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DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
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May 29, 1996

Lynn D. Lonjers
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350 South Figueroa Street, Suite 250
Los Angeles, CA 90071-1102

Re: **Effect of Labor Code § 204.3 on Interpretive Bulletin 84-2 (As Superseded by 86-2)**

Dear Ms. Lonjers:

This is in reply to your letter of April 17, 1996, addressed to Leslie Clements regarding compensatory time off. Your question is whether the provisions of the Labor Code § 204.3 would affect the Interpretive Bulletin. In the view of the Division it would.

An analysis of section 204.3 reveals that it is intended to allow an employee to accumulate compensatory time over an extended period of time up to a total of 240 hours. The section is designed, it would appear, to allow California workers to waive the requirement that they be paid, in cash, for their overtime work not later than the pay period following the period in which the work was performed. (See Labor Code § 204, final sentence of first paragraph) We note that the provisions of Labor Code § 204.3 do not address the requirements of the federal Fair Labor Standards Act of 1937 and California employers would be well-advised to determine their liability under that Act before implementing the type of program allowed by § 204.3.

The provisions of the Labor Commissioner's Interpretive Bulletin requires that the employee may agree to perform work for which premium pay would be required and, in return, receive compensating time off at the same rate as that required by the premium wage. That is, if a worker requests that he or she be allowed to work on the ninth hour of one day and be allowed to leave early on another day in that pay period (or the following pay period under the revised provisions of Labor Code § 204; See Interpretive Bulletin 86-2) the employee would have to be allowed one and one-half hours off to compensate for the one hour of overtime. The Interpretive Bulletin affected all non-exempt employees in California.

The provisions of Labor Code § 204.3 develop a far more detailed set of rules for accomplishing its goal, and, in addition, the Labor Code section allows far more latitude than that allowed by the Labor Commissioner's policy by providing for the accumulation of the time up to 240 hours[1]. However, the Legislature narrowed the scope of the classification of employees to whom the exception could apply to only those workers employed under Orders 2, 4, 6, 7, 9, 11, 12 and 15. While there is no stated reason for the narrow application of the exception, it must be assumed that the Legislature considered the concept of compensating time off in lieu of overtime pay inappropriate in all but the limited circumstances covered in the seven IWC Orders to which the exemption applies.

While the Labor Commissioner has the authority to interpret the IWC Orders for purposes of enforcement (See *Skyline Homes v. Department of Industrial Relations* (1985) 165 Cal.App.3d 239; 211 Cal.Rptr. 792; 166 Cal.App.3d 232(c) (hrg. den. 5/29/85); *Aguilar v. Assoc. for Retarded Children* (1991) 234 Cal.App.3d 21) "[I]t is fundamental that an administrative agency has only such power as has been conferred upon it by the constitution or by statute and an act in excess of the power conferred upon the agency is void." (See *Ferdig v. State Personnel Bd.* (1969) 71 Cal.2d 96, 103-104; *California State Restaurant Assn. v. Whitlow* (1976) 58 Cal.App.3d 340, 346-347) An administrative agency may not, in the absence of valid statutory or constitutional authority, substitute its judgment for that of the Legislature under the guise of regulation or enforcement policy. *Whitlow, supra*, 58 Cal.App.3d at 347. The *Whitlow* case also stands for the proposition that an administrative agency may not modify, alter or enlarge the provisions of the legislative act being administered. *Id.* at 347; see also, *Ralphs Grocery Co. v. Reimel* (1968) 69 Cal.2d 172, 176 at fn. 3.

The Division policy announced in Interpretive Bulletins 84-2 and 86-2 was intended, at the time, to provide a narrow exemption to the requirements of the IWC Orders in order to allow employees and employers leeway.

In the view of the Division, the Legislature's adoption of the test set out in Labor Code § 204.3 has effectively revised the IWC Orders and any attempt by the Division, through an enforcement policy, to change the test would be an abuse of discretion. Interpretive Bulletin 86-2 (amending and superseding 84-2) is not enforceable. This office will take steps to notify the field staff.

Thank you for bringing this matter to our attention.

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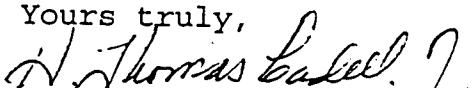
[1]The language of the statute does not seem to limit the accumulation of the compensating time to any specific period time period.

Yours truly,



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