

Memorandum

To : All Professional Staff

Date , June 27, 1988

Subject: Interpretive
Bulletin No. 88-2
(Amended)

Minors and Learners
Wages Under IWC Order
MW88

From : Department of Industrial Relations
Division of Labor Standards Enforcement
Lloyd W. Aubry, Jr.
State Labor Commissioner

Industrial Welfare Commission Order No. MW-88 raises the minimum wage to \$4.25 per hour effective July 1, 1988. Because the federal minimum wage will likely still be \$3.35 per hour as of July 1, 1988, California employers may make increasing use of the learners' and minors' wage provisions set forth in Section 4 of the IWC Orders. These provisions permit the payment of 85% of the minimum wage to certain learners and minors. This memo is intended to provide guidance on the validity of any such arrangements that are encountered in the field.

Section 4(A) of the Industrial Welfare Commission Orders currently provides:

"(A) Every employer shall pay to each employee wages not less than three dollars and ten cents (\$3.10) per hour for all hours worked effective January 1, 1980, and three dollars and thirty-five cents (\$3.35) per hour for all hours worked, effective January 1, 1981, except:

(1) LEARNERS. Employees 18 years of age or over, during their first one hundred sixty (160) hours of employment in occupations in which they have no previous or similar experience, may be paid not less than eighty-five percent (85%) of the minimum wage rounded to the nearest nickel.

(2) MINORS^{1/} may be paid not less than eighty-five percent (85%) of the minimum wage rounded to the nearest nickel provided that the number of minors employed at said lesser rate shall not exceed twenty-five percent (25%) of the persons regularly employed in the establishment. An employer of less than ten (10) persons may employ three (3) minors at said lesser rate. The twenty-five percent (25%) limitation on the employment of minors shall not apply during school vacations.

1/ The Orders define minors for the purposes of the Orders as "any person under the age of eighteen (18) years" (Section 2(H) in most of the Orders, 2(I) or 2(J) in others). The learners' provision is available only to employees who are over 18 years of age.

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NOTE: Under certain conditions, the full minimum wage may be required for minors (see Labor Code Section 1391.2(b))."

As noted above, the minimum wage will increase to \$4.25 per hour as of July 1, 1988. Rounded to the nearest nickel, 85% of \$4.25 is \$3.60 an hour meaning that the state learner/minor rate will be .25 cents more than the federal minimum wage.^{2/} As you know, the new minimum wage also provides for an alternative minimum wage for tipped employees of \$3.50 per hour as long as the employee receives \$60 a month in tips. This provision is currently in litigation and a final decision on its validity may not be reached by July 1, 1988. In any case, the tipped employee alternative rate is Section 4(A)(3) in most of the Orders, directly under the learners' and minors' rate provisions, Sections 4(A)(1) and 4(A)(2). Because of this placement in the Orders, it is clear that should the tipped employee provision be held valid, the minors' and learners' rates would not be applicable to tipped employees already being paid the alternative minimum wage rate under Section 4(A)(3).

The learners' and minors' provisions are to be strictly enforced. Section 4(A)(1) dealing with learners permits the 85% rate to be paid only to those learners who have no previous similar or related experience. Before paying such a wage, it is the responsibility of the employer to determine whether the employee has had any previous similar or related experience. The fact that an employee is unfamiliar with the employer's systems or procedures is not sufficient to permit use of the rate under Section 4(A)(1). The burden is on the employer to demonstrate these facts, otherwise we will assess and require payment of the full minimum wage.

Similarly, with regard to Section 4(A)(2), the burden will be on the employer to prove that the number of minors employed in a particular establishment does not exceed 25% of the persons "regularly employed" in the establishment except during school vacations when any number of minors may be employed at the lower rate. For the purposes of this section, school vacation means any full day when the minor's school would normally be in session but is not due to a school holiday. Weekends shall only be considered part of the school vacation when the school holiday is more than one full day.

^{2/} We have been informed by the U. S. Department of Labor, Wage and Hour Division, that after July 1, 1988 it will no longer issue a certificate permitting employment of full time students at the \$2.85 subminimum rate since that rate would be below the learners and/or minors rate in the California Wage Orders of \$3.60 per hour and therefore unavailable to California employers.

There are also several statutory provisions which impinge on the employer's ability to use the learners' and minors' rates. Section 1391.2 of the Labor Code provides:

"(a) Notwithstanding Sections 1391 and 1391.1, any minor under 18 years of age who has been graduated from a high school maintaining a four-year course above the eighth grade of the elementary schools, or who has had an equal amount of education in a private school or by private tuition, or who has been awarded a certificate of proficiency pursuant to Section 48412 of the Education Code, may be employed for the same hours as an adult may be employed in performing the same work.

(b) Notwithstanding the provisions of the orders of the Industrial Welfare Commission, no employer shall pay any minor described in this section in his employ at wage rates less than the rates paid to adult employees in the same establishment for the same quantity and quality of the same classification of work; provided, however, that nothing herein shall prohibit a variation of rates of pay for such minors and adult employees engaged in the same classification of work based upon a difference in seniority, length of service, ability, skill, difference in duties or services performed, whether regularly or occasionally, difference in the shift or time of day worked, hours of work, or other reasonable differentiation, when exercised in good faith."

Obviously each case is going to have to be analyzed on its own merits to determine whether or not adults and minors (as described in 1391.2(a)) are performing the same quantity and quality of the same classification of work. Once again, it is the employer's burden to demonstrate that there are differences which meet the criteria set forth in 1391.2(b) and which preclude application of the full adult minimum wage to the above-described minors working in the employer's establishment.

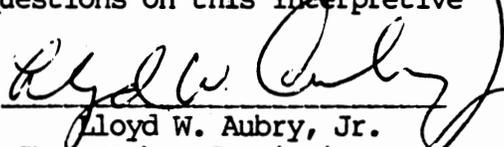
Sections 1394 and 1394.1 apply to the employment of minors in agricultural production. Section 1394(a) exempts certain minors from the hours restrictions in Section 1391 (minors restricted to working 8 hours per day or 48 hours per week) and provides:

"Nothing in this part or Article II (commencing with Section 1285) of Chapter 2 of this part shall prohibit or prevent any of the following:

(a) The employment of minors 16 years of age or older for more than eight hours in one day or more than 48 hours in one week (i) in agricultural, horticultural, viticultural, or domestic labor; (ii) in any industry, business, or establishment operated for the purposes of grading, sorting, cleaning, drying, cooling, icing, packing, or otherwise preparing any agricultural product for distribution, including all the operations incidental thereto; or (iii) in any operation performed in a permanent, fixed structure or establishment on the farm or on a moving packing plant on the farm for the purpose of preparing agricultural products for market when such operations are done on the premises owned or operated by the same employer who produced the products referred to herein, including all operations incidental thereto."

However, Section 1394.1 adds another requirement to permitting the waiver of hours allowed in Section 1394. The waiver of hours restrictions for minors over 16 in the industries and occupations listed in (ii) and (iii) in Section 1394 is only permitted under Section 1394.1 if "the minor is paid at least the adult minimum wage for all hours worked in such industry, business, establishment, or operation." Thus, an employer is permitted to pay the 85% rate to minors in these occupations only if the minor's work does not exceed 8 hours a day or 48 hours in a week. However, if the minor works any hours in excess of those hours within the workweek, then the employer is required to pay the full adult minimum for all hours worked during that week.^{3/} If the employer pays the subminimum for any excess hours, there is a violation not only of Section 1394.1 but also of Section 1391 and civil penalties for child labor law violations may be imposed.

Of course, under any of the above provisions, the employer must keep accurate records documenting their proper use. Moreover, the above relates only to California ^{4/} law and a number of federal statutes may also apply in these situations. Anyone contemplating use of these provisions should be encouraged to check with federal authorities to assure that any actions taken are in compliance with federal law. If you have any questions on this Interpretive Bulletin, please contact your supervisor.


Floyd W. Aubry, Jr.
State Labor Commissioner

^{3/} A similar provision is found in Section 4(A)(3) of Orders 8-80 and 13-80.

^{4/} The Division has recently published a pamphlet, "Child Labor Laws in California" which provides an extensive description of California law on this subject. Parties affected by the child labor laws should be encouraged to obtain a copy of the pamphlet and study it.