STATE OF CALIFORNIA
GEORGE DEUKMEJIAN, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
Legal Section
30 Van Ness Avenue, Suite 4400
San Francisco, CA 94102

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Re: Request for Interpretation of Wage Orders

Dear Sirs:

James Curry, the Acting Labor Commissioner, has asked me to respond to your letter of July 17th.

You state that your firm represents a client which offers cleaning and maintenance service to supermarts throughout the State of California. Your client's employees travel from the firm's facilities to supermarkets and clean and maintain shopping carts, meat racks and sidewalks. The orders for these services are placed with the firm directly but, you state, the employees are expected to recommend services to the customer. The employees are paid on a per unit basis and the compensation is referred to as "brokerage." You assume that the employees fall under the coverage of Wage Order 4-89 and you rely on the provisions of Section 3(C) of that order to relieve the employer of the overtime provisions.

I must advise you that based upon the facts you have submitted, the workers would fall under the provisions of Wage Order 5-89, not 4-89. Section 2(C)(6) of Order 5-89 provides that the "Public Housekeeping Industry" includes:

> "Establishments contracting for development, maintenance or cleaning of grounds; maintenance or cleaning of facilities and/or quarters of commercial units and living units;"

Order 5-89 contains no provision akin to Section 3(C) of Order 4-89. Thus, your client would not be able to utilize the overtime exemption even if the exemption did apply to the facts you outline.

You state in your letter that you have "informally" been advised by "two separate Deputy Labor Commissioners" that the plan you propose would be acceptable. You state that both of the deputies stated that "the employer has the choice in California whether to pay an hourly wage rate or a commission/ brokerage (or piece rate[1]), and as long as the guaranteed wage rate exceeds minimum wage and employees receive at least one and one-half times (or double-time) that rate for all overtime hours, the employer is not required to perform an additional regular rate/overtime pay calculation based on the 'brokerage' amount."

Obviously, that information would be incorrect. It does not surprise me that with your expertise in labor law you would wish to confirm any such interpretation before implementing a wage plan based on that information and subjecting your client to substantial liability for unpaid overtime wages.

As you know, the overtime must be based on the "regular rate of pay." For purposes of piece rate calculations[2], the regular rate of pay is determined in California by dividing the total amount earned by the total number of hours worked. The employee is entitled to half of this "regular rate" for each hour over eight in one day (up to and including 12 hours in a day) and forty hours in a week. All hours requiring the payment of double time must be compensated by adding the full "regular rate" to that already paid.

I hope this adequately addresses the issues you raised in your letter of July 17th.

1/ Your letter refers to the compensation as a "brokerage", but frankly we can find no dictionary definition or common usage of the term "brokerage" which would match the description of the plan you set out. I believe that the term "piece rate" (which you use parenthetically on page 5 of your letter) best describes the compensation plan.

2/ Note that the method described is only applicable to "piece rate" and "commission" compensation plans. See discussion at Skyline Homes, Inc. v. Department of Industrial Relations (1985) 165 Cal.App.3d 239, 254. Normally, the total wages must be divided by the number of non-premium hours worked.

The Division takes its responsibility for training quite seriously and has attempted to insure, through training, that the enforcement policy of the Division is consistent throughout the state. It is, of course, difficult to address the statement that you recieved the erroneous information from "two Deputy Labor Commissioners" without being able to question the deputies to establish the circumstances surrounding the encounter. It is often a miscommunication which leads to the type of misinformation you state that you recieved from the two Deputy Labor Commissioners. However, for purposes of training, the Division would appreciate knowing the names or the offices of the two Deputy Labor Commissioners you state gave you the erroneous information you cited in your letter.

Yours truly,

H. THOMAS CADELL, JR.
Chief Counsel

c.c. James Curry
Simon Reyes