STATE OF CALIFORNIA PETE WILSON, Governor

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September 3, 1997

Richard J. Simmons
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333 So. Hope Street, 48th Floor
Los Angeles, CA 90071-1448

Re: **Remuneration Test**

Dear Mr. Simmons:

In our letter to you of April 28, 1997, regarding the Remuneration Requirements of the California Wage Orders, you asked the following question:

> 10. If the DLSE takes the position that a minimum guarantee (on a weekly or monthly basis) must exist, may an employer pay an employee who receives such a guarantee additional compensation on an hourly basis for extra work beyond a specified number of hours each day and/or each week without compromising the employee's exempt status?

In the response to this question, the division relied upon the ruling of the Ninth Circuit Court of Appeal in the case of *Abshire v. County of Kern*, 908 F.2d 483, 486 (9th Cir.1990), cert. denied, 498 U.S. 1068, in concluding that "[S]uch additional compensation for extra hours is...not consistent with salaried status." The concern, we felt, was that an employer could pay a salary which met the less than significant requirements of either the federal salary test or the California remuneration test and add a more reasonable hourly rate to that sum. The fear was that the worker could face a deduction from the hourly rate which would have the effect of providing the very deduction which is prohibited by the salary and remuneration tests which DOL and DLSE have both relied upon.

On August 15, 1997, the Ninth Circuit held the language in the *Abshire* case to be dictum and essentially held that the Department of Labor's interpretation of the Code of Federal Regulations at 29 C.F.R. § 541.118(a) that:

> "additional compensation besides the required minimum weekly salary guarantee may be paid to exempt employees for hours beyond their standard workweek without affecting the salary basis of pay. Thus, extra compensation may be paid for overtime to an exempt employee on any basis. The overtime payment need not be at time and one-half, but may be at straight time, or at one-half time, or flat sum, or on any other basis." Citing D.O.L. Wage & Hour Opinion Letter No. 1738 (April 5, 1995); see also D.O.L. Wage & Hour Division Opinion Letter No. 1737 (April 5, 1995). (*Boykin, et al. v. Boeing Company*, 1997 U.S. App. LEXIS 22277, August 15, 1997, p. 4-5 of Slip Opinion)

The *Boykin* court noted that "the focus of the regulations is to prohibit employers from claiming that their employees are compensated on a salary basis when the employees are subject to deductions in pay...As the district court aptly noted: 'it is difficult to perceive the alleged injury to a salaried employee who receives some form of hourly overtime compensation without fear of having compensation docked on the same basis.' The DOL's interpretation of the salary-basis test is not plainly erroneous or inconsistent with the regulations." (*Id.*, p. 6 of Slip Opinion)

It must be noted, that the DOL's interpretation, which the DLSE will now adopt, only allows for an hourly rate for hours worked in excess of the standard. The DLSE will generally consider such an hourly rate to be valid if paid for more than eight hours in any one day or more than 40 hours in any one week. This does not mean that an employer is required to pay the overtime for all hours in excess of eight or forty; but may, instead, choose any number of hours in a day in excess of eight or in a workweek in excess of forty after which the hourly "overtime" pay will be paid. If the employer can show that the industry practice is to work a lesser number of hours, DLSE will accept the payment to an otherwise exempt employee of an hourly rate in excess of that number of hours which is found to be the industry standard regarding number of hours in a workday or a workweek.

This clarification of the remuneration requirements of the IWC is intended to insure that, as far as is possible, the overtime requirements under the IWC Orders are consistent with those of the requirements under the FLSA. The change in the position announced by the Ninth Circuit described above requires this clarification.

If you have any questions or concerns regarding this issue, please contact this office.

Yours truly,

H. Thomas Cadell, Jr.

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