STATE OF CALIFORNIA PETE WILSON, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
LEGAL SECTION
30 Van Ness Avenue, Ste. 4400
San Francisco, CA 94102

H. THOMAS CADELL, Chief Counsel

April 11, 1991

Re: Alternating Workweek

This letter is in response to yours of March 26th and confirms our telephone conversation of yesterday regarding this subject.

In response to your questions, I must advise you that the Division would not accept an alternating workweek which made use of a "regular schedule" which exceeded 40 hours in a week. Consequently, the proposed work schedule you submitted would not be permitted.

In our telephone conversation we also discussed the possibility of adopting an alternating workweek schedule which has a varying number of hours or days in succeeding weeks so long as the schedule is "fixed" and repeated. For instance, I suggested that under Order 1[1] it would be possible to adopt a work schedule which provided for four ten-hour days in one week followed by four nine-hour days and one four-hour day in the following week. The workweeks would repeat thereafter. This would be acceptable since the schedule meets the requirements of the Order and allows the employee to make plans based upon the schedule. As you indicated you understood, the Division requires that the "regular schedule" must specify the days of the week and the hours of the day.

The last question you ask in your letter of March 26th is divided into two parts. In answer to that part of your question regarding whether work performed on an unscheduled workday must be compensated at premium rates, the answer is yes. For instance, in the case of a four/ten workweek which called for the worker to work on Tuesday through Friday, any work performed on any other day would have to be compensated at time and one-half for the first

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[1] It must be borne in mind that Order 1-89 unlike the other orders, requires that the workweek be 40 hours and that the daily work hours not exceed ten nor be less than four.

eight hours and double time thereafter. This would be so regardless of the fact that the employee did not work the 40 hours in the scheduled workweek. In response to the second part of question 3, since Order 1-89 requires a 40-hour week as a condition of adoption of an alternative workweek, that part of the question is moot. However, if we were not talking about Order 1-89, and a regularly scheduled workweek provided for four nine-hour days (a thrity-six hour workweek) any hours in excess of nine in any one day or on any fifth, sixth or seventh day would have to be compensated at premium rates.

The Division has taken the position that the adoption of the alternative workweek creates an exception to the employer's obligation to pay daily overtime. As with any exception to remedial legislation, this must be narrowly construed. The DLSE has concluded that the IWC, in effect, required a trade-off for exemption from the overtime requirements after eight hours. The trade-off is strict compliance with the language of the Orders read in light of the stated basis for the exceptions. Interpretive Bulletin 89-3 explains the Division enforcement policy in detail.

I hope this adequately addresses all of the questions you raised in your letter and in our telephone conversation. If you have any further questions please feel free to give me a call.

It was good to hear from you. It has been some time since our appearance in the Fourth District Court of Appeal. I'm glad to see that you have continued your interest in labor law.

Yours truly,

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