1991.11.01-4

November 1, 1991

Karen B. McHugh
Brunick, Alvarez & Battersby
Post Office Box 6425
San Bernardino, CA 92412

Re: **24-Hour Employees**

Dear Ms. McHugh:

Your letter of September 30, 1991, directed to the Division requesting an opinion has been assigned to this office for response. Your letter of July 26, 1991, addressed to Richie Jenkins, Senior Deputy in the San Bernardino District Office was attached and sets out the facts and the questions you raise.

You state that you represent a "private retirement villa" which desires to hire two individuals to work weekends only to perform a variety of tasks including general on-site control and supervision. These two non-exempt workers would begin their shift on Friday afternoon and be "on duty until Sunday afternoon for a total of forty-eight hours."

You ask:

1. What overtime requirements will apply to these employees?

A. There is no language contained in the current IWC Orders which would exempt such employees from the overtime requirements of Section 3 of Order 5-89. It is not clear whether these individuals will be required to reside[1] on the premises full time. If they are required to reside on the premises, the definition of the term "Hours Worked" in Order 5-89 would require that the workers be paid during the hours when they are "carrying out assigned duties" must be compensated. (See Order 5-89, §2(H))

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[1] The term "reside" means to live on the premises on a full-time basis and are provided with adequate quarters. Thus, if the employees have another home and only sleep and eat on the employer's premises for a portion of the workweek, they are not resident. The exception to this rule would be those employees who fall into the category of ambulance drivers' and attendants who are given an exemption under the provisions of Orders 9-90 and 4-89, but are not exempted under the provisions of 5-89.

The criteria which you set out regarding "adequate sleeping facilities", "uninterrupted 'night's sleep'", etc., only applies to the exception provided for ambulance drivers as discussed in footnote 1. This exception, even if applicable[2], could not be applied here as there is no such exception in Order 5-89.

I suggest that you review the case of *Alvarez v. ARC* a recent decision of the Fourth District Court of Appeal. That case will help to explain the Division enforcement policy and the rationale underlying that policy in more detail. The case is reported in the Los Angeles Daily Journal of September 24th.

Your statement that the DLSE would permit these "weekend employees" to be compensated on a lump sum basis is erroneous. Please review the case of *Ghory v. Al-Lahham* (1989) 209 Cal.App.3d 1487, which holds that unless there is an explicit agreement as to the hourly rate, the hourly rate is reached by using the formula set out in *Skyline Homes v. DIR* (1985) 165 Cal.App.3d 239, i.e., dividing the total amount received by the straight time hours worked.

I am sorry if you have been misinformed regarding DLSE policy in this area. Many times these misunderstandings arise as a result of telephone conversations wherein not all of the facts are presented. Other times, of course, the misinformation is the result of the fact that DLSE personnel are misinformed. The Division prides itself on the continuing training it conducts with the limited resources it has available. If, in the future, you have any questions regarding explanation of DLSE policy which you receive, please contact the Senior Deputy in the office for clarification. If you still have questions, feel free to call this office.

Yours truly,

H. THOMAS CADELL, JR.
Chief Counsel

c.c. James H. Curry, Acting Labor Commissioner
Simon Reyes, Assistant Labor Commissioner
Richie Jenkins, Sr. Deputy, San Bernardino
Ed Voveris, Regional Manager

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[2] The DLSE has extended this exception for ambulance drivers to private "firefighters" who perform on-site medical services in conjunction with their firefighting duties. The extension has not been and, indeed, could not logically be extended to the type of work your letter anticipates.