

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT

LEGAL SECTION

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March 22, 2001

Robert Bayer
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Minneapolis, MN 55402-1609

ALSO FAXED TO (612) 607-7100

Re: Compensation for Employee's Stand-By Time
Labor Certification Application Filed by SubHerb Farms

Dear Mr. Bayer:

This in response to your letter of January 31, 2001 to State Labor Commissioner Arthur Lujan, seeking our opinion as to whether or not a job requirement to be on-call 24 hours a day, as described in an 'Application for Alien Employment Certification' filed with the U.S. Department of Labor ("DOL") and the California Employment Development Department ("EDD"), constitutes 'controlled standby' that must be compensated. You state that the Labor Commissioner's opinion on this matter has been requested by Martin Rios, a Certifying Officer with the DOL's Employment and Training Administration, in connection with that agency's processing of the application for alien employment certification. Initially, I should caution you that we are extremely reluctant to make any determination on the sole basis of a written job description. It has been our experience that actual employment requirements and conditions often differ from whatever may be set out in a job description, and thus, it would be improper to rely on an opinion as to an employee's right to compensation if the nature of the work or conditions under which the job is performed differ from the way the work is described in the job description. Nonetheless, with that cautionary note, we will attempt to answer the question presented based on the job description.

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The Application for Employment Certification identifies the position as a "senior line 1 operator," which entails, according to your letter of January 31, 2001, "the operation, maintenance and repair of complex flash freezing equipment." You further state that the employee holding this position "must be on call to repair any breakdowns that the regular operating staff cannot handle." However, during on-call time the employee "does not have to remain at home or in a restricted area. He has a cell phone and pager; he is free to go wherever he wants as long as he can be reached in the event of an emergency."

You further state you have been advised that under California law, on-call hours need be compensated only if the employee is confined to the employer's work site or to his home, unable to move about; and that if an employee who is required to carry a cell phone or pager and respond to calls, but is otherwise free to move about, no compensation for the on-call time is required. This is certainly **not** an accurate statement of California law. To be sure, if an employee is required to stand-by while geographically restricted to the employer's worksite or his home, all hours so restricted would constitute controlled standby time and must be compensated. But the fact that an on-call employee is not geographically restricted to the worksite or his home does not automatically mean that the on-call time is not compensable. Rather, California law, much like federal law, looks to a variety of factors to determine "whether [an employee] is so restricted during on-call hours as to be effectively engaged to wait." Berry v. County of Sonoma (1994) 30 F.3d 1174. (See 12/28/98 DLSE Opinion Letter to Laura G. Drenning re: Compensability of On-Call Time, a copy of which is attached hereto.) Under state law, the relevant factors are:

1. Whether there are excessive geographical restrictions on the employee's movements,
2. Whether the frequency of calls is unduly restrictive,
3. Whether a fixed time limit for response is unduly restrictive,
4. Whether the on-call employee can easily trade his or her on-call responsibilities with another employee, and
5. Whether and to what extent the employee engages in personal activities during on-call periods.

Thus, an employee who is not geographically restricted to his or her residence or employer's premises, but who is nonetheless required to respond in person to any call within a specified and fairly limited amount of time (so as to be effectively restricted to an area close to the employer's premises), and who cannot readily trade his or her on-call duties

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with another employees, is likely to be found subject to such significant restrictions as to require compensation for all on-call hours.

Your letter fails to provide sufficient information to enable us to make any determination as to each of the five factors set out above. For that reason, we are unable to reach a conclusion as to whether the employee's on-call hours would constitute controlled (and hence, compensable) or uncontrolled, uncompensated standby time.

In your correspondence to EDD dated December 9, 1997, you assert that the job in question is an exempt position, and therefore, that even if the on-call time constituted controlled standby time, it would not be necessary to provide the employee with additional compensation for time spent on-call. There is no question that absent an agreement for extra pay for on-call duty, a *bona fide* exempt employee need not be paid anything above his or her regular salary for all hours worked. When an employee is exempt from payment of overtime, the employee's salary covers all hours worked as a matter of law. But here too, the issue of whether this employee would be exempt or non-exempt cannot be determined on the basis of a job description. Rather, under California law an employee is not exempt unless the employee is primarily engaged -- that is, spends more than 50% of his or her work time -- performing exempt duties. Thus, to determine whether a worker is exempt, we must examine the nature of the actual work performed, and the actual amounts of time spent performing exempt and non-exempt work. This is particularly critical where, as here, the description of the work seems to suggest that the employee will be performing a mixture of exempt and non-exempt work. For example, you indicate that among other things, the employee will be responsible for performing emergency repairs or adjustments to the processing equipment, and replacing components, modifying and designing new equipment. None of these tasks constitute exempt work. On the other hand, you indicate that this "senior line 1 operator" will supervise 14 other employees, and in that capacity, will be responsible for planning, coordinating and reviewing the work of these subordinates. These tasks would fall under the exempt side of the ledger. Your assertion that these supervisory tasks "represent at least 60% of the job" may or may not reflect the actual reality of the way in which this employee would spend his time on a day to day basis. As such, we cannot draw any conclusion as to whether the employee will be exempt from overtime (in which case his \$35,000 annual salary would cover all hours worked), or whether he would be entitled to additional overtime compensation for any overtime hours worked.


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I am sorry we cannot provide you with the definitive answers you seek, but hopefully, this letter will assist you in analyzing the issues pursuant to the applicable law. Thank you for your interest in California wage and hour law.

Sincerely,



Miles E. Locker
Chief Counsel

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