STATE OF CALIFORNIA PETE WILSON, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
LEGAL SECTION
45 Fremont Street, Suite 3220
San Francisco, CA 94105
(415) 975-2060

H. THOMAS CADELL, JR., *Chief Counsel*

December 3, 1997

Robert J. Nobile, Esq.
Winston & Strawn
200 Park Avenue
New York, NY 10166

Re: **Fluctuating Workweek In California**

Dear Mr. Nobile:

This is intended to reply to your letter of November 27, 1997, regarding the use of the fluctuating workweek method of payment in California.

As you note, effective January 1, 1998, some - but not all - of the California Industrial Welfare Commission Orders will no longer require overtime after eight hours in a workday. Orders 1, 4, 5, 7 and 9 have been amended so that they no longer require the payment of a premium rate for work in excess of eight hours in a workday. All of the other Orders, however, continue to require the payment of a premium for daily[1] overtime.

This change in the overtime requirements does not, however, affect the enforcement policy of the Division of Labor Standards Enforcement which does not allow the use of the fluctuating workweek method. The Division's policy in this regard was tested in the case of *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)

The *Skyline* court discussed the role of the eight-hour day in the analysis of the law and reached the conclusion that the inclusion of the eight-hour day was inconsistent with the federal

[1]Order 14 covering the agricultural occupations requires premium after 10 hours in a workday.

RE-HTCINIG:

fluctuating workweek concept; however, the court also reached the conclusion that the fluctuating workweek was inconsistent with the California law because, unlike the federal Fair Labor Standards Act which requires a premium for overtime work in order to compensate employees for the "strain of working long hours", the California law "relies on the imposition of a premium or penalty pay for overtime work to regulate maximum hours consistent with the health and welfare of employees..." (*Skyline*, 165 Cal.App.3d at 249, emphasis added) This remains a fact.

The *Skyline* court chided the plaintiffs in the decision, stating that they "fail to recognize one of the primary functions under state law of the requirement of overtime pay." The *Skyline* court noted that "Premium pay for overtime is the primary device for enforcing limitations on the maximum hours of work" (citing *Calif. Mfrs. Assn. v. IWC* (1980) 109 Cal.App.3d 95, 111) and citing from the California Supreme Court in *IWC v. Superior Court, supra*, the court pointed out that remedial legislation such as the Orders "should be liberally construed to promote the general object sought to be accomplished." *Id.*, at 250.

A fluctuating workweek formula would provide that an employee who was to receive $400.00 per week would receive an overtime premium calculated by dividing the total number of hours worked into the $400.00 wage to determine the "regular rate of pay", and dividing that dividend by two to determine the half-time rate to be paid for all hours over the limitation established by the Orders after which overtime "premium" must be paid. The longer the employee works, the less the "premium" pay per hour he or she is due. Far from being a "penalty" to the employer, it is nothing less than an incentive to the employer to work individuals overtime since the longer the employee works, the less of a premium is owed for the overtime work. An example makes the point clearer. Assume that an employee is to receive $400.00 per week on a fluctuating workweek plan for answering the phone:

(a) If the employee works 50 hours in a week his regular rate of pay is $8.00 per hour ($400 ÷ 50); he is entitled to one-half of that hourly rate for all hours in excess of 40 ($4.00); and, thus is entitled to a total of $440.00 for the week's work.

(b) If the employee works 60 hours in a week his regular rate of pay is $6.67 per hour ($400 ÷ 60); he is entitled to one-half of that hourly rate for all hours in excess of 40 ($3.33); and, thus is entitled to a total of $466.67 for the week's work.

(c) If the employee works 70 hours in a week his regular rate of pay is $5.71[2] per hour ($400 ÷ 70); he is entitled to one-half of that hourly rate for all hours in excess of 40 ($2.86); and, thus is entitled to a total of $485.71 for the week's work.

In other words, the employee would receive $40.00 for working the first ten hours ($4.00 for each overtime hour); but only $66.67 for working twenty hours ($3.33 for each overtime hour), and even less - $85.71 ($2.86 for each overtime hour) - for working thirty hours. The employee answering the telephone is not given the opportunity to increase his base wage (as is the case with commissioned or piece rate workers) but is simply paid a lesser rate per hour by the addition of each hour worked because the employer has chosen to calculate his overtime premium on the fluctuating workweek basis.

Given the intent of the IWC as announced by the California courts, coupled with the fact that a fluctuating workweek formula provides an ever-decreasing regular rate of pay, it is clear that California courts would continue to recognize that the fluctuating workweek formula does not comport with the intent of the IWC. The IWC intended to adopt the 40-hour workweek "consistent with the FLSA" (Statement of Basis, Orders 1, 4, 5, 7 and 9). Obviously, the Commission's use of this term was to emphasize that the FLSA only provides overtime after forty hours in a week. The statement does not address calculation of the overtime. Had the IWC intended to make the overtime calculation consistent with the FLSA they certainly would not have left intact the many definitions contained in the Orders which make such calculation consistencies impossible.

More important, had the IWC intended that the DLSE was to adopt the fluctuating workweek method of calculation, it certainly would have told the DLSE. As the Commission states in its Statement of Basis, the Commission consulted with the Division of Labor Standards Enforcement in an effort to eliminate contradictions and promote clarity on the issue of alternative workweeks. Since the Commission is assumed to know the enforcement position of the DLSE and, so was aware of the DLSE policy in regard to the fluctuating workweek, it should be evident that if they intended to adopt the federal regulation, the Commission would have directed DLSE to do so.

---

[2]Of course, after March 1, 1998, the California "Living Wage" initiative passed by the California voters in 1996, will require that the worker receive $5.75 per hour so that would be the lowest the "regular rate of pay" could be calculated.

There is no record of any such directive and the Statement of Basis adopted by the Commission does not address the question.

In your letter of November 27, 1997, you also ask for advice concerning the extent of the coverage of section 3(B) of Wage Order 4-98. The section excludes from overtime requirements "any employee whose earnings exceed one and one-half times the minimum wage if more than one-half of that employee's compensation represents commissions."

The case of *Keyes Motors v. DLSE* (1987) 197 Cal.App.3d 557; 242 Cal.Rptr. 873, defined the term commission for purposes of the IWC Orders and held that (1) the employees must be involved principally in selling a product or service, not making the product or rendering the service; (2) the amount of their compensation must be a percent of the price of the product or service.

Thank you for your interest in California labor law. I hope this adequately addresses the questions you asked in your letter of November 27th.

Yours truly,

H. Thomas Cadell, Jr.

H. THOMAS CADELL, JR.
Chief Counsel

c.c. Jose Millan, State Labor Commissioner
Nance Steffen, Assistant Labor Commissioner
Greg Rupp, Assistant Labor Commissioner
Tom Grogan, Assistant Labor Commissioner