

**STATEMENT AS TO THE BASIS FOR  
WAGE ORDER NO. 16 REGARDING  
CERTAIN ON-SITE OCCUPATIONS  
IN THE CONSTRUCTION, DRILLING,  
MINING, AND LOGGING INDUSTRIES**

**TAKE NOTICE** that the Industrial Welfare Commission of the State of California ("IWC"), in accordance with the authority vested in it by the California Constitution, Article 14, Section 1, as well as Labor Code §§ 500-558, and 1171-1204, has promulgated a new, comprehensive wage order for employees working in on-site occupations in construction, drilling, mining and logging. Prior to January 1, 1999, employees in these occupations were not included, but were not specifically exempt from, the IWC's wage orders. However, pursuant to the "Eight-Hour-Day Restoration and Workplace Flexibility Act," Stats. 1999, ch. 134 (commonly referred to as "AB 60"), the Legislature reaffirmed the State's commitment to the eight-hour workday standard and daily overtime, and authorized workers in this State who are not specifically exempt by statute or regulation from the IWC's wage orders to adopt regularly scheduled alternative work days and weeks. The Legislature intended the provisions of AB 60 to apply to all workers. Thus held the IWC public meetings and investigative hearings during which it received public comment on how to implement of AB 60.

On January 28, 2000, the IWC adopted the Interim Wage Order - 2000, which became effective March 1, 2000. The Interim Wage Order expressly states that any industry or occupation not previously covered by, and all employees not specifically exempted in, the IWC's Wage Orders in effect in 1997, or otherwise exempted by law, are covered by that order. In particular, it cites employee work activities in on-site construction, drilling, mining, and logging as being covered. However, the Interim Wage Order is limited in scope to the requirements of AB 60 and does not include all of the regulations generally found in the IWC's other hours and working conditions orders. In order to determine whether a separate and more comprehensive wage order should be promulgated for construction, drilling, mining, and logging, and at the request of both employer and employee representatives, the IWC also voted on January 28, 2000 to convene a wage board based on the criteria set forth in Labor Code § 1178.

Following its receipt of the report of the wage board, the IWC held additional public meetings and public hearings pursuant to Labor Code §§ 1178.5(c) and 1181 during which it considered the recommendations of the wage board, proposed new regulations for a new wage order for occupations in on-site construction, drilling, mining, and logging, and received testimony and written materials regarding the proposed regulations. The proposed regulations included many of the sections generally found in Wage Orders 1 through 15, as well as language amending those wage orders that the IWC adopted on June 30, 2000 to comply with AB 60. The public hearings on the proposed regulations were held in September and October 2000.

The IWC adopted Wage Order 16 on October 23, 2000. It will become effective January 1, 2001. The IWC considered all correspondence, verbal presentations, and other written materials that were submitted prior to the adoption of the Order. In addition, by the October 23rd hearing on the regulations regarding these occupations, employer and employee groups had agreed to compromise language on many provisions and requested that the IWC to accept the proposed compromise. The IWC did so. The IWC submits the following statement as to the basis for the Order and notes that, generally, there is no discussion of those parts of the Order that are not otherwise different from amended Wage Orders 1 through 15, because the IWC is continuing in effect regulations that have previously become a part of the standard working conditions of employees in this State.

**1. APPLICABILITY OF ORDER**

This order applies to all workers in the following on-site occupations: 1) construction, including, but not limited to, work involving alteration, demolition, building, excavating, renovation, remodeling, maintenance, improvement, and repair work, and work for which a contractor's license is required by the California Business

and Professions Code Division 3, Chapter 9, §§ 7025 et seq.; 2) mining (other than those employees covered by Labor Code § 750 et seq.), including all work required to mine and/or establish pits, quarries, and surface or underground mines for the purposes of exploration, or extraction of nonmetallic minerals and ores, coal, and building materials such as stone and gravel; 3) drilling, including but not limited to, all work required to drill, establish, repair, and rework wells for the exploration or extraction of oil, gas, or water resources; and 4) logging work for which a timber operator's license is required pursuant to California Public Resources Code §§ 4571 through 4586, whether said workers are paid on a time, piece rate, commission, or other basis. The IWC notes that this Order is intended to cover construction workers regardless of whether or not their employers are required to possess a contractor's license. The IWC further notes that section 3 of this Order does not apply to those mining employees subject to Labor Code § 750, which regulates the hours and working conditions of employees working in underground mines, smelters, and plants for the extraction and reduction or refining of metals and metallic ores. In addition, this Order supersedes any industry or occupational order for those employees employed in occupations covered by this Order.

Generally, the Order provides, in part, that employees employed in administrative, executive, and professional capacities are exempt from Sections 3 through 12. According to the provisions of Labor Code § 515, the criteria that must be satisfied in order to obtain an exemption from overtime pay requirements based on the fact that an individual is an administrative, executive, or professional employee, are that the particular employee must be primarily engaged in duties which meet the test for the exemption, and earn a monthly salary of no less than two times the state minimum wage for full time employment. Labor Code § 515(e) defines "primarily" as "more than one-half of an employee's work time," and § 515(c) defines "full-time employment" as 40 hours per week.

Thus the Legislature has codified the longstanding IWC regulatory requirement that an employee must spend more than 50% of his or her work time engaged in exempt activity in order to be exempt from receiving overtime pay. The IWC notes that this California "quantitative test" continues to be different from and more protective of employees than, the federal "qualitative" or "primary duty" test. Unlike the California standard, federal law allows an employee that is found to have the "primary duty" of an administrator, executive, or professional to be exempt from overtime pay even though that employee spends most of his or her work time doing nonexempt work. Under California law, one must look to the actual tasks performed by an employee in order to determine whether that employee is exempt. In addition, the statutory threshold for monthly employee remuneration has substantially increased from the amounts set forth in prior IWC wage orders, and that remuneration must be received in the form of a salary.

While the IWC was pursuing the usual statutory course for promulgating regulations with regard to the employees covered by this Order, it was also on a fast track for meeting the requirements of AB 60, including making a determination of the duties which meet the test of the administrative, executive, and professional exemption. In accordance with the mandate of Labor Code § 515(a) and the expedited promulgation process authorized by § 517, the IWC conducted a review of duties. The IWC held public meetings and hearings, and received verbal and written public comment in the form of testimony, correspondence, and legal argument regarding various proposals for exempt duties. The bulk of the information came from employers and employees involved in retail, restaurant, and fast food service businesses, as well as representatives of these groups. The IWC also received substantial comment from the legal community. The chief concern of all of these groups related to the distinction between executive managerial employees and nonexempt employees. Employees stated that it was common to have the title of a manager and not be paid overtime, yet perform many of the same tasks as other nonexempt employees during most of the workday. Many employers asked for specific action by the IWC, including the classification of work in settings, such as retail stores, where managers may spend a significant amount of time on the retail floor in the course of managing the operation and directing and supervising the staff. They argued that an employee should not lose his or her exempt manager status merely because he or she sometimes may have to chip in and perform nonexempt work. Attorneys representing employers argued that California should move toward the federal regulatory standards. Other attorneys representing employees reminded the IWC that use of federal regulations might conflict with

California's more protective statutory requirement that, in order to be exempt, employees must be "primarily engaged" in exempt work. The IWC determined that the way to harmonize these various and competing concerns was to focus on identifying the federal regulations that could be used to describe managerial duties within the meaning of California law. The purpose of identifying and referring to such regulations is to more clearly delineate managerial duties that meet the test of the exemption and to promote consistent enforcement practices.

After digesting all the information received in its review, the IWC chose to adopt regulations that substantially conform to current guidelines in the enforcement of IWC orders, whereby certain Fair Labor Standards Act regulations (Title 29 C.F.R. Part 541) have been used, or where they have been adapted to eliminate provisions that are inconsistent with the more protective provisions of California law. The IWC intends the regulations in its orders to provide clarity regarding the federal regulations that can be used describe the duties that meet the test of the exemption under California law, as well as to promote uniformity of enforcement. The IWC deems only those federal regulations specifically cited in this Order, and in effect at the time of its promulgation, to apply in defining exempt duties under California law.

Executive Exemption. The IWC derived the duties which meet the test for the executive exemption from language in the federal regulation 29 C.F.R. § 541.1(a)-(c), with one important exception. The reference in 29 C.F.R. § 541.1(a) to the phrase "primary duty" is omitted because, as discussed above, that phrase refers to a federal test that provides less protection to employees. Subsection A (3) refers to the federal regulations, 29 C.F.R. §§ 541.102, 541.104-541.106, 541.108, 541.109, 541.111, 541.115, and 541.116, that may be used to describe exempt duties under California law. Included in these regulations is one that describes work that is "directly and closely related" to exempt work. (29 C.F.R. § 541.108.) For example, time spent by a manager using a computer to prepare a management report should be classified as exempt time where use of the computer is a means for carrying out the exempt task.

The IWC relies on the California Supreme Court's decision in *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 801-802, for determining whether an employee is primarily engaged in exempt duties. Although that case involved the exemption for outside salespersons, the determination of whether an employee is an outside salesperson is also quantitative: the employee must regularly spend more than half of his or her working time engaged in sales activities outside the workplace. In remanding the case back to the Court of Appeal, the California Supreme Court offered the following advice:

"Having recognized California's distinctive quantitative approach to determining which employees are outside salespersons, we must then address an issue implicitly raised by the parties that caused some confusion in the trial court and the Court of Appeal: Is the number of hours worked in sales-related activities to be determined by the number of hours that the employer, according to its job description or its estimate, claims the employee should be working in sales, or should it be determined by the actual average hours the employee spent on sales activity? The logic inherent in the IWC's quantitative definition of outside salesperson dictates that neither alternative would be wholly satisfactory. On the one hand, if hours worked on sales were determined through an employer's job description, then the employer could make an employee exempt from overtime laws solely by fashioning an idealized job description that had little basis in reality. On the other hand, an employee who is supposed to be engaged in sales activities during most of his working hours and falls below the 50 percent mark due to his own substandard performance should not thereby be able to evade a valid exemption. A trial court, in determining whether the employee is an outside salesperson, must steer clear of these two pitfalls by inquiring into the realistic requirements of the job. In so doing, the court should consider, first and foremost, how the employee actually spends his or her time. But the trial court should also consider whether the employee's practice diverges from the employer's realistic expectations, whether there was any concrete expression of employer displeasure over an employee's substandard performance, and whether these expressions were

themselves realistic given the actual overall requirements of the job."

The IWC does not intend to modify or limit the California Supreme Court's statements or its decision.

Administrative Exemption. The IWC similarly derived the duties that meet the test for the administrative exemption from language in the federal regulation 29 C.F.R. § 541.2(a)-(c), with the exception of the "primary duty" phrase. Title 29 C.F.R. § 541.2(a)(2), refers to school administration, but the IWC does not intend to establish a different test with regard to school administration, or to affect the professional exemption as it relates to teachers, or to otherwise change existing law. Subsection 1(A) sets forth the California "primarily engaged" requirement. Subsection 1(A)(3) also sets forth the federal regulations, 29 C.F.R. §§ 541.201, 541.205, 541.208, and 541.210, that may be used to describe exempt duties under State law. These regulations include types of administrative employees and categories of administrative work. The IWC again relies on the California Supreme Court's decision in *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th at 801-802, quoted above, for determining whether an employee is primarily engaged in exempt duties. In citing that language, the IWC intends to provide some guidance in the enforcement of its regulations, and does not intend to modify or limit the California Supreme Court's statements or its decision.

Professional Exemption. The IWC developed the duties that meet the test for the professional exemption from the list of recognized professions contained in prior wage orders as well as from Labor Code §§ 515(f) and 1186. The recognized professions are law, medicine, dentistry, optometry, architecture, engineering, accounting, and teaching. Although registered nurses and pharmacists were previously included in the list of recognized professionals, they are prevented by statute by statute from being considered to be exempt as professionals. Teaching continues to require a certificate from the Commission for Teacher Preparation and Licensing, or teaching in an accredited college or university, to be eligible for the professional exemption.

The new regulations in this section of the IWC's wage orders regarding the administrative, executive, and professional exemption are consistent with existing law and enforcement practices.

This section further provides that outside salespersons are exempt from the provisions of the IWC's wage orders. Pursuant to the requirements of Labor Code § 517(d), the IWC conducted a review of the wages, hours, and working conditions of outside salespersons and received testimony and correspondence on these matters. Some witnesses urged the IWC adopt a more expansive definition of an outside salesperson. Others asked the IWC to define more clearly those activities that are not "sales related." After considering proposals by both employers and employees, the IWC determined that it would not change its longstanding definition of "outside salesperson." (See *Ramirez v. Yosemite Water Co.*, 20 Cal.4th 785.) However, pursuant to a two-thirds (2/3) vote of the wage board, the IWC adopted a definition of "outside salesperson" for Order 16 which further narrowed the exemption to explicitly exclude any employee who makes deliveries or service calls for the purpose of installing, replacing, repairing, removing, or servicing a product. The IWC notes that this exception is to be construed narrowly, as a determination that an employee is an outside salesperson deprives that employee of the protections of the wage orders and many other provisions of the Labor Code.

Consistent with the IWC's other wage orders, the provisions of this Order do not apply to any individual who is the parent, spouse, child, or legally adopted child of the employer.

A recent legislative enactment provides an exemption from the provisions of this Order to any individual participating in a National Service Program, such as AmeriCorps, NCCC, and Senior Corps, that carry out services with the assistance of grants from the Corporation for National and Community Service within the meaning of Title 42, United States Code, § 12571. (See Stats. 2000, ch. 365, amending Labor Code § 1171.)

The IWC received no compelling evidence to warrant including any other provisions to this section at this time.

## **2. DEFINITIONS**

Consistent with its other orders the IWC included definitions for the following terms: "Commission", "Division", "Alternative Workweek Schedule", "Emergency", "Employee", "Employer", "Employ", "Hours Worked", "Minor", "Outside Salesperson", "Primarily", "Split Shift", "Wages", "Workday or day", and "Workweek or week". As noted above, the definition of "Outside Salesperson" was modified to limit its applicability.

Pursuant to a two-thirds (2/3) vote of the wage board, the term "employer" in Wage Order 16 includes persons or entities that "exercise control over wage, hours, and/or working conditions." This definition was specifically intended to include both temporary employment agencies and employers who contract with such agencies to obtain employees within the definition of "employer".

Pursuant to a two-thirds (2/3) vote of the wage board, the term "alternative workweek" in Wage Order 16 includes language which requires that any alternative workweek proposal must be made by an employer "who has control over wages, hours, and working conditions." This was meant to limit access to alternative workweek schedules to those employers who directly control wages, hours, and working conditions and to exclude employers, such as temporary employment agencies, who merely supply labor from instituting alternative workweeks. Similar language was added to Section 3(B)(1) and 3(B)(2).

Pursuant to a two-thirds (2/3) vote of the wage board, the term "split shift" was defined in Wage Order 16. However, the wage board also failed to recommend and the IWC did not adopt language that exists in other wage orders creating premium pay requirements for employees who are required to work split shifts. Therefore, this definition has no operative legal effect.

During public meetings and hearings regarding AB 60, the IWC received testimony from employee and employer groups requesting clarification regarding what was included in the definitions of a workday and a workweek. There was also confusion regarding the definition of an alternative workweek. The IWC adopted the following language into the Interim Wage Order - 2000 and Wage Orders 1-13, 15, and now Order 16: 1) "Workday" and "day" mean any consecutive 24-hour period beginning at the same time each calendar day; 2) "Workweek" and "week" mean any seven (7) consecutive days, starting with the same calendar day each week. "Workweek" is a fixed and regularly recurring period of 168 hours, seven (7) consecutive 24-hour periods; 3) An "Alternative workweek schedule" means any regularly scheduled workweek requiring an employee to work more than eight (8) hours in a 24-hour period. The definitions provided in this section for "workday" and "day," "workweek" and "week," and "alternative workweek schedule" are identical to the definitions provided in Labor Code § 500.

Pursuant to a two-thirds (2/3) vote of the wage board, the IWC included additional definitions for "Work Unit", which means all nonexempt employees of a single employer within a given craft who share a common work site, and may consist of an individual employee as long as the criteria for an identifiable work unit in this subsection is met, and "Regularly Scheduled Workweek", which means a schedule where the length of the shift and the number of days of work are predesignated pursuant to an alternative workweek schedule. "Shift" is defined in other wage orders as designated hours of work by an employee, with a designated beginning and quitting time.

"Shift" is defined in other wage orders as designated hours of work by an employee, with a designated beginning and quitting time. "The definitions recommended by the Wage Board by a two-thirds (2/3) vote and adopted by the IWC did not include a definition of "shift" as in the case of all other wage orders. This omission was apparently inadvertent and does not reflect an intention on the part of the IWC to adopt a different definition of "shift" than exists in all other wage orders. Therefore, in interpreting the meaning of the term

"shift", it is appropriate to look to the definition as it appears in other wage orders for guidance.

The IWC received no compelling evidence to warrant including any other provisions to this section at this time.

### **3. HOURS AND DAYS OF WORK**

#### **DAILY OVERTIME - GENERAL PROVISIONS**

This portion of Section 3 states the daily overtime provisions mandated by AB 60. This section clarifies that premium pay for the "seventh day of work in any one workweek" refers to the seventh consecutive day of work in a workweek. The IWC received testimony regarding the general provisions of overtime as mandated by AB 60. Both employers and employees testified that they were confused regarding the meaning of the "seventh day of work" in the calculation of premium pay. The time-and-a-half provision in Labor Code §510(a) refers to "seventh day of a workweek," but the double time provision refers to "seventh day of a workweek." This slight difference creates the confusion as to whether AB 60 requires double time pay for any work performed in excess of eight hours on the seventh day of the workweek, even if the employee has not worked on all seven days of that workweek. The IWC found that the purpose of the seventh day premium is to provide extra compensation to workers who are denied the opportunity to have a day off during the workweek. Following a literal interpretation of the double time provision would illogically reward someone who may only be scheduled to work one day, and that day fortuitously happens to be the seventh day of the employer's workweek. To clarify this matter, the IWC inserted the term "consecutive" to specify that an employee must work on all seven days in a designated workweek to receive overtime compensation for the seventh day of work in a workweek.

In determining overtime compensation for nonexempt full-time salaried employees, this section also restates Labor Code § 515 (d), which clarifies that the rate of 1/40th of the employee's weekly salary should be used in the computation.

#### **ALTERNATIVE WORKWEEKS SCHEDULES**

This portion of section 3 provides the general guidelines for the adoption of employer proposed alternative workweek schedules provided by Labor Code § 511. Section 511 has specific provisions for adopting alternative workweek schedules and sets the standards for determining the overtime compensation for employees who adopt such schedules.

Generally, an employer does not violate the daily overtime provisions by properly instituting an alternative workweek schedule of up to ten (10) hours per day within a forty (40) hour workweek. Instead, once employees have properly adopted an alternative workweek schedule, an employer must pay one and one-half (1½) times the employees' regular rate of pay for all work performed in any workday beyond that alternative workweek of up to twelve (12) hours a day or beyond forty (40) hours per week, and double the employees' regular rate of pay for all work performed in excess of twelve (12) hours per day and any work in excess of eight (8) hours on those days worked beyond the adopted alternative workweek schedule. However, in no event can there be an alternative workweek in construction occupations that provides for more than eight (8) hours of work in a day on a public works contract in violation of Labor Code §§ 1810-1815.

Pursuant to a 2/3 (two-thirds) vote of the Wage Board, Order 16 also provides for an alternative workweek schedule of up to twelve (12) hours in a workday within a forty (40) hour workweek for employees working in offshore oil and gas production, drilling, and servicing occupations, as well as for employees working in onshore oil and gas separation occupations directly servicing offshore operations. The IWC received testimony and correspondence from employees, employers, and representatives in the drilling industry regarding alternative workweeks. Citing personal preference, family care, commuter traffic, transportation to and from

offshore rigs, and mental and physical well-being, the vast majority of testimony urged the adoption of an alternative workweek permitting 12-hour days without the payment of overtime. Based on all the information it received and consistent with the two-thirds (2/3) vote of the wage board, the IWC determined that, given their unique working conditions, employees working in offshore oil and gas production, drilling, and servicing occupations, as well as for employees working in onshore oil and gas separation occupations directly servicing offshore operations should have the option to adopt alternative workweek schedules with work days of more than 10 but not exceeding 12 hours. The IWC notes that workers employed in occupations "directly servicing" offshore drilling facilities do not include employees working in oil refineries or other manufacturing facilities covered by other wage orders. Employees working pursuant to such an alternative workweek schedule are to be paid an overtime rate of compensation of no less than two (2) times their regular rate of pay in excess of the regularly scheduled hours established by the alternative workweek agreement, and for one and one-half (1½) times their regular rate of pay for any work in excess of forty (40) hours per week. The other provisions of this section, including those governing elections, shall apply to these occupations.

The IWC further clarified that hours considered in the calculation of daily overtime pay are not counted in the determination of 40-hour workweek overtime compensation. Basically, there is no "pyramiding" of separate forms of overtime pay for the same hours worked. Once an hour worked is paid at the applicable daily overtime rate, that same hour cannot be used in the computation of forty hours for the purposes of weekly overtime pay.

After receiving testimony and correspondence from employees who sought predictability in work schedules, and employers who sought flexibility in work schedules, the IWC concluded that an employer proposal for an alternative workweek schedule must designate the number of days in the workweek and number of hours in the work shift. The employer does not need to specify the actual days to be worked within that workweek prior to the alternative workweek election. The phrase "regularly scheduled," as set forth in Labor Code § 511(a), means that the employer must schedule the actual work days and the starting and ending time of the shift in advance, providing the employees with reasonable notice of any changes, wherein said changes, if occasional, shall not result in a loss of the overtime exemption. However, Labor Code § 511(a) does not authorize an employer to create a system of "on-call" employment in which the days and hours of work are subject to continual changes, depriving employees of a predictable work schedule.

The IWC received several inquiries concerning flexibility for employees switching alternative workweek options after an election is held. The IWC concluded that upon the approval of the employer, an employee may move from one menu option to another. Additionally, the "menu of options" provisions provided in Labor Code § 511(a) provides that an employer may propose "a menu of work schedule options, from which each employee in the unit would be entitled to choose. Such choice may be subject to reasonable nondiscriminatory conditions, such as a seniority-based system or a system based on random selection for selection of limited alternative schedules, provided that any limitation imposed upon an employee's ability to choose an alternative schedule is approved as part of the 2/3 vote of the work unit. If the employer's business needs preclude allowing its employees to freely choose among work schedule options, the employer should not propose a menu of work schedule options. Instead, the employer may be able to propose more than one alternative workweek schedule by dividing the workforce into separate work units, and proposing a different alternative workweek schedule for each unit. This method would inform each employee of exactly which schedule would be adopted by the election. In order to provide flexibility in accommodating the personal needs of employees, the IWC further clarified that employers may grant employee requests to switch same-length shifts on an occasional basis.

Based on some of the testimony the IWC received regarding alternative workweek schedules, a question arose as to whether an employer who adopted an alternative workweek arrangement of no greater than ten (10) hours per day could lawfully require employees to work beyond those scheduled hours on a recurring basis with the payment of appropriate overtime compensation. Labor Code §511(a) provides that employees may elect to establish a "regularly scheduled alternative workweek" that authorizes work by the affected employees for no longer than 10 hours within a 40-hour workweek. However, Labor Code § 511(b) provides that an employee

working beyond the hours established by the alternative workweek agreement shall be entitled to overtime compensation. The IWC believes that, reading these two provisions of the Labor Code together, an employer who requires an employee to work beyond the number of hours established by the alternative workweek agreement, even if such overtime hours are worked on a recurring basis, does not violate the law if the appropriate overtime compensation is paid.

The IWC has received questions regarding how part-time employees working in employee units that have adopted alternative workweeks should be paid overtime. It is the IWC's continued intention that a part-time employee be paid overtime in the same manner as other employees in the work unit. Thus if the employee work unit has adopted an alternative work week schedule of four ten-hour days, a part-time employee working two ten-hour days would not be paid overtime after eight hours; rather, overtime would be paid after working the ten-hour daily shift.

This section echoes Labor Code §511(c), which prohibits employers from reducing an employee's regular rate of hourly pay as the result of the adoption, repeal, or nullification of an alternative workweek schedule. Labor Code §511(c) only applies to reductions in the regular rate of pay that are instituted after January 1, 2000, the effective date of AB 60.

This section also reflects the requirements of Labor Code § 511(d) regarding the required reasonable accommodation of employees who are unable to work alternative workweek schedules that are established through election, the permissible accommodation of employees hired after the election who are unable to work the alternative workweek schedules established through election, and the required exploration of "any available reasonable alternative means" of accommodation of the religious belief of an affected employee that conflicts with the alternative workweek schedule established through election. In addition, this section states the requirements for the employer reporting of alternative workweek election results mandated by Labor Code §511 (e), as well as the provisions in Labor Code §554 concerning the accumulation of days of rest. The requirement of one day's rest in seven is mandated by Labor Code §§ 551 and 552.

## ELECTION PROCEDURES

Labor Code 517(a) directed the IWC to adopt regulations before July 1, 2000 regarding "the conduct of employee workweek elections, procedures for employees to petition for and obtain elections to repeal alternative workweek schedules, procedures for implementation of those schedules, conditions under which an adopted alternative workweek schedule can be repealed by the employer, employee disclosures, designations of work, and the processing of workweek election petitions." In accordance with this mandate, this section also lays out the election procedures for the adoption and repeal of alternative workweek schedules. Labor Code § 511(e) requires employers to report the results of any election to the Division of Labor Statistics and Research.

Based on testimony it received during public meetings and hearings, as well as its consideration of proposals of election procedures that were submitted, the IWC determined its wage orders should have more extensive procedures and safeguards than included in the Interim Wage Order - 2000. The language adopted reiterates the two-thirds (2/3) vote before the performance of work and secret ballot election requirements found in Labor Code § 511(a).

However, the adopted language also sets up employee disclosure guidelines and mandates that an employer must provide disclosure in a non-English language if at least five (5) percent of the affected employees primarily speak that non-English language. Written disclosure and at least one meeting must be held at least fourteen (14) days prior to the secret ballot vote. This 14-day notice provision was previously applicable only to the health care industry. Failure to abide by these employee disclosure requirements will render the election null and void.

In addition, Wage Order election procedures require employers to hold elections at the work site of the affected employees, specify that employers must bear any election costs, and authorizes the Labor Commissioner to investigate employee complaints. Following an investigation, an employer may be required to select a neutral third party to conduct the election. In order to provide additional protection for employees, the IWC added language that prohibits employers from intimidating or coercing employees to vote either in support of or in opposition to a proposed alternative workweek. Also, employees cannot be discharged or discriminated against for expressing opinions about elections or for voting to adopt or repeal an alternative workweek agreement.

Following the repeal of an alternative workweek schedule, the employer faces a sixty (60) day compliance deadline, but the Division of Labor Standards Enforcement (DLSE) may grant an extension upon showing of undue hardship. This provision merely restates preexisting language from Wage Orders 1 through 13.

The requirements that an election to repeal an alternative workweek agreement must be held within thirty (30) days of an employee petition and on the affected employees' work site fall under the IWC's Labor Code § 517 authority. The prerequisite of a six (6) month lapse after the adoption of an alternative workweek schedule before an election to repeal can be held is similar to preexisting language found in Wage Orders 1 through 13 requiring a (12) month lapse after the adoption of a alternative workweek schedule. However, employees and employers in the construction industry testified that crews at work sites can change often and that a work unit could have a 50% or more change in employees in a much shorter time period. In response to this information, the IWC reduced the time period and included a provision that if the number of employees that are employed for at least 30 days in the work unit that adopted an alternative workweek schedule increases by 50% above the number who voted to ratify the employer proposed alternative workweek schedule, the employer must conduct a new ratification election pursuant to the election procedures contained in this section.

The adopted language clarifies that the report on election results is a public document, and further specifies the content required for each report. The language also provides for a thirty (30) day grace period before employees are required to work any new alternative workweek schedules adopted through election.

## OTHER PROVISIONS

**Make up Time:** This section implements the make up time provisions mandated by Labor Code §513. The statute provides that an employer must approve the written request of an employee on each occasion the employee would like to perform make up time in the same workweek. In the interest of employer and employee convenience, the IWC decided to allow any employee who knows in advance that he or she will be requesting make up over a succession of weeks to request make up work time for up to four weeks in advance.

**Collective Bargaining Agreements:** This section updates the criteria for the collective bargaining agreement exemption in accordance with Labor Code § 514. Except for the requirement of one days rest in seven, the employees working under valid collective bargaining agreements are exempt from the above provisions if the agreement provides for the wages, hours of work, and working conditions of the employees, premium wage rates are designated for all overtime hours worked, and their regular hourly rate of pay is at least thirty (30) percent more than the state minimum wage.

The California Labor Federation submitted testimony that Labor Code §514 was intended to permit the parties to a collective bargaining agreement to define what constitutes "overtime hours" and to determine the rate of premium pay to be paid for all overtime hours worked. The Commission agrees that § 514 permits the parties to a collective bargaining agreement to establish alternative workweek agreements through the collective bargaining process provided certain conditions are met. Thus, so long as the collective bargaining agreement establishes regular and overtime hours within the work week, establishes premium pay for all such hours worked, and the regular rate of pay is more than (30) percent above the minimum wage, then the exemption

established by Labor Code § 514 is applicable.

The IWC received no compelling evidence to warrant including any other provisions to Section 3, Hours and Days of Work, at this time.

#### **4. MINIMUM WAGES**

The IWC was in the process of conducting its minimum wage review during the same time that it held meetings and hearings regarding this Wage Order. On October 23, 2000, the IWC, *inter alia*, adopted an increase to the minimum wage and to meal and lodging credits. The IWC proceeded according to its authority in the Labor Code and the Constitution of California, article 14, §1, and acted after holding investigative public hearings as required by Labor Code § 1178, considering the report of the Wage Board on the minimum wage selected pursuant to Labor Code § 1178.5, and subsequently holding public hearings according to the requirements of Labor Code § 1181. Effective January 1, 2001, every employer will be required to pay to each employee wages not less than six dollars and twenty-five cents (**\$6.25**) per hour for all hours worked, and effective January 1, 2001, and not less than six dollars and seventy-five cents (**\$6.75**) per hour for all hours worked.

#### **5. REPORTING TIME PAY**

This section continues the reporting time pay provisions contained in the IWC's other wage orders, except that it adds compromise language proposed by employee and employer representatives for two additional provisions. The first provision is that all employer-mandated travel that occurs after the first location where the employee's presence is required by the employer shall be compensated at the employee's regular rate of pay or, if applicable, the premium rate that may be required by the provisions of Labor Code § 510 and Section 3, Hours and Days of Work, above. See *Morillion v. Royal Packing* [Morillion et. al v. Royal Packing Co., (2000) 22 Cal. 4<sup>th</sup> 575]. The second provision is that this section does not apply to any employee covered by a valid collective bargaining agreement unless the collective bargaining agreement expressly provides otherwise. As with the IWC's other orders, this section does not apply when: operations cannot commence or continue due to threats to employees or property; or when recommended by civil authorities; or public utilities fail to supply electricity, water, or gas, or there is a failure in the public utilities or sewer system; or the interruption of work is caused by an Act of God or other cause not within the employer's control.

#### **6. RECORDS**

This provision requires every employer "who has control over the wages, hours, or working conditions" of employees to keep accurate personnel and payroll records in accordance with the Labor Code. This provision was intended to require both temporary employment agencies and employers who contract with temporary employment agencies to maintain such records. Moreover, it specifically incorporates the special payroll reporting requirements imposed on employers performing services on public works projects (Labor Code section 1776).

#### **7. DEDUCTIONS FROM PAY**

This provision forbids an employer from deducting any money from an employee's wages unless such deductions are specifically allowed pursuant to Labor Code sections 220-226. It also prohibits an employer or agent of the employer from charging the employee for cashing a payroll check.

#### **8. UNIFORMS AND EQUIPMENT**

The IWC retained its longstanding policy of requiring employers to provide uniforms, tools and equipment

necessary for the performance of a job. Subsection (B) permits an exception to the general rule by allowing an employee who earns more than twice the State minimum wage to be required to provide hand tools and equipment where such tools and equipment are customarily required in a trade or craft. This exception is quite narrow and is limited to hand (as opposed to power) tools and personal equipment, such as tool belts or tool boxes, that are needed by the employee to secure those hand tools. Moreover, such hand tools and equipment must be customarily required in a recognized trade or craft.

The language specifically references Labor Code section 2802, which mandates that the employer indemnify employees who are required to provide hand tools and equipment pursuant to Subsection B if those tools or equipment are damaged or lost in the course and scope of employment.

## **9. MEALS AND LODGING**

As discussed above in Section 4, Minimum Wage, the IWC was in the process of conducting its minimum wage review during the same time that it held meetings and hearings regarding this Wage Order. On October 23, 2000, the IWC, *inter alia*, adopted a proportional increase in meal and lodging credits to the minimum wage.

## **10. MEAL PERIODS**

This Wage Order continues the requirement of a meal period for an employee working for a period of more than five (5) hours, and provides for a second meal period in accordance with Labor Code §512(a). Senate Bill 88, Stats. 2000, chapter 492, added subsection (b) to Labor Code § 512, which provides that, notwithstanding subsection (a), the IWC may adopt a working condition order that allows a meal period to begin after six hours of work if it determines that the order is consistent with the health and welfare of the affected employees. The IWC made no such a determination with regard to Wage Order 16. Any employee who works more than six hours in a workday must receive a 30-minute meal period. If an employee works more than five hours but less than six hours in a day, the meal period may be waived by the mutual consent of the employer and employee.

During its AB 60 review, the IWC received several comments concerning the potential prohibition of on-duty meal periods. Under the current IWC wage orders, an "on-duty meal period" is permitted only when (1) the nature of the work prevents the employee from being relieved of all duty, and (2) the employee and employer have entered into a written agreement permitting an on-duty meal period. An employee must be paid for the entire on-duty meal period since it is considered time worked.

Notwithstanding other provisions regarding meal periods, the IWC adopted proposed language prepared for its consideration by employee and employer representatives. This language provides that in all places of employment the employer shall provide an adequate supply of potable water, soap, or other suitable cleansing agent and single use towels for hand washing. Also, with the exception of the hand washing requirements and the penalty discussed below, the IWC adopted proposed language providing that the provisions of this section do not apply to any employee covered by a valid collective bargaining agreement if the agreement expressly provides for the wages, hours of work, and working conditions of the employees, and if the agreement provides premium wage rates for all overtime hours worked and a regular hourly rate of pay for those employees of not less than thirty (30) percent more than the state minimum wage.

During its review of its wage orders and of various industries pursuant to the provisions of AB 60, the IWC heard testimony and received correspondence regarding the lack of employer compliance with the meal and rest period requirements of its wage orders. The IWC therefore added a provision to this section that requires an employer to pay an employee one additional hour of pay at the employee's regular rate of pay for each work day that a meal period is not provided. An employer shall not count the additional hour of pay as "hours worked" for purposes of calculating overtime pay. The IWC adopted language for Order 16 that provides that this penalty

does not apply in cases where a valid collective bargaining agreement provides a final and binding mechanism for resolving disputes regarding enforcement of the meal period provisions.

## **11. REST PERIODS**

Pursuant to Labor Code § 5116, the IWC adopted rest period language that requires every employer to authorize and permit all employees to take rest periods, which insofar as practicable, shall be in the middle of each work period. The authorized rest period time is based on the total hours worked daily at the rate of ten (10) minutes net rest time for every four (4) hours worked, or major fraction thereof, and is to be taken at employer designated areas, which may include or be limited to the employees immediate work area.

The IWC also adopted proposed language prepared for its consideration by employee and employer representatives with regard to rest periods. This language provides that employers may stagger rest periods to avoid interruption in the flow of work and to maintain continuous operations, or schedule rest periods to coincide with breaks in the flow of work that occur in the course of the workday. Employers need not authorize rest periods in limited circumstances when the disruption of continuous operations would jeopardize the product or process of the work. However, employers must make-up the missed rest period within the same work day or compensate the employee for the missed ten (10) minutes of rest time at his or her regular rate of pay within the same pay period. Also, rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 ½) hours, and authorized rest period time must be counted as hours worked for which there can be no deduction from wages. In addition, The provisions of this section are not applicable to any employee covered by a valid collective bargaining agreement if the collective bargaining agreement provides equivalent protection.

As discussed above in Section 10, Meal Periods, the IWC heard testimony and received correspondence regarding the lack of employer compliance with the meal and rest period requirements of its wage orders. The IWC therefore added a provision to this section that requires an employer to pay an employee one additional hour of pay at the employee's regular rate of pay for each work day that a rest period is not provided. An employer shall not count the additional hour of pay as "hours worked" for purposes of calculating overtime pay.

The IWC adopted language for Order 16 that provides that this penalty does not apply in cases where a valid collective bargaining agreement provides a final and binding mechanism for resolving disputes regarding enforcement of the rest period provisions.

## **12. SEATS**

This provision slightly modifies the language adopted in other wage orders governing seats by limiting its applicability to situations where seats are provided "consistent with industry-wide standards" and to provide that this requirement shall not exceed regulations promulgated by the Occupational Safety and Health Standards Board. The IWC agrees with testimony by both employer and employee representatives that that a requirement that the employer provide seats is not applicable in many on-site construction, logging, and mining occupations which are performed in outdoor environments.

## **13. TEMPERATURE**

This provision slightly modifies the language adopted in other wage orders governing temperature by limiting its application to interior workplaces where control of temperature is consistent with industry-wide standards. It also provides that this requirement shall not exceed regulations promulgated by the Occupational Safety and

Health Standards Board.

#### **14. ELEVATORS**

This provision slightly modifies the language adopted in other wage orders governing elevators by permitting the use of equipment which provides "similar service" to an elevator, to limit its application to situations where use of elevators is consistent with industry-wide standards, and to specify that the elevator or similar service is required when employees are 60 (sixty) feet or more above or 48 (forty-eight) of more feet below ground level. It also provides that this requirement shall not exceed regulations promulgated by the Occupational Safety and Health Standards Board.

#### **15. EXEMPTIONS**

In the IWC's other wage orders this section previously allowed the Division of Labor Standards Enforcement, after an investigation and finding that enforcement would not materially affect the welfare or comfort of employees and would work an undue hardship on the employer, to exempt the employer and employees from the requirements of certain sections of the IWC's wage orders. After considering the testimony and correspondence it received with regard to meal periods, and in light of the mandatory provisions of Labor Code § 512, the IWC decided to remove Section 11, Meal Periods, from the list of sections that can be exempt from enforcement.

#### **18. PENALTIES**

This section sets forth the provisions of Labor Code § 558, which specifies penalties for initial and subsequent violations. The IWC received inquiries as to whether "willfulness" is a required element for the issuance of a civil penalty. There were also concerns over the assessment of penalties against an employer's payroll clerk, payroll supervisor, or a payroll processing service for failure to issue checks reflecting the required overtime compensation. AB 60 fails to address these issues, but the IWC noted that there is no intent to penalize individuals that are merely carrying out policies formulated by an employer.