 3(C).[1] As explained above, however, the basis for the additional payment either on a per hour basis or a percentage of the revenue produced basis, does not meet the requirements of that exemption.

There is nothing in the California law which would preclude the employer from paying the worker based on a piece rate which provided that the rate of pay would depend on production. But, as with federal law, all of the sums received for piece rate must be figured into the formula for determining the "regular rate of pay." Under the scenario you paint, a Crew Chief - Class I - who worked 52 hours in a workweek (six days, assuming no double time obligation) and produced gross revenues of $5,400.00 would receive $963.69 calculated as follows:

$5400 x 16%[2] = $864.00 ÷ 52 hrs. = $16.615[3] ÷ 2 = $8.307[4] x 12 hrs. = $99.69[5]. $864.00 + $99.69 = $963.69.

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[1]At Exhibit A, page 1, of your letter you state that "[a]ll employees in all categories are guaranteed a minimum of $4.25 per hour for the first 8 hours worked per day, $6.38 per hour for the 9th through 12th hours worked in a day, and $8.50 per hour for any hours worked in excess of 12 per day, no matter which category they fall under. We can only account for one category of worker who would make only $4.25 per hour under the arrangement you have set out: the helper category.

[2]The so-called "discretionary bonuses" (amounting to 2⅛%) do not meet the requirements of that category and, thus, assuming they are paid, will be figured into the formula for determining the regular rate.

[3]Regular rate of pay.

[4] Half time rate for determining time and one-half premium.

[5]Overtime premium assuming no double time obligation.

The procedure for computing the overtime in the situation involving piece rate or commission is set out in the DLSE Policy and Procedure Manual at § 10.83. A copy of the applicable page is attached hereto. I have chosen the second method, but you may use the first method if you desire and your bookkeeping procedures will allow such calculations.

In addressing Exhibit B we will first note that we assume that the percentage rates listed represent a percentage of the gross revenue produced by the employee during the work period. This, again, would be a piece rate or commission job.

While federal law provide excludable overtime premiums, the federal regulations (29 C.F.R. § 778.308) require that the overtime premium be paid at an hourly rate. Your proposal would have the premium paid at a percentage rate of the gross revenue produced for the period. While we make no representation regarding federal law, we assume this would not meet the standards discussed in the federal regulations.

The federal regulations, of course, are based on a specific provision of the Fair Labor Standards Act. (29 U.S.C. 207(e)(5)) The California IWC Orders do not have such an exemption and, consequently, this agency has no power to create such an exemption.

You ask in your letter whether uniformed employees must be compensated in any way for cleaning their own uniforms when the uniforms are made of "wash and wear" fabric? The answer is, no.

Your letter also discusses the use of a mutually agreed upon time/location chart which sets forth time for travel. The DLSE would accept such a chart so long as the information regarding time and distance was reasonable and relatively current. The DLSE would suggest that the adoption of a written agreement which incorporates the chart and its use would be in the best interests of both the employer and the employee.

I hope this adequately addresses the issues you raised in your letter. If you have any further questions on this issue, please call the undersigned.

Yours truly,

H. Thomas Cadell, Jr.

H. THOMAS CADELL, JR.
Chief Counsel

c.c. Victoria Bradshaw