STATE OF CALIFORNIA
GEORGE DEUKMEJIAN, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
3 GOLDEN GATE AVENUE
SAN FRANCISCO, CALIFORNIA 94102

1988.06.02

ADDRESS REPLY TO:
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IN REPLY REFER TO:

Legal Section

June 2, 1988

David E. Kenney, Esq.
Karns & Karabian
900 Wilshire Blvd.
Suite 530
Los Angeles, CA 90017

Re: Computation of Overtime

Dear Mr. Kenney:

This is in reply to your letter of April 12, 1988, wherein you solicit an interpretation of the provisions of 29 C.F.R. §779.410 et seq. in light of I.W.C. Orders Nos. 4-80 and 7-80.

I sent a letter on April 15, 1988, advising you that this interpretation would take some time in view of the heavy influx of requests for information prompted by the upcoming change in the minimum wage. Frankly, I also needed time to study your letter and its implications. With the help of staff I believe I have grasped the crux of your letter.

As you know, in situations where California laws are patterned on federal statutes, California courts may look to federal case law interpreting those statutes for persuasive guidance. (Alcala v. Western Ag Ent. (1986) 182 Cal.App.3d 546 at 550) However, I know of no authority which would allow the Division to look to Federal Regulations interpreting federal statutes for persuasive guidance. But despite this fact, The Division may look to Federal Regulations for rationale where the statute upon which the regulation is grounded is essentially the same as the state provision. Such is not the case here.

The provisions of 29 C.F.R. §779.410 et seq. which you quote provide the regulations concerning the implementation of the overtime exemption for certain commissioned employees under 29 U.S.C. §207(i). However, it is my understanding of your letter of April 12th that you are not intending to use the "disjunctive" employment agreement to qualify a sales employee for the overtime exemption.

The provisions of 29 C.F.R. §779.421 do allow the use of a "basic rate" for computing overtime under certain conditions where "commissioned employees" (which, incidentally has a

much broader meaning under federal law) do not meet the exemption requirements of section 7(i) of the Act. The regulations concerning the computation of the "basic rate" are found at 29 C.F.R. §548.1 et seq. A thorough reading of those provisions will reveal that the regulations do not actually rely upon the "disjunctive" employment agreement approach you describe in your letter but rely, instead on a complex scheme which is designed to assure that the "regular rate" is somewhat akin to a "prevailing rate" in the area. DLSE policy provides no such mechanism.

In addition, of course, the DLSE policy in this regard has historically required that all of the wages received by the employee be included in the computation of the regular rate of pay. To allow, as your letter indicates, for the employer to unilaterally set a "regular rate" upon which the overtime compensation is to be based would defeat the rationale underlying the imposition of "premium pay" as a penalty (See Skyline Homes v. DLSE (1985) 165 Cal.App.3d 239 at 249).

I hope this adequately addresses the concerns you have raised. Please excuse the delay in responding to your letter but, as I pointed out in my letter of April 15th, the heavy influx of requests for interpretations have slowed the process. Thank you for your patience.

Yours truly,

H. Thomas Cadell Jr.

H. THOMAS CADELL, JR.
Chief Counsel

c.c. Lloyd W. Aubry; Jr.
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