STATE OF CALIFORNIA GRAY DAVIS, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
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H. THOMAS CADELL, *Of Counsel*

January 29, 2003

Richard M. Albert
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Los Angeles, CA 90067-3021

Re: **Calculation Of Regular Rate Of Pay** (00261)

Dear Mr. Albert:

Your letter to Arthur Lujan, State Labor Commissioner, regarding the above-referenced subject has been assigned to this office for response.

In you letter you state that your client, a hospital in California, "wishes to provide additional compensation to employee to 'make them whole' when they are 'called off' scheduled work because of low census or other patient care related reasons." In order to accomplish this, your client proposes the following:

> Assuming that an individual typically works three (3) twelve (12) hour shifts per week at a base hourly rate of $20.00 per hour. In a typical workweek, the worker would work 24 straight time hours at $20.00 per hour ($480.00) and 12 overtime hours at time and one-half (i.e., $30.00 per hour) ($360.00). The employee would earn a total of $840.00 for the above workweek.
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> In order, your argument states, to keep the employees whole and to compensate those who are provided less hours to work than their normally scheduled hours of work, your client proposes to calculate wages due employees by utilizing the "blended rate" rather than the base hourly rate. According to your argument, from a calculation standpoint only, time and one-half would not be provided for scheduled hours worked over eight (8) in a day since overtime is in essence already calculated into the blended rate. The blended rate is calculated, in your example, by dividing the 36 regular hours worked into the total sum earned in the week. You arrive at

an hourly rate of $23.33 using this method.

You provide an example to illustrate your client's proposal:

> Assume the employee is sent home early on his-her third shift of the week, and only works four (4) hours that day compared to the usual twelve. Compensation due under the current methodology would be: 20 hours at $20.00 per hour ($400.00) and eight hours at $30.00 per hour ($240.00) for a total of $640.00.
>
> On the other hand, as you point out, in this particular circumstance, using your proposed "blended rate" the worker would be entitled to 28 hours at $23.33 (the blended rate) per hour for a total of $653.24 – a total of $13.24 more for the shortened workweek.

The "methodology" you suggest is nothing more than additional wages paid to an employee for working a short shift. This is recognized by the U.S. Department of Labor's Regulations which you cite in your letter (29 C.F.R. 778.218(b)[1]). It is similar to the "reporting time" pay wage required in the IWC Orders; but, unlike the Reporting Time provision, the differential is based on a calculation rather than a set amount. The Reporting Time wage which must be paid is a minimum requirement for being called into work. Thus, under California law, if an employee who is scheduled for or usually works an eight-hour shift is sent home after only three hours, the employer is still required to compensate the employee for one-half of the usual or scheduled shift (i.e., four hours) at the employee's regular rate of pay.

As we understand your proposal, your client will simply use the calculation you refer to as the "blended rate method" to calculate a bonus to be paid to hourly workers who are called into work and not provided with the full shift of work. We need to emphasize that the California law requires that at least one half of the scheduled or usual shift be paid at the employee's regular

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[1]We must point out that the C.F.R. section you cite (778.218) is based specifically on the provisions of 29 U.S.C. § 207(e)(2). DLSE takes the position that the failure of the IWC to define the term "regular rate" indicates the Commission's intent that in determining what payments are to be included in or excluded from the calculation of the regular rate of pay, California will adhere to the standards adopted by the U.S. Department of Labor to the extent that those standards are consistent with California law. (See DLSE Manual, Section 49)

rate of pay[2].

You ask the DLSE to address two specific questions based on the facts you have submitted:

1. Does the difference between the base hourly rate and the blended rate constitute "pay for idle hours" under 29 C.F.R. § 778.218?

As pointed out, above, while the federal regulation you cite is based on specific language contained in the Fair Labor Standards Act which does not appear in California law, for enforcement purposes, DLSE adopts the federal regulations dealing with the provisions of 29 U.S.C. § 207(e) to the extent that those regulations are consistent with California law. As of this date no inconsistency with California law has been brought to our attention in regard to the provisions of the regulation.

The payment of the bonus amount which would be calculated as the difference between the wages due based on the overtime worked at the "regular rate of pay" and the sum you describe as a "blended rate" as set out in your example, need not be calculated into the regular rate of pay. This is so because, under the facts you present, the "blended rate" is simply a method to calculate a bonus paid to hourly employees for periods of time when the employer has not provided the usual or scheduled hours. The differential you describe may be added to the regular wages due the employees as a lump sum "idle hours premium" which is exempt from the regular rate calculations.

We must caution that the provisions of 29 C.F.R. § 778.218 define the limitations on the exclusion of these payments from the regular rate of pay calculations. The type of absence envisioned is "infrequent or sporadic or unpredictable." We also must mention that we do not, by this opinion, adopt the term "blended rate" which you use as applicable to the situation you describe. A "blended rate" is one used when different hourly rates are paid by the same employer to an employee for differing types of work.

We hope this adequately addresses the issues raised in your letter. Thank you for your interest in California labor law.

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[2]You should note that consistent with this, any reporting time pay, extra pay for failure to provide a meal period or a break or payment received for split shifts are, in the view of the DLSE, in the nature of premiums required by law and not received for performance of a duty. Thus, these payments are not included in computing the regular rate of pay. (See DLSE Manual, 49-2 and 49-3)

Yours truly,

H. THOMAS CADELL, JR.
Attorney for the Labor Commissioner

c.c. Arthur Lujan, State Labor Commissioner
Tom Grogan, Chief Deputy Labor Commissioner
Anne Stevason, Chief Counsel
Assistant Labor Commissioners
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