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*

March 25, 1994

Holly Culhane
Professional Administrative Systems
1401 19th Street, Suite 115
Bakersfield, CA 93301

Re: **Applicability of IWC Orders**

Dear Ms. Culhane:

The Labor Commissioner has asked me to respond to your letter of February 18, 1994, regarding the following fact situation:

> An employer who currently has employees working in positions that are covered by a California Wage Order for the first six hours of a workday (and, therefore, eligible for overtime over eight hours in a workday and over 40 hours in a workweek) frequently has occasion to assign employees to work in positions which are not covered by a California Wage Order (and, therefore, eligible for overtime only after 40 hours in a workweek[1]) after the original six hours of the workday. The affected employee then works an additional three or four hours in that workday for a total of nine or ten hours in the workday.

You ask whether an employee in the position outlined above would be eligible for overtime under California law after eight hours in a workday when the overtime work actually takes place while working in a position which only requires overtime payment over 40 hours in a workweek.

For purposes of this response, we will assume that the two positions to which the worker is assigned are non-exempt positions (i.e., that they are not managerial, administrative or professional positions) and that the latter position is one which is specifically exempted by the IWC Orders.

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[1]You do not explain what type of position you refer to; however, the truck driver exemption used for purposes of this letter would be a specifically exempt position which, under normal circumstances, would not be subject to managerial, administrative or professional exemption ·atus. However, it should be pointed out that if the worker is exempt under the driver .emption for state overtime purposes, the worker would be exempt from both the daily and the weekly overtime requirements.

If the employee is employed as a dock worker for the first six hours and then is assigned to drive a three-axle truck for the remainder of the day, the time engaged in driving the truck would specifically not be covered by the terms of the IWC Order because the worker would be regulated either by the provisions of 49 C.F.R. § 395.1 to 395.13 or 13 C.C.R. § 1200.

Under these circumstances, the work performed in the specifically exempt category would not, for purposes of state overtime requirements, be counted either as daily overtime or for purposes of calculating the weekly overtime.

We must caution you that this would only apply to specifically mentioned categories of workers who are working in occupations which would normally be non-exempt except for the specific language of the IWC Orders. An employer may not, for instance, escape his or her overtime obligation by working an individual in a non-exempt position for six hours per day and then assigning the worker to an exempt (managerial, administrative or professional) position for an additional four hours per day. The exempt or non-exempt status of the worker in those situations would be measured by the amount of work in the given category and the non-exempt status would arise only if the worker was primarily engaged in work which was exempt. If the worker was engaged in non-exempt work more than 50% of the time, all of the time would be considered non-exempt and the overtime premium would apply.

I hope this adequately addresses the issues you raised in your letter of February 18th. If you have any further questions please contact the DLSE District office in Bakersfield.

Yours truly,

H. THOMAS CADELL, JR.
Chief Counsel

c.c. Victoria Bradshaw
Barry Davis, Sr. Deputy
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