

Question received by e-mail at DLSE Info Web Site:

From: Dcaspersandiego@aol.com
 Sent: Tuesday, April 30, 2002 12:38 PM
 To: DIRInfo
 Subt: Alternative Work Week Wages / Training Agreement

I was hired on July 23, 2001 at a starting salary of \$18.85. It is the practice of this company to withhold the last paycheck and monies for any Personal Time off acquired prior to the date of an Individual's termination with the company. In previous contact with the CA Labor Board I was informed this type of contract is illegal in the State of California.

We trained for 6 weeks, 5 eight hour days/40 hr week. I was paid my starting salary of \$18.85/hr.

I began working 10 hr shifts in the dialysis clinic on Sept 3, 2001. On Sept 22, 2001 my wages were based on \$ 17.137 per hr for 8 hrs and 2 hrs of time and a half at \$8.5685. ($17.137 \times 8 \text{ hrs} = \$137.096 + 2 \text{ hrs} @ \$25.7055 = \$51.411$ for a total of 188.507 for 10 hrs - or \$18.8507 per hr.)

On March 1, 2002 we began working 12 hr shifts and wages were based on \$16.15/hr x 8 hrs and 4 hrs of time and a half at \$8.078. ($16.156 \times 8 \text{ hrs} = \$129.248 + 4 \text{ hrs} @ \$24.234 = \$96.936$ for a total of 226.184 for 12 hrs - or \$18.848666 per hr.)

Response By DLSE Info:

May 22, 2002

We have to have more information regarding your allegation that monies are withheld from the final pay for any "personal time off." There may be something we are missing, but it would not be required that an employer pay an hourly employee for hours he or she did not work.

On the second issue we do have concerns with the payroll practices of the employer.

It appears from what you are saying that the employer has instituted regularly scheduled work shifts of more than eight hours in a day and, in conjunction therewith, reduced the hourly wage in order to reduce the overtime obligation that is required of the employer. Under the original work schedule as a trainee you were paid \$18.85 per hour and your schedule was the typical eight-hour day within a five-day workweek. Had you worked the entire 40-hour workweek you would have received \$754.00; your hourly pay was reduced after training to \$17.137 and you were required to work four ten-hour days; your hourly pay was further reduced to \$16.156 and your required workday was extended to 12 hours. Below is a breakdown of how your wage package has been handled. It should be noted, of course, that under the 12-hour scenario, we do not know whether you were required to work three 12-hour days and one four-hour day, or whether your weekly wage was simply reduced. The outline below shows the result if you were working three twelves and a four.

	Original Pay		Pay After Training		Pay For 12-Hour Day
Hrly Wage	\$18.85		\$17.137		\$16.156
Hrly x 40	\$754.00	Hrly x 40	\$685.48	Hrly x 40	\$646.24
		Hrly x 1.5	\$25.706	Hrly x 1.5	\$24.234
		Hrly x 32	\$548.384	Hrly x 28	\$452.368
		1.5 x 8	\$205.644	1.5 x 12	\$290.808
		Wkly	\$754.028	Wkly	\$743.176

One can not help but notice that the three hourly pay scales are designed to accomplish an approximately equal weekly wage no matter how many daily hours the employee is required to work. As a matter of fact, the twelve-hour day scenario actually costs the employer less than the eight-hour day

when calculated by the week.

The Legislature, in adopting the provisions of the "eight-Hour-Day Restoration and Workplace Flexibility Act of 1999 (AB 60), provided the reader with the Legislative intent in its findings and declarations: "The eight-hour workday is the mainstay of protection for California's working people, and has been for over 80 years," the Legislature announced. The Legislators went on to note that California adopted the 8-hour day in 1911, long before the federal government enacted overtime protections for workers. The Legislature pointed out that "[e]nding daily overtime would result in a substantial pay cut for California workers who currently receive daily overtime..." and that "[n]umerous studies have linked long work hours to increased rates of accident and injury" and that "[f]amily life suffers when either or both parents are kept away from home for an extended period of time on a daily basis." Clearly, the Legislature intended that the eight-hour day was to be the norm and any extension of that norm was to be the exception and not the rule.

As the California Supreme Court announced many years ago, in *Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 166 Cal.Rptr. 331, 613 P.2d 579, "The Commission relies on the imposition of a premium or penalty pay for overtime work to regulate maximum hours consistent with the health and welfare of employees covered by this order." That announced purpose has not changed. (See *Skyline Homes v. Department of Industrial Relations* (1985) 165 Cal.App.3d 239, 249; 211 Cal.Rptr. 792; 166 Cal.App.3d 232(c) (hrg. den. 5/29/85)) Both the California courts and the Legislature understand that any deviation from the eight-hour day requirement would require the payment of a premium. It was this premium which was designed as an incentive to employers not to employ workers for more than eight hours in a workday.

As the California Supreme Court in the 1980 case cited above noted, the IWC had provided for alternative workweek as early as the 1976 Orders, and that such workweeks were allowed so long as they met the criteria set out by the IWC. Again, as in the past, in the alternative workweeks provided in the new legislation at Labor Code § 551, in order for an employer to escape the obligation of daily overtime under the terms of an alternative workweek, the provisions of that section and the IWC Orders must be met.

The Legislature defined what it meant by "alternative workweek schedule" at Labor Code § 500(c) to mean "any regularly scheduled workweek requiring an employee to work more than eight hours in a 24-hour period." Clearly, this definition is far more broad than the provisions of Section 511(a) and (g) requires and recognizes that eight hours a day is the "norm" and that any other schedule would be an alternative. The Legislature intended to define any alternative workweek which required an employee to work more than eight hours in a workday, as alternative; this clearly indicates that not only the alternative workweek schedules that were permitted by the Code were intended to be covered by the definition.

The Legislature obviously recognized that nothing in the law would prevent an employer from adopting an "alternative workweek schedule" as a requirement for its employees without proposing the alternative workweek for a vote by the employees. Such an alternative workweek would not, of course, preclude "payment to the affected employees of an overtime rate of compensation" for the hours over eight; but it would be an "alternative workweek schedule".

At the time of the adoption of AB 60, the Legislature included Labor Code § 511(c) which provides:

An employer shall not reduce an employee's regular rate of hourly pay as a result of the adoption, repeal or nullification of an alternative workweek schedule.

The Legislature must have had a reason to add this provision. Obviously, there would be no incentive to reduce an employee's hourly rate of pay simply to accommodate an alternative workweek which was adopted pursuant to the Code. If an employee were making, for example, \$20.00 per hour on a regular eight-hour schedule, five days a week, and the employer wished to have the employee work ten hours per day within the forty-hour workweek, the employee would still make the same hourly rate for the workweek.

The obvious intent of the language was to preclude an employer from establishing an alternative

workweek which required an employee to work more than the established eight-hour day while reducing the hourly rate paid to the employee.

Common sense teaches that the Legislature could not possibly have intended that an employer could escape the requirements imposed by the statute to allow the employees to vote on an alternative to the eight-hour day by simply unilaterally instituting such a work schedule without also requiring the employer to pay a penalty premium for requiring the longer workday. If there were no prohibition on the right of the employer to reduce the hourly wage of the employee in conjunction with the unilateral establishment of an alternative workweek, there would be no premium or penalty attached to the imposition of the longer day and, thus, no disincentive to such unilateral action. The whole alternative workweek scheme designed by the Legislature would be superfluous because any employer could easily avoid the restrictions placed on the alternative workweek by simply unilaterally instituting such a plan.

Under the statute and the IWC Orders, the employer who validly proposes an alternative workweek which is adopted by his or her employees is prohibited from reducing the hourly wage in conjunction with the process. In addition, an employer who allows employees to adopt an alternative workweek and then fails to provide a full day of work is required by the IWC Orders to pay time and one-half for all hours over eight in the workday.

The Legislature could not possibly have intended to allow an employer (who, without a vote by the affected employees, unilaterally imposed an alternative workweek) to reduce the hourly wage in conjunction therewith and, thus, escape the premium or penalty.

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