

DEPARTMENT OF INDUSTRIAL RELATIONS

DIVISION OF LABOR STANDARDS ENFORCEMENT

LEGAL SECTION

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**Re: Definition of "Customarily and Regularly" As
That Term Is Used In Connection With The Time
During Which An Employee Must Supervise Two Or
More Employees In Order To Meet The Requirements
for An Exemption As An Executive Employee**

Gentlemen:

Having received two letters requesting the same information, I feel that it is most appropriate to answer the question posed in a joint letter.

The language contained in section 10.61(b) of the Division's Operations and Procedures Manual is taken directly from the language used in 29 C.F.R. §541.107. The federal regulations, of course, speak to the exercise of "discretion"; but the Division intended that the definition apply to the time during which an employee must supervise two or more employees in order to meet the requirements for an exemption as an executive employee under the California law.

As I explained to Mr. Thornfeldt when I spoke to him in a recent telephone conversation, I can think of no instance where the Division has been officially called upon to formulate or apply a "percentage" formula to the definition. It appears that the amplification on the definition which is contained at subd. (b) of §541.107 would make it clear that it is a factual inquiry which must be made. To paraphrase the Federal Regulations:

"The requirement will be met by the employee who normally and recurrently is called upon to [supervise two or more workers] in the day-to-day performance of his duties."

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As you know, the California law differs substantially from the federal law in the basic definition of the terms used. Unlike the federal regulations which look to the "primary duty"¹ of the employee, the IWC Orders emphasize the type of work the employee is "primarily engaged in." The IWC Orders define "primarily" to mean more than half the employee's work time.

The employee who devotes more than fifty percent of his or her time to supervision would almost certainly be supervising more than two employees on a regular basis. From a practical point of view, no employer could possibly afford the cost of supervision where the ratio is one to two. This is obviously the reason the Division has never been called upon to give a formal opinion or design a formula regarding the number of workers supervised.

I hope this is of assistance to you and the court. If either of you have any further questions please feel free to contact me.

Yours truly,

H. THOMAS CADELL, JR.
Chief Counsel

c.c. Victoria Bradshaw, State Labor Commissioner

This "primary duty" test has led to the absurd result reached in *Donovan v. Burger King*, 672 F.2d 1141, where the court essentially held that the assistant manager who devoted much of his day to frying hamburgers was still exempt because while frying hamburgers he was thinking about his supervisory duties.