STATE OF CALIFORNIA PETE WILSON, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
LEGAL SECTION
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H. THOMAS CADELL, JR., *Chief Counsel*

February 22, 1993

Gerald J. Stefanick
Cresswell Garden
Ashland, PA 17921

Re: **Calculation Of Regular Rate Of Pay In Cases Involving Piece Rate**

Dear Mr. Stefanick:

This is in response to your letter of January 28, 1993, regarding the calculation of the regular rate of pay and payment of overtime compensation to an individual employed part of his time on an hourly basis and the remainder of the time on a piece rate basis[1].

If the employee were employed full time as a golf instructor and all of his compensation were based upon the piece rate he is paid, the correct method to calculate his regular rate would be to divide the compensation received by all of the hours worked and pay the worker half the regular hourly rate for all overtime hours. The DLSE allows this method for payment of piece rate employees and commissioned salespersons based on the fact that the extra hours worked have allowed the employee to make additional compensation over and above that which would be available to a salaried or hourly employee through increased productivity. However, in the type of situation you present, the worker is limited to an hourly rate for a portion of the time he is scheduled to work and has no opportunity during that time to increase his wage through increased productivity.

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[1] While your letter refers to commissions paid to the worker, the State of California does not recognize the payment program as a commission. A commission, for purposes of the California law, is defined as the sum paid to an individual involved primarily in the "sale" of goods or services where the commission is based upon a percentage of the price for which the goods or services are sold. *Keyes Motors v. DLSE* (1987) 197 Cal.App.3d 557, 242 Cal.Rptr. 873. In this case, the individual is engaged "primarily" in the teaching of golf, not in the sale of the service. Actually, the rate can easily be determined to be nothing more than an hourly rate based upon 75% of $50.00 or $37.50. Simply calling it a commission or a piece rate does not make it so.

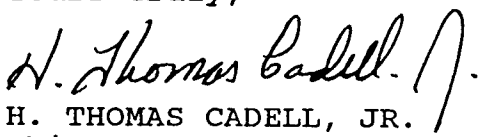
Thus, where the compensation package is mixed, the regular rate of pay can only be determined by dividing the total amount earned by the number of non-overtime hours worked. Therefore, in the scenario you present, the worker is entitled to recover $750.00 for the piece rate and an additional $150.00 for the non-piece rate time; a total of $900.00. This total compensation is then divided by 40 hours to determine the regular rate of pay. ($22.50) The rate of $22.50 times 1½ is required to meet the overtime requirements for the ten hours of overtime. The worker is entitled, under California law, to recover $1237.50. (See *Skyline Homes v. Department of Industrial Relations* (1985) 165 Cal.App.3d 239, 211 Cal.Rptr. 792; 166 Cal.App.3d 232(c) (hrg. den. 5/29/85))

If the DLSE enforcement were otherwise than outlined above, an employer would be able to pay an employee two different rates of pay without the need to calculate the regular rate based on the weighted average by simply calling the one rate a piece rate.

This enforcement policy is consistent[2] with the federal government's approach to the question of inclusion of commissions or piece rates in the regular rate of pay (29 C.F.R. §778.117). Except of course, under a specific section of the Fair Labor Standards Act (29 U.S.C. 207(i)) the employee would be exempt in this case. However, as stated above, the term commission is not applicable in California to other than salespersons primarily engaged in the sale of the goods or services.

I hope this adequately addresses the issue you raised in your letter of January 28th. If you have any further questions please contact the District Office of the Division of Labor Standards Enforcement with jurisidiction over the working relationship in question.

Yours truly,



H. THOMAS CADELL, JR.
Chief Counsel

c.c. Victoria Bradshaw, State Labor Commissioner

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[2] The DLSE attempts to interpret the requirements for determining the "regular rate of pay" so that it is consistent with the method adopted by the U.S. Department of Labor. This is not always possible, however, due to differences in the law.