

STATEMENT AS TO THE BASIS

TAKE NOTICE Pursuant to the "Eight-Hour-Day Restoration and Workplace Flexibility Act," Stats. 1999, ch. 134 (commonly referred to as "AB 60"), the Legislature reaffirmed the State's commitment to the eight-hour workday standard and daily overtime, and authorized workers to adopt regularly scheduled alternative work days and weeks according to statutory and regulatory provisions. The Industrial Welfare Commission of the State of California ("IWC"), in accordance with the authority vested in it by the California Constitution, Article 14, Section 1, as well as Labor Code §§ 500-558, and 1171-1204, held public meetings and investigative hearings during which it received public comment regarding the implementation of AB 60 and, on March 1, 2000, the IWC's Interim Wage Order - 2000 became effective. The IWC subsequently has held additional public meetings and public hearings pursuant to Labor Code §517(a) to further review all of its Wage Orders for purposes of complying with AB 60. The IWC has considered all correspondence, verbal presentations, and other written materials submitted prior to the adoption of amended wage orders. The IWC submits the following statement as to the basis for the various amendments made to sections 1, 2, 3, 4, 7, 9,11, 12, 17, and 20¹ of Wage Orders 1 through 15, and to the Interim Wage Order - 2000. The Statements as to the Basis for the remaining parts of the IWC's wage orders are contained in prior printings of those orders. These remaining parts have not been changed, and there is no need for an explanation because the IWC is continuing in effect regulations that have previously become a part of the standard working conditions of employees in this State.

1. APPLICABILITY OF ORDER

Amendments to this section apply to Wage Orders 1 through 13, 15, and the Interim Wage Order. Generally, the section now provides, in part, that employees employed in administrative, executive, and professional capacities are exempt from Sections 3 through 12 of these wage orders. According to the provisions of Labor Code § 515, the criteria that must be satisfied in order to obtain an exemption from overtime pay requirements based on the fact that an individual is an administrative, executive, or professional employee, are that the particular employee must be primarily engaged in duties which meet the test for the exemption, and earn a monthly salary of no less than two times the state minimum wage for full time employment. Labor Code § 515(e) defines "primarily" as "more than one-half of an employee's work time," and § 515(c) defines "full-time employment" as 40 hours per week.

¹Please note that not all amendments apply to all of the wage orders, and that the sections of the Interim Wage Order are slightly different from the other wage orders. Please refer to the detailed Statement below.

Thus the Legislature has codified the longstanding IWC regulatory requirement that an employee must spend more than 50% of his or her work time engaged in exempt activity in order to be exempt from receiving overtime pay. The IWC notes that this California "quantitative test" continues to be different from and more protective of employees than, the federal "qualitative" or "primary duty" test. Unlike the California standard, federal law allows an employee that is found to have the "primary duty" of an administrator, executive, or professional to be exempt from overtime pay even though that employee spends most of his or her work time doing nonexempt work. Under California law, one must look to the actual tasks performed by an employee in order to determine whether that employee is exempt. In addition, the statutory threshold for monthly employee remuneration has substantially increased from the amounts set forth in prior IWC wage orders, and that remuneration must be received in the form of a salary.

In addition to the above requirements, Labor Code § 515(f) codified the IWC's existing treatment of registered nurses employed to engage in the practice of nursing. They are not to be considered exempt professional employees, and will not be considered exempt under Labor Code § 515(a) unless they individually meet the criteria established for executive or administrative employees. Similarly, Labor Code § 1186 (enacted by Senate Bill 651, Stats. 1999, ch. 190), provides that pharmacists employed to engage in the practice of pharmacy no longer qualify as exempt professional employees and must individually meet the criteria established for executive or administrative employees in order to be considered exempt under Labor Code § 515(a).

In accordance with the mandate of Labor Code § 515(a) and the expedited process for the promulgation of regulations authorized by § 517, the IWC conducted a review in order to determine the administrative, executive, and professional duties that meet the test of the exemption. The IWC held public meetings and hearings, and received verbal and written public comment in the form of testimony, correspondence, and legal argument regarding various proposals for exempt duties. The bulk of the information came from employers and employees involved in retail, restaurant, and fast food service businesses, as well as representatives of these groups. The IWC also received substantial comment from the legal community. The chief concern of all of these groups related to the distinction between executive managerial employees and nonexempt employees. Employees stated that it was common to have the title of a manager and not be paid overtime, yet perform many of the same tasks as other nonexempt employees during most of the workday. Many employers asked for specific action by the IWC, including the classification of work in settings, such as retail stores, where managers may spend a significant amount of time on the retail floor in the course of managing the operation and directing and supervising the staff. They argued that an employee should not lose his or her exempt manager status merely because he or she sometimes may have to chip in and perform nonexempt work. Attorneys representing employers argued that California should move toward the federal regulatory standards. Other attorneys representing employees reminded the IWC that use of federal regulations might conflict with California's more protective statutory requirement that, in order to be exempt, employees must be "primarily

engaged" in exempt work. The IWC determined that the way to harmonize these various and competing concerns was to focus on identifying the federal regulations that could be used to describe managerial duties within the meaning of California law. The purpose of identifying and referring to such regulations is to more clearly delineate managerial duties that meet the test of the exemption and to promote consistent enforcement practices.

The IWC also received testimony and correspondence from registered nurses regarding the loss of their exempt status as professional employees. The IWC received similar testimony and correspondence from pharmacists and pharmacy representatives. Some testimony reflected the desire to reinstate the professional exemption, while other testimony based on safety and accuracy considerations did not. In addition, advocates seeking an exemption for pharmacists urged that, if the professional exemption could no longer be used, the definition for the administrative exemption should be expanded to include the coverage of pharmacists. Arguments included greater flexibility, professional degrees, and their managerial and advisory duties. Testimony submitted against the allowance of an exemption cited strenuous working conditions, potential jeopardy to the quality of patient care, and the interest of minimizing medical errors. The IWC does not have the power to repeal Labor Code § 515(f) or 1186, which explicitly require that registered nurses and pharmacists individually meet the administrative or executive criteria in order to qualify for an exemption. Accordingly, the IWC chose not to address regulations relating to registered nurses and pharmacists.

Advanced practice nurses, which is an umbrella term that includes nurse practitioners, clinical nurse specialists, certified registered nurse anesthetists, and certified nurse-midwives, submitted testimony advocating the continuation of their exempt status as professional employees. They noted, among other things, that they are not employed to engage in the practice of nursing, and they have advanced degrees in specialized areas, and/or special certification by the State of California. They further noted their 24-hour responsibility for patients, independent management duties, and the need for continuity of patient care as justification for status as exempt professionals. Health care organizations and health care employees both submitted comments and correspondence urging an exemption for advanced practice nurses. On the other hand, labor organizations representing advanced practice nurses testified that they should be treated no differently than other nurses. The IWC also received information regarding pending legislation (Senate Bill 88) that would provide exempt professional status to three types of advanced practice nurses. This legislation was enacted and signed by Governor Davis in September 2000. Accordingly, Sections 3-12 the IWC Wage Orders 1-13 and 15, and Sections 4 and 5 of the Interim Wage Order do not apply to certified nurse midwives, certified nurse practitioners, and certified nurse anesthetists, within the meaning of Articles 2.5, 7, and 8, of Business and Professions Code, Division 2, Chapter 6, who otherwise satisfy the requirements for the professional, executive or administrative exemption. (See Stats. 2000, ch. 492, amending Labor Code § 515.)

After digesting all the information received in its review, the IWC chose to adopt regulations for Wage Orders 1 - 13, and 15 that substantially conform to current guidelines in the enforcement of IWC orders, whereby certain Fair Labor Standards Act regulations (Title 29 C.F.R. Part 541) have been used, or where they have been adapted to eliminate provisions that are inconsistent with the more protective provisions of California law. The IWC intends the regulations in these wage orders to provide clarity regarding the federal regulations that can be used describe the duties that meet the test of the exemption under California law, as well as to promote uniformity of enforcement. The IWC deems only those federal regulations specifically cited in its wage orders, and in effect at the time of promulgation of these wage orders, to apply in defining exempt duties under California law.

Executive Exemption. The IWC derived the duties which meet the test for the executive exemption from language in the federal regulation 29 C.F.R. § 541.1(a)-(d), with one important exception. The reference in 29 C.F.R. § 541.1(a) to the phrase "primary duty" is omitted because, as discussed above, that phrase refers to a federal test that provides less protection to employees. Instead section A(1) generally refers to managerial duties and responsibilities, while section A(5) sets forth California's "primarily engaged" requirement. Section A(5) also refers to the federal regulations, 29 C.F.R. §§ 541.102, 541.104-541.111, 541.115-541.116, that may be used to describe exempt duties under California law. Included in these regulations are two which describe work and occasional tasks that are "directly and closely related" to exempt work. (29 C.F.R. §§ 541.108 and 541.110.) For example, time spent by a manager using a computer to prepare a management report should be classified as exempt time where use of the computer is a means for carrying out the exempt task. The IWC recognizes that 29 C.F.R. § 541.110 also refers to "occasional tasks" that are not "directly and closely related." The IWC does not intend for such tasks to be included in the calculation of exempt work. In addition, the last sentence of section A(5) comes from the California Supreme Court's decision in *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 801-802. Although that case involved the exemption for outside salespersons, the determination of whether an employee is an outside salesperson is also quantitative: the employee must regularly spend more than half of his or her working time engaged in sales activities outside the workplace. In remanding the case back to the Court of Appeal, the California Supreme Court offered the following advice:

"Having recognized California's distinctive quantitative approach to determining which employees are outside salespersons, we must then address an issue implicitly raised by the parties that caused some confusion in the trial court and the Court of Appeal: Is the number of hours worked in sales-related activities to be determined by the number of hours that the employer, according to its job description or its estimate, claims the employee should be working in sales, or should it be determined by the actual average hours the employee spent on sales activity? The logic inherent in the IWC's quantitative definition of outside salesperson dictates that neither alternative would be wholly satisfactory. On the one hand, if hours worked on sales were determined through an employer's job

description, then the employer could make an employee exempt from overtime laws solely by fashioning an idealized job description that had little basis in reality. On the other hand, an employee who is supposed to be engaged in sales activities during most of his working hours and falls below the 50 percent mark due to his own substandard performance should not thereby be able to evade a valid exemption. A trial court, in determining whether the employee is an outside salesperson, must steer clear of these two pitfalls by inquiring into the realistic requirements of the job. In so doing, the court should consider, first and foremost, how the employee actually spends his or her time. But the trial court should also consider whether the employee's practice diverges from the employer's realistic expectations, whether there was any concrete expression of employer displeasure over an employee's substandard performance, and whether these expressions were themselves realistic given the actual overall requirements of the job."

The IWC, in summarizing the above language in its wage orders, intends to provide some guidance in the enforcement of its regulations. The IWC does not intend to modify or limit the California Supreme Court's statements or its decision.

Administrative Exemption. The IWC similarly derived the duties that meet the test for the administrative exemption from language in the federal regulation 29 C.F.R. § 541.2(a)-(c), with the exception of the "primary duty" phrase. Section B(1)(b), which restates 29 C.F.R. § 541.2(a)(2), refers to school administration, but is not intended to establish a different test with regard to school administration, or to affect the professional exemption as it relates to teachers, or to otherwise change existing law. Section B(4) sets forth the California "primarily engaged" requirement. That section also sets forth the federal regulations, 29 C.F.R. §§ 541.201-541.205, 541.207-541.208, 541.210, and 541.215, that may be used to describe exempt duties under State law. These regulations include types of administrative employees, categories of administrative work, and a description of what is meant by the phrase "discretion and independent judgment." The last sentence of section B(4) again summarizes the California Supreme Court's decision in *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th at 801-802, quoted above. In summarizing that language, the IWC intends to provide some guidance in the enforcement of its regulations, and does not intend to modify or limit the California Supreme Court's statements or its decision.

Professional Exemption. The IWC developed the duties that meet the test for the professional exemption from the list of recognized professions contained in prior wage orders as well as from language in the federal regulations 29 C.F.R. § 541.3(a)(1), (2), and (4), and 541.3(b). The recognized professions are law, medicine, dentistry, optometry, architecture, engineering, accounting, and teaching. Although registered nurses and pharmacists were previously included in the list of recognized professionals, as discussed above, they can no longer be considered to be exempt as professionals. (Labor Code §§ 515(f) and 1186.) Teaching continues to require a certificate from the Commission for Teacher Preparation and

Licensing, or teaching in an accredited college or university, to be eligible for the professional exemption.

Employees subject to Wage Orders 1, 4, 5, 9, and 10 have had the "learned or artistic" aspect of the professional exemption available to them since 1993. The IWC found no reason to limit this aspect of the exemption to those five wage orders. The IWC therefore decided to include the "learned and artistic" provisions uniformly throughout all the wage orders. Section C(4) sets forth the federal regulations, 29 C.F.R. §§ 541.207, 541.301(a)-(d), 541.302, 541.306, 541.307, 541.308, and 541.310, that may be used to describe exempt duties under State law.

The new regulations in this section of the IWC's wage orders regarding the administrative, executive, and professional exemption are consistent with existing law and enforcement practices.

Recent legislative enactments provide exemptions from some or all of the provisions of the IWC's wage orders. In addition to an exemption for certain advanced practice nurses, SB 88, Stats. 2000, ch. 492, creates an exemption for certain employees in computer software fields. Sections 3-12 of IWC Wage Orders 1-13 and 15, and Sections 4 and 5 of the Interim Wage Order will not apply to employees in computer software fields who 1) earn forty-one dollars (\$41.00) or more per hour, 2) are primarily engaged in work that is intellectual or creative and requires the exercise of discretion and independent judgment, and 3) are highly skilled and proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, and software engineering within the meaning of added Labor Code § 515.5. In addition, effective January 1, 2001, the IWC's orders will not apply to any individual participating in a National Service Program, such as AmeriCorps, AmeriCorps NCCC, and Senior Corps, that carry out services with the assistance of grants from the Corporation for National and Community Service within the meaning of Title 42, United States Code, Section 12571. (See Stats. 2000, ch. 365, amending Labor Code § 1171.)

This section further provides that outside salespersons are exempt from the provisions of the IWC's wage orders. Pursuant to the requirements of Labor Code § 517(d), the IWC conducted a review of the wages, hours, and working conditions of outside salespersons and received testimony and correspondence on these matters. Some witnesses urged the IWC adopt a more expansive definition of an outside salesperson. Others asked the IWC to define more clearly those activities that are not "sales related." After considering proposals by both employers and employees, the IWC determined that it would not change its longstanding definition of "outside salesperson." (See *Ramirez v. Yosemite Water Co.*, 20 Cal.4th 785.) However, the IWC notes that this exception is to be construed narrowly, as a determination that an employee is an outside salesperson deprives that employee of the protections of the wage orders and many other provisions of the Labor Code.

The provisions of Wage Order 10 now apply to all employees employed by an employer operating a business at a horse racing facility, including stable employees. Stable employees include, but are not limited to grooms, hotwalkers,

exercise workers, and any other employees engaged in the raising, feeding, or management of racehorses, employed by a trainer at a racetrack or other non farm training facility. Employees in the commercial fishing industry are now covered by wage orders 10 and 14.

The IWC received no compelling evidence, and concluded there was no reason at this time, to warrant making any other changes in the provisions of this section.

2. DEFINITIONS

Amendments to this section apply to Wage Orders 1 through 13, and 15. The IWC received testimony from employee and employer groups requesting clarification regarding what a workday and a workweek included. There was also confusion regarding the definition of an alternative workweek. The IWC adopted the following language into the Interim Wage Order - 2000: 1) "Workday" and "day" mean any consecutive 24-hour period beginning at the same time each calendar day; 2) "Workweek" and "week" mean any seven (7) consecutive days, starting with the same calendar day each week. "Workweek" is a fixed and regularly recurring period of 168 hours, seven (7) consecutive 24-hour periods; 3) An "Alternative workweek schedule" means any regularly scheduled workweek requiring an employee to work more than eight (8) hours in a 24-hour period. This language will now replace the language in Wage Orders 1 through 13 and 15. The definitions provided in this section for "workday" and "day," "workweek" and "week," and "alternative workweek schedule" are identical to the definitions provided in Labor Code §500.

The IWC determined that an additional definition for a work "shift" should be added to its wage orders. "Shift " means designated hours of work by an employee, with a designated beginning and quitting time.

As discussed below in Section 3, Hours and Days of Work, the IWC also determined that the health care industry should retain the option to adopt alternative workweek schedules with work days of more than 10 but not exceeding 12 hours. The IWC has therefore included definitions in Wage Orders 4 and 5 for the terms "health care industry," "employees in the health care industry" and "health care emergency." These three terms are discussed more fully in Section 3.

The IWC received no compelling evidence, and concluded there was no authority at this time, to warrant making any other change in the provisions of this section other than those required by AB 60.

3. HOURS AND DAYS OF WORK

DAILY OVERTIME - GENERAL PROVISIONS²

This portion of Section 3 states the daily overtime provisions mandated by AB 60 and applies to Wage Orders 1 through 13, unless otherwise indicated. This section clarifies that premium pay for the "seventh day of work in any one workweek" refers to the seventh consecutive day of work in a workweek. The IWC received testimony regarding the general provisions of overtime as mandated by AB 60. Both employers and employees testified that they were confused regarding the meaning of the "seventh day of work" in the calculation of premium pay. The time-and-a-half provision in Labor Code §510(a) refers to "seventh day of a workweek," but the double time provision refers to "seventh day of a workweek." This slight difference creates the confusion as to whether AB 60 requires double time pay for any work performed in excess of eight hours on the seventh day of the workweek, even if the employee has not worked on all seven days of that workweek. The IWC found that the purpose of the seventh day premium is to provide extra compensation to workers who are denied the opportunity to have a day off during the workweek. Following a literal interpretation of the double time provision would illogically reward someone who may only be scheduled to work one day, and that day fortuitously happens to be the seventh day of the employer's workweek. To clarify this matter, the IWC inserted the term "consecutive" to specify that an employee must work on all seven days in a designated workweek to receive overtime compensation for the seventh day of work in a workweek.

In determining overtime compensation for nonexempt full-time salaried employees, this section also restates Labor Code § 515 (d), which clarifies that the rate of 1/40th of the employee's weekly salary should be used in the computation.

ALTERNATIVE WORKWEEKS SCHEDULES³

This portion of section 3 provides the general guidelines for Wage Orders 1 through 13 for the adoption of employer proposed alternative workweek schedules provided by Labor Code § 511. Section 511 has specific provisions for adopting alternative workweek schedules and sets the standards for determining the overtime compensation for employees who adopt such schedules.

Generally, Wage Orders 1 through 13 provide that an employer does not violate the daily overtime provisions by properly instituting an alternative workweek schedule of up to ten (10) hours per day within a forty (40) hour workweek. Instead, once employees have properly adopted an alternative workweek schedule, an employer must pay one and one-half (1½) times the employees' regular rate of pay for all work performed in any workday beyond that alternative workweek of up to twelve (12) hours a day or beyond forty (40) hours per week, and double the employees' regular

² See Section 4 of the Interim Wage Order

³ See Sections 5-8 of the Interim Wage Order.

rate of pay for all work performed in excess of twelve (12) hours per day and any work in excess of eight (8) hours on those days worked beyond the adopted alternative workweek schedule. Wage Orders 4 and 5 also provide for alternative workweek schedules of up to twelve (12) hours in a workday within a forty (40) hour workweek for employees in the health care industry. In addition, the IWC has provided for special exemptions from daily overtime for organized camp counselors and employees in the ski and commercial fishing industries. These matters are discussed in more detail below.

The IWC notes that Wage Order 1-89, which was reinstated by AB 60, provided for an alternative workweek "of not more than ten (10) hours per day within a workweek of not less than forty (40) hours," as opposed to the language adopted by the IWC that provides for an alternative workweek of not more than ten (10) hours per day within a "within a forty (40) hour workweek," as specified in AB 60. To resolve this conflict, and in the interest of uniformity and greater flexibility in crafting alternative workweek schedules, the IWC adopted the latter language to insert into Wage Orders 1 through 13. Thus, Wage Order 1 now contains language identical to the other wage orders.

The IWC further clarified that hours considered in the calculation of daily overtime pay are not counted in the determination of 40-hour workweek overtime compensation. Basically, there is no "pyramiding" of separate forms of overtime pay for the same hours worked. Once an hour worked is paid at the applicable daily overtime rate, that same hour cannot be used in the computation of forty hours for the purposes of weekly overtime pay.

After receiving testimony and correspondence from employees who sought predictability in work schedules, and employers who sought flexibility in work schedules, the IWC concluded that an employer proposal for an alternative workweek schedule must designate the number of days in the workweek and number of hours in the work shift. The employer does not need to specify the actual days to be worked within that workweek prior to the alternative workweek election. The phrase "regularly scheduled," as set forth in Labor Code § 511(a), means that the employer must schedule the actual work days and the starting and ending time of the shift in advance, providing the employees with reasonable notice of any changes, wherein said changes, if occasional, shall not result in a loss of the overtime exemption. However, in no event does Labor Code § 511(a) authorize an employer to create a system of "on-call" employment in which the days and hours of work are subject to continual changes, depriving employees of a predictable work schedule. Moreover, in Wage Orders 1, 2, 3, 6, 7, 8, 11, 12, and 13, the IWC retained the pre-AB-60 requirement that alternative workweek schedules provide for two (2) consecutive days off for employees.

The IWC received several inquiries concerning flexibility for employees switching alternative workweek options after an election is held. The IWC concluded that upon the approval of the employer, an employee may move from one menu option to another. Additionally, the "menu of options" provision provided in Labor Code § 511(a) provides that an employer may propose "a menu of work schedule options,

from which each employee in the unit would be entitled to choose. "Such choice may be subject to reasonable nondiscriminatory conditions, such as a seniority-based system or a system based on random selection for selection of limited alternative schedules, provided that any limitation imposed upon an employee's ability to choose an alternative schedule is approved as part of the 2/3 vote of the work unit. If the employer's business needs preclude allowing its employees to freely choose among work schedule options, the employer should not propose a menu of work schedule options. Instead, the employer may be able to propose more than one alternative workweek schedule by dividing the workforce into separate work units, and proposing a different alternative workweek schedule for each unit. This method would inform each employee of exactly which schedule would be adopted by the election. In order to provide flexibility in accommodating the personal needs of employees, the IWC further clarified that employers may grant employee requests to switch same-length shifts on an occasional basis.

Based on some of the testimony the IWC received regarding alternative workweek schedules, a question arose as to whether an employer who adopted an alternative workweek arrangement of no greater than ten (10) hours per day could lawfully require employees to work beyond those scheduled hours on a recurring basis with the payment of appropriate overtime compensation. Labor Code §511(a) provides that employees may elect to establish a "regularly scheduled alternative workweek" that authorizes work by the affected employees for no longer than 10 hours within a 40-hour workweek. However, Labor Code § 511(b) provides that an employee working beyond the hours established by the alternative workweek agreement shall be entitled to overtime compensation. The IWC believes that, reading these two provisions of the Labor Code together, an employer who requires an employee to work beyond the number of hours established by the alternative workweek agreement, even if such overtime hours are worked on a recurring basis, does not violate the law if the appropriate overtime compensation is paid.

However, the IWC added a section to its wage orders out of its continued concern that employers could establish alternative workweek agreements and then consistently deviate from the regular schedule approved by the employees without paying overtime compensation for work performed beyond eight hours in a day. Such conduct effectively deprives employees of the right established by Labor Code §511(a) to a "regularly scheduled" alternative workweek and could lead to abuses. To prevent any such abuses, the IWC wage orders now provide that, if an employer sends workers home early on a work day that they are scheduled to work beyond eight hours without the payment of overtime pursuant to an alternative workweek agreement, the employer is required to pay overtime compensation in accordance with the provisions of the Labor Code §511(a) for all hours worked in excess of eight (8) hours on that workday.

The IWC has received questions regarding how part-time employees working in employee units that have adopted alternative workweeks should be paid overtime. It is the IWC's continued intention that a part-time employee be paid overtime in the same manner as other employees in the work unit. Thus if the employee work unit has adopted an alternative work week schedule of four ten-hour days, a part-time

employee working two ten-hour days would not be paid overtime after eight hours; rather, overtime would be paid after working the ten-hour daily shift.

This section echoes Labor Code §511(c), which prohibits employers from reducing an employee's regular rate of hourly pay as the result of the adoption, repeal, or nullification of an alternative workweek schedule. Labor Code §511(c) only applies to reductions in the regular rate of pay that are instituted after January 1, 2000, the effective date of AB 60.

This section also reflects the requirements of Labor Code § 511(d) regarding the required reasonable accommodation of employees who are unable to work alternative workweek schedules that are established through election, the permissible accommodation of employees hired after the election who are unable to work the alternative workweek schedules established through election, and the required exploration of "any available reasonable alternative means" of accommodation of the religious belief of an affected employee that conflicts with the alternative workweek schedule established through election. In addition, this section states the requirements for the employer reporting of alternative workweek election results mandated by Labor Code §511(e), as well as the provisions in Labor Code §554 concerning the accumulation of days of rest. The requirement of one day's rest in seven is mandated by Labor Code §§ 551 and 552.

Notwithstanding the general provisions in its wage orders regarding alternative workweeks, Wage Orders 4 and 5 allow employees in the "health care industry" to adopt employer proposed alternative workweeks of up to twelve (12) hours in a workday within a forty (40) hour workweek. Labor Code § 511(g) and the Interim Wage Order 2000 previously authorized such alternative workweeks if they were adopted according to the election and other requirements contained in those measures. In addition, the Interim Wage Order provides that such alternative workweeks are valid only until the effective date of wage orders promulgated pursuant Labor Code §517. In the meantime, the IWC conducted a review of the health care industry, as required by Labor Code § 517(b), to determine inter alia whether the allowance of twelve hour workdays should continue to be an option for employees, and what employees should be considered a part of the health care industry.

The IWC received testimony and correspondence from numerous employees, employers, and representatives of the health care industry regarding alternative workweeks. Citing personal preference, commuter traffic, mental and physical well-being, family care, and continuity of patient care issues, the vast majority of testimony from health care employees urged the retention of the 12-hour workday. Advocates of 12-hour workdays also noted that 8-hour shifts were impractical for hospital and home health care services, and that their industry should be afforded greater flexibility.

The IWC received additional testimony and correspondence from employees who work eight (8) hour shifts and prefer doing so. These employees also emphasized the need for flexibility in work scheduling, so that eight (8) shifts would not be

eliminated, and so that employees would not be forced to work longer or shorter hours than desired.

The IWC also received testimony concerning patient safety considerations in support of the elimination of 12-hour workdays. These witnesses advised that the last four hours of 12-hour shifts can be exhausting and that exhaustion can result in a greater inclination toward making mistakes.

Based on all the information it received, the IWC determined that the health care industry should retain the option to adopt alternative workweek schedules with work days of more than 10 but not exceeding 12 hours. The IWC further determined that it will retain through its wage orders the provisions of former Labor Code § 1182.9, that employers engaged in the operation of a licensed hospital, or in providing personnel for the operation of a licensed hospital, may propose regularly scheduled alternative workweeks that include no more than three (3) twelve (12)-hour workdays within a 40-hour workweek, and that, if such an alternative workweek is adopted, an employer must make a reasonable effort to find another work assignment for any employee who participated in the vote which authorized the schedule and is unable to work the 12-hour shift. However, an employer is not being required to offer a different work assignment to an employee if such a work assignment is not available or if the employee was hired after the adoption of the twelve (12) hour, three (3) day alternative workweek schedule.

The main question remaining was how the health care industry would be defined. Following several public meetings and hearings, employer and employee representatives decided to work together and attempt to resolve several issues regarding the health care industry and to draft proposed language for consideration by the IWC. Prior to the public hearing on June 30, 2000, these two groups were able to negotiate compromises agreeable to both sides and to propose such language to the IWC. The proposed language, which the IWC adopted, defines the "health care industry" as hospitals, skilled nursing facilities, intermediate care and residential care facilities, convalescent care institutions, home health agencies, clinics operating twenty-four (24) hours per day, and clinics performing surgery, urgent care, radiology, anesthesiology, pathology, neurology, or dialysis. The IWC received testimony and correspondence that in intermediate care and residential care facilities other regulatory agencies use the term "resident" to describe persons receiving medical care in those facilities. The IWC concluded that the term "patient" includes "residents" of those facilities as defined by Health & Safety Code §§ 1250(c), (d), (e), (g), and (h), and 1569.2(k).

The proposal also included language defining the employees that are a part of the health care industry. The IWC adopted this proposal with one amendment regarding animal health care. Employees in the health care industry are now defined as those employees who provide patient care, or work in a clinical or medical department, including pharmacists dispensing prescriptions in any practice setting, or work primarily or regularly as members of a patient care delivery team, or are licensed veterinarians, registered veterinary technicians, and unregistered animal health

assistants and technicians providing patient care in animal hospital settings or facilities equivalent to those described above for people.

The regulations make clear that the phrase "employees in the healthcare industry" does not include those persons primarily engaged in providing meals, performing maintenance or cleaning services, doing business office or other clerical work, or undertakings involving any combination of such duties. Therefore, any alternative workweek schedule that is adopted by employees primarily engaged in these duties, and that provides for workdays in excess of 10 hours, is now null and void.

The IWC intends the definition of employees in the health care industry to encompass pharmacists who dispense prescriptions in all practice settings, including community retail pharmacists. The IWC also intends to include within the definition of the health care industry all employees who primarily or regularly provide hospice care as members of a patient care delivery team.

The IWC further notes that the requirement that an employee work primarily or regularly as a member of a patient care delivery team means that the employee must spend more than one-half of his or her work time engaged in such work. In Wage Orders 4-89 and 5-89, as amended in 1993, the IWC had a different definition of the term "primarily" for employees in the health care industry. According to those orders, "the term 'primarily' as used in section 1, Applicability, means (1) more than one-half the employee's work time as a rule of thumb or, (2) if the employee does not spend more than 50 percent of the employee's time performing exempt duties, where other pertinent factors support the conclusion that management, managerial, and/or administrative duties represent the employee's primary duty." This definition no longer exists. Again, the IWC emphasized that, consistent with Labor Code §515(e), "primarily" means one-half the employee's work time.

With regard to animal health care, the IWC received testimony from veterinarians and the California Veterinary Medical Association which represents approximately 4,500 licensed veterinarians and registered veterinary technicians who own and/or work in some 2,200 hospitals, clinics and independent practices throughout the State. The Association advised the IWC that approximately 50% of the animal care facilities are 24-hour hospitals that provide medical, dental, and surgical care, as well as emergency and critical care for patients. The IWC determined that licensed veterinarians, registered veterinary technicians and unregistered assistants had the same work-related issues and personal concerns regarding alternative workweek schedules as employees providing health care services to humans, and that such employees, who provide patient care within the meaning of Business and Professions Code §§ 4825-4857 in facilities similar to those described above for the treatment of humans, should be included in the health care industry.

The negotiated proposed language that the IWC adopted also includes a few protections for employees working 12-hour shifts. Employees cannot be required to work more than 12 hours in a 24-hour period unless there is a "health care emergency," as that phrase is defined in the regulation, and even though all reasonable steps have been taken to provide otherwise, the continued overtime is

necessary to provide the required staffing. However, an employee may be required to work up to thirteen (13) hours within a 24-hour period if the employee that is supposed to relieve the first employee does not show up for his or her shift on time and does not notify the employer two hours in advance that he or she will not appear for duty as scheduled. Also, no employee can be required to work more than sixteen (16) hours in a 24-hour period unless by a voluntary mutual agreement of the employee and employer, and no employee can work more than 24 consecutive hours until that employee receives 8 consecutive off-duty hours. Finally, the adopted language provides that, if, during the last quarter of 1999, an employer implemented a reduced pay rate for employees choosing to work 12 hour shifts, and desires to reimplement a flexible work arrangement that includes twelve (12) hour shifts at straight time for the same work unit, the employer must pay a base rate to each affected employee in the work unit that is no less than that employee's base rate in 1999 immediately prior to the date of the rate reduction.

The IWC retained the provisions in Wage Order 5 relating to the following method of calculating overtime compensation. An employer engaged in the operation of a hospital or other institution primarily engaged in the care of the sick, aged, or mentally ill or defective in residence may, pursuant to an agreement or understanding arrived at before the performance of work, establish a work period of fourteen (14) consecutive days in lieu of a workweek of seven (7) consecutive days if, for any work in excess of eighty (80) hours in such fourteen (14) day period, the employee receives compensation at a rate of not less than one and one-half (1½) times the employee's regular rate of pay.

ELECTION PROCEDURES

Labor Code 517(a) directed the IWC to adopt regulations before July 1, 2000 regarding "the conduct of employee workweek elections, procedures for employees to petition for and obtain elections to repeal alternative workweek schedules, procedures for implementation of those schedules, conditions under which an adopted alternative workweek schedule can be repealed by the employer, employee disclosures, designations of work, and the processing of workweek election petitions." In accordance with this mandate, this section also lays out the election procedures for the adoption and repeal of alternative workweek schedules. Labor Code § 511(e) requires employers to report the results of any election to the Division of Labor Statistics and Research.

Based on testimony it received during public meetings and hearings, as well as its consideration of proposals of election procedures that were submitted, the IWC determined its wage orders should have more extensive procedures and safeguards than included in the Interim Wage Order - 2000. The language adopted reiterates the two-thirds (b) vote before the performance of work and secret ballot election requirements found in Labor Code § 511(a), and also provides a definition for "affected employees in the work unit." This definition is derived from preexisting language found in Wage Orders 4, 5, 9, and 10.

However, the adopted language also sets up employee disclosure guidelines and mandates that an employer must provide disclosure in a non-English language if at least five (5) percent of the affected employees primarily speak that non-English language. Written disclosure and at least one meeting must be held at least fourteen (14) days prior to the secret ballot vote. This 14-day notice provision was previously applicable only to the health care industry. Failure to abide by these employee disclosure requirements will render the election null and void.

In addition, Wage Order election procedures now require employers to hold elections at the work site of the affected employees, specify that employers must bear any election costs, and authorizes the Labor Commissioner to investigate employee complaints. Following an investigation, an employer may be required to select a neutral third party to conduct the election. In order to provide additional protection for employees, the IWC added language that prohibits employers from intimidating or coercing employees to vote either in support of or in opposition to a proposed alternative workweek. Also, employees cannot be discharged or discriminated against for expressing opinions about elections or for voting to adopt or repeal an alternative workweek agreement.

The procedures further provide for the revocation of an alternative workweek schedule. The one-third (1/3) petition threshold and two-thirds (b) vote required to reverse an alternative workweek agreement reflects language adopted in the Interim Wage Order – 2000. While Wage Orders 1, 9, 10 and non-health care industry employees in Wage Orders 4 and 5 already followed these requirements, Wage Orders 2, 3, 6, 7, 8, 11, 12, 13, and Wage Orders 4 and 5 in the coverage of health care industry employees instead required a majority of employees to petition for an election. In the interest of establishing a universal provision applicable to all wage orders, the IWC decided to defer to the one-third (1/3) standard.

Following the repeal of an alternative workweek schedule, the employer faces a sixty (60) day compliance deadline, but the Division of Labor Standards Enforcement (DLSE) may grant an extension upon showing of undue hardship. This provision merely restates preexisting language from Wage Orders 1 through 13.

The requirements that an election to repeal an alternative workweek agreement must be held within thirty (30) days of an employee petition and on the affected employees' work site fall under the IWC's Labor Code § 517 authority. The prerequisite twelve (12) month lapse after the adoption of an alternative workweek schedule before an election to repeal can be held reflects preexisting language found in Wage Orders 1 through 13.

The adopted language clarifies that the report on election results is a public document, and further specifies the content required for each report. The language also provides for a thirty (30) day grace period before employees are required to work any new alternative workweek schedules adopted through election.

OTHER PROVISIONS⁴

⁴ See Sections 6-8 of the Interim Wage Order.

Minors: This section reflects the current penalties for violation of child labor laws. Violators are now subject to civil penalties from \$500 to \$10,000 as well as to criminal penalties. These increased penalties, initially set forth in the Interim Wage Order - 2000, will now be reflected in all the IWC's wage orders.

Make up Time: This section implements the make up time provisions mandated by Labor Code §513. The statute provides that an employer must approve the written request of an employee on each occasion the employee would like to perform make up time in the same workweek. In the interest of employer and employee convenience, the IWC decided to allow any employee who knows in advance that he or she will be requesting make up over a succession of weeks to request make up work time for up to four weeks in advance.

Collective Bargaining Agreements: This section updates the criteria for the collective bargaining agreement exemption in accordance with Labor Code § 514. Except as provided in subsections referring to overtime for minors 16 and 17 years of age, the availability of a place to eat for workers on night shift, and limits on work over 72 hours, employees working under valid collective bargaining agreements are exempt from the AB 60 overtime provisions if the agreement provides for the wages, hours of work, and working conditions of the employees, premium wage rates are designated for all overtime hours worked, and their regular hourly rate of pay is at least thirty (30) percent more than the state minimum wage.

This provision replaces the previous requirement that employees under collective bargaining agreements must earn at least one-dollar (\$1) an hour more than the state minimum wage to qualify for the exemption. Premium wage rates are any rates higher than the regular hourly wage rate. The IWC also adopted language that requires the application of "one day's rest in seven" for employees working under a collective bargaining agreement unless the agreement explicitly states otherwise.

The California Labor Federation submitted testimony that Labor Code §514 was intended to permit the parties to a collective bargaining agreement to define what constitutes "overtime hours" and to determine the rate of premium pay to be paid for all overtime hours worked. The Commission agrees that § 514 permits the parties to a collective bargaining agreement to establish alternative workweek agreements through the collective bargaining process provided certain conditions are met. Thus, so long as the collective bargaining agreement establishes regular and overtime hours within the work week, establishes premium pay for all such hours worked, and the regular rate of pay is more than (30) percent above the minimum wage, then the exemption established by Labor Code § 514 is applicable.

Personal Attendants: Wage Order 5 previously included an exemption from Section 3, Hours and Days of Work, for personal attendants, adult employees or minors who are permitted to work as adults who have direct responsibility for children under eighteen (18) years of age receiving twenty-four (24) hour care, organized camp counselors, and resident managers of homes for the aged having less than eight (8) beds as long as such employees were not employed more than 54 hours nor more than six (6) days in any workweek, except under certain emergency conditions. The

IWC learned, however, that, except for organized camp counselors, the provisions of this exemption violate the requirements of the federal Fair Labor Standards Act. In order to comply with federal law, the IWC reduced the weekly overtime provisions to 40 hours for personal attendants, adult employees or minors who are permitted to work as adults who have direct responsibility for children under eighteen (18) years of age receiving twenty-four (24) hour care, and resident managers of homes for the aged having less than eight (8) beds. It is the IWC's intention is that these employees may work more than eight (8) hours in a day as long as their weekly hours do not exceed 40 and, consistent with prior enforcement practices, any such employees who work more than 40 hours in a workweek must receive overtime pay for any day during that workweek in which they worked more than eight (8) hours. The IWC notes, however, that personal attendants who are also "employees in the health care industry," who also work in facilities within the meaning of the term "health care industry," may elect to work pursuant to an alternative workweek schedule adopted pursuant to the provisions applicable to such employees.

Ski Industry Employees (See Wage Order 10): Pursuant to Labor Code § 517(b), The IWC conducted a review of the wages, hours, and working conditions of employees working at establishments that offer Alpine and Nordic skiing and related recreational activities to the public. The IWC received testimony and written submissions from employees who overwhelmingly disapproved the special exemption from overtime set forth in former Labor Code § 1182.2 whereby employees could be required to work up to 56 hours in a workweek without the payment of overtime. Employees stated that their income is just above the minimum wage, that they have often worked ten (10) to fourteen (14) hours at straight time without breaks or meal periods, and at their income it is difficult to pay rent or otherwise make ends meet. They asked that they receive the same protections as other employees under AB 60. In addition, labor representatives testified that ski facilities in neighboring Nevada are required to pay overtime to employees after eight (8) hours without any apparent financial hardship.

Employers testified that they are a very small industry of 38 facilities, with a low profit margin that is very dependent upon the vagaries of the weather and a primarily seasonal workforce. Employers further stated that, unlike other industries that are dependent on the weather, ski facilities must be cleared for safe public use every day they are open. They also noted that, under the federal Fair Labor Standards Act, the ski industry is exempt from having to pay weekly overtime after forty (40) hours, and that, if they are required to comply with all the requirements of AB 60, their profit margin will be eliminated. As a compromise, they requested that the IWC issue regulations requiring overtime to be paid after forty-eight (48) hours in a workweek year-round.

The IWC concluded that it would be inconsistent with the health, safety, and welfare of employees to continue the former statutory exemption from daily overtime in a regulation. Instead, Wage Order 10 will now provide that an employer engaged in the operation of a ski establishment as defined in that order will not be in violation of overtime provisions by instituting a regularly scheduled alternative workweek of 48 hours or less during any month of the year when Alpine or Nordic skiing activities are actually being conducted. However, overtime must be paid at the rate of 1 ½

times the regular rate of pay for all hours worked in excess of ten (10) hours in a day or 48 hours in a workweek.

Commercial Fishing Employees (See Wage Orders 10 and 14): The IWC received testimony from persons employed in the commercial passenger fishing industry that, due to the uncertain length of the work day as well as long established customs in the industry, which is highly dependent on the availability of fish, it would be inappropriate to impose a requirement that employees receive overtime pay. In addition, commercial passenger fishing boats are subject to minimum manning requirements regulated by the United States Coast Guard, Title 46, Code of Federal Regulation, Part 15, which limit the number of hours that crew members may work while at sea. There is also an exemption from overtime requirements for commercial fishing vessels under the Fair Labor Standards Act. Therefore, the IWC concluded that it would continue the exemption from Section 3, Hours and Days of Work, formerly set forth in the Labor Code § 1182.3, for employees of commercial passenger fishing boats when they perform duties as licensed crew members. Such an exemption would not apply to other employees in the industry, such as clerical or maintenance personnel, who do not perform duties as licensed crew members on fishing boats.

The IWC received no compelling evidence to warrant making any other changes in the provisions of Section 3, Hours and Days of Work.

4. MINIMUM WAGES

While there are no changes to present minimum wage levels, the IWC currently is conducting its minimum wage review. A new minimum wage may become effective January 1, 2001. If there is a new minimum wage, it will, in turn, affect the level of meal and lodging credits.

Commercial Fishing: Under former Labor Code § 1182.3 employees in this industry were exempt from the minimum wage. The IWC conducted a review of this industry pursuant to Labor Code § 517(b), and received testimony from representatives of the commercial passenger fishing industry that the custom in the industry was to pay crew members on the basis of "one-half day," "three-quarter day," "full day," or "overnight" trips. These employers wished to continue this custom consistent with their present obligation to pay the minimum wage for all hours worked. The provisions of Section 4 (E) would allow employers to record pay of crew members in accordance with a formula based on the length of the trip. However, if the trip exceeds the defined hours of the formula, the additional hours would have to be recorded as additional hours worked and compensated accordingly. In practice, this alternative record keeping system may result in employees being paid more than the actual hours worked, but can never result in them being paid less than the actual hours worked. It is, therefore, primarily established as a convenience for employers. It is noted that regulations of the United States Coast Guard establish minimum crew standards which are intended to insure that, when boats are at sea for protracted periods, they receive adequate rest periods.

9. UNIFORMS AND EQUIPMENT

The IWC retained its longstanding policy of requiring employers to provide uniforms, tools and equipment necessary for the performance of a job. Subsection (B) permits an exception to the general rule by allowing an employee who earns more than twice the State minimum wage to be required to provide hand tools and equipment where such tools and equipment are customarily required in a trade or craft. This exception is quite narrow and is limited to hand (as opposed to power) tools and personal equipment, such as tool belts or tool boxes, that are needed by the employee to secure those hand tools. Moreover, such hand tools and equipment must be customarily required in a recognized trade or craft.

11. MEAL PERIODS⁵

Wage Orders 1, 2, 3, 6, 7, 8, 9, 10, 11, 13 and 15 continue the preexisting requirement of a meal period for an employee working for a period of more than five (5) hours, and provide for a second meal period in accordance with Labor Code §512(a).

Senate Bill 88, Stats. 2000, chapter 492, added subsection (b) to Labor Code § 512, which provides that, notwithstanding subsection (a), the IWC may adopt a working condition order that allows a meal period to begin after six hours of work if it determines that the order is consistent with the health and welfare of the affected employees. The IWC made such a determination with regard to Wage Order 12 and continued the existing language providing for a first meal for an employee working for a period of more than six (6) hours, and for a second meal period in accordance with Labor Code §512.

Consistent with the health, safety, and welfare of employees in the health care industry, the IWC determined that Wage Orders 4 and 5 should have somewhat different language regarding meal periods. The IWC received correspondence from members of the health care industry requesting the right to waive a meal period if an employee works more than a 12-hour shift. The IWC notes that Labor Code § 512 explicitly states that, whenever an employee works for more than twelve hours in a day, the second meal period cannot be waived. However, Labor Code § 516 authorizes the IWC to adopt or amend the orders with respect to break periods, meal periods, and days of rest for all California workers consistent with the health and welfare of those workers.

⁵ See Section 9 of the Interim Wage Order.

The IWC received several comments concerning the potential prohibition of on-duty meal periods. Under the current IWC wage orders, an "on-duty meal period" is permitted only when (1) the nature of the work prevents the employee from being relieved of all duty, and (2) the employee and employer have entered into a written agreement permitting an on-duty meal period. An employee must be paid for the entire on-duty meal period since it is considered time worked.

Any employee who works more than six hours in a workday must receive a 30-minute meal period. If an employee works more than five hours but less than six hours in a day, the meal period may be waived by the mutual consent of the employer and employee.

Notwithstanding other provisions regarding meal periods, the IWC adopted proposed language prepared for its consideration by employee and employer representatives of the health care industry. This language provides that employees in the health care industry covered by Wage Orders 4 and 5 who work shifts in excess of eight (8) hours in a workday may voluntarily waive their right to one of their two meal periods, provided that the waiver is in writing and voluntarily signed by the employer and employee. The employee may revoke the waiver at any time by providing the employer with at least one (1) day's written notice of the revocation. However, while the waiver is in effect, the employee must be paid for all working time, including an on-the-job meal period.

During its review of its wage orders and of various industries pursuant to the provisions of AB 60, the IWC heard testimony and received correspondence regarding the lack of employer compliance with the meal and rest period requirements of its wage orders. The IWC therefore added a provision to this section that requires an employer to pay an employee one additional hour of pay at the employee's regular rate of pay for each work day that a meal period is not provided. An employer shall not count the additional hour of pay as "hours worked" for purposes of calculating overtime pay.

The IWC received no compelling evidence, and concluded there was no authority at this time, to warrant making any other change in the provisions of this section other than those required by AB 60.

12. REST PERIODS

As discussed above in Section 11, Meal Periods, the IWC heard testimony and received correspondence regarding the lack of employer compliance with the meal and rest period requirements of its wage orders. The IWC therefore added a provision to this section that requires an employer to pay an employee one additional hour of pay at the employee's regular rate of pay for each work day that a rest period is not provided. An employer shall not count the additional hour of pay as "hours worked" for purposes of calculating overtime pay.

Commercial Fishing Employees: The IWC added the last paragraph of Section 12 to insure that crew members on commercial passenger fishing boats are at sea for periods of twenty-four (24) hours or longer receive no less than eight (8) hours off-duty within each twenty-four (24) hour period to permit the employee to sleep. This rest period is in addition to the meal and rest periods otherwise required under Section 12.

17. EXEMPTIONS

This section previously allowed the Division of Labor Standards Enforcement, after an investigation and finding that enforcement would not materially affect the welfare or comfort of employees and would work an undue hardship on the employer, to exempt the employer and employees from the requirements of certain sections of the IWC's wage orders. After considering the testimony and correspondence it received with regard to meal periods, and in light of the mandatory provisions of Labor Code § 512, the IWC decided to remove Section 11, Meal Periods, from the list of sections that can be exempt from enforcement.

20. PENALTIES ⁶

This section sets forth the provisions of Labor Code § 558, which specifies penalties for initial and subsequent violations. In accordance with that section, the IWC voted to extend the penalties provisions to Wage Order 14. The IWC received inquiries as to whether "willfulness" is a required element for the issuance of a civil penalty. There were also concerns over the assessment of penalties against an employer's payroll clerk, payroll supervisor, or a payroll processing service for failure to issue checks reflecting the required overtime compensation. AB 60 fails to address these issues, but the IWC noted that there is no intent to penalize individuals that are merely carrying out policies formulated by an employer.

⁶See Section 10 of the Interim Wage Order.