

# **STATEMENT AS TO THE BASIS**

## **FOR WAGE ORDER NO. 14**

### **AMENDMENTS RELATING TO SHEEPHERDERS**

**TAKE NOTICE** that the Industrial Welfare Commission of the State of California (the "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 amendments to Wage Order 14 for employees working as sheepherders.

Wage Order 14 contained a total exemption from all of its provisions for persons employed as sheepherders. During its review for the General Minimum Wage Order, MW-2001, the IWC conducted an investigation as to whether it should retain or eliminate all of the non-statutory full and partial exemptions from the minimum wage, including the exemption for sheepherders. After the wage board concluded its review of the minimum wage, the IWC held several public hearings concerning the adequacy of the minimum wage. At those hearings, there was extensive testimony presented by representatives of sheepherders urging the IWC to eliminate the minimum wage exemption and proposing the creation of a special minimum wage covering sheepherders. Representatives of sheep ranchers testified in support of a continued exemption from the minimum wage for sheepherders. Employer sheep ranchers and attorneys for their industry registered fervent opposition to the repeal of their exemption and presented some employees who supported their position. They argued that the federal H-2A work visa program [Section 101(a)(15)(H)(ii)(a) of the Immigration and Nationality Act (see 8 U.S.C. Section 1101, *et seq.*)] covering this industry worked well and did not need to be fixed. On the contrary, other employees and their legal representatives testified concerning abject living and working conditions. They also testified that domestic sheepherders are not necessarily subject to H-2A provisions and therefore may be paid less for the same living and working conditions. Based on that information, the IWC decided that it should investigate the hours of work and conditions of labor of sheepherders in California in addition to the investigation of their wages. After completing that investigation on December 5, 2000, the IWC determined that the wages paid to sheepherders may be inadequate to supply the cost of proper living and that the hours and working conditions of sheepherders may be prejudicial to their health and welfare. The IWC therefore voted to convene a wage board to determine whether the total exemption in Wage Order 14 affecting sheepherders should be eliminated.

Following its receipt of the report of the wage board, the IWC prepared proposed regulations incorporating the recommended amendments from both the employer and employee representatives of the wage board. None of these recommendations had received either a majority or a two-thirds vote of the wage board. On April 9, 2001, the IWC held a public hearing pursuant to Labor Code §§ 1178.5(c) and 1181 during which it considered those recommendations and received additional testimony and written materials.

At a public meeting held April 24, 2001, the IWC adopted sheepherder amendments to Sections 1, 2, 4, 7, 10, and 18 of, and added a new Section 14 to, Wage Order 14 pursuant to Labor Code § 1182. They become effective July 1, 2001. The IWC submits the following statement as to the basis for these amendments and notes that there is no discussion of other sections because the IWC is continuing in

effect regulations that have previously become a part of the standard working conditions of employees covered by Wage Order 14.

## **1. Applicability of Order.**

The IWC deleted former paragraph F of this section which provided that this Order "shall not apply to shepherders". The section now provides that Sections 3 [Hours and Days of Work], 4(A) through (D) [Minimum Wages], 5 [Reporting Time Pay], 6 [Licenses for Disabled Workers], 9 [Uniforms and Equipment], 11 [Meal Periods], 12 [Rest Periods], and 13 [Seats] do not apply to an employee engaged to work as a "shepherd" as that term is defined in the Order. The section further provides that the Order, including the hourly minimum wage provisions of Section 4(A), applies to any workweek during which a shepherd is engaged in any other agricultural or other non-shepherding work. Domestic shepherders and shepherders working in California under an H-2A contract now receive the same protections under California law.

The IWC held several public meetings and hearings during which it amassed information regarding the conditions of shepherders and the shepherding/lambing/wool industry in California. There are a relatively small number of commercial sheep producers in California. The number of employees engaged to work as shepherders, which may be as low as 300-400, is equally small. In addition, most of these employees are foreign nationals working in California on fixed term contracts under the federal H-2A program, which allows for such employment based on a determination that there are an insufficient number of workers in this country to perform the duties of a shepherd. Pursuant to the H-2A program, sheep ranchers in California currently pay \$900.00 per month in wages for shepherding and also provide meals and lodging. According to one recent, but limited, report, approximately 10 per cent of these employees are U.S. citizens or resident domestic workers.

The wage board report states:

"This occupation has remained largely unchanged over many centuries. Flocks generally range from 800-1000 head are assigned to a herder who becomes primarily responsible for the welfare of that flock. The calendar or seasonal year of modern commercial sheep production centers around the harvest of the crop for both wool production (shearing) and meat production (lambing). These are both labor intensive periods and appear to occur in non-remote areas where the Employers have or share facilities for the performance of these activities. While not clear from the record, it appears that there is fixed housing for some, if not all herders working at these locations. Other periods of the year are spent by the shepherd and his flock in more or less remote locations. Some of this time will allow the shepherd to have access to mobile housing, known as a sheep camp, in which other herders and their flocks may also frequent. Some period of time may be spent in singular isolation in the backcountry. In both these latter situations, the shepherd is dependent upon the Employer for his health and well-being."

Since the employee and employer sides of the shepherd wage board submitted separate recommendations to the IWC without any of these recommendations receiving either a majority or a two-thirds vote of the wage board, the IWC noticed both sets of recommendations as proposed regulations for public comment. The IWC received verbal and written communications in the form of articles, testimony, correspondence, and legal argument on those proposals. The amendments that

the IWC adopted represent its effort to reach a compromise between the two proposals. In addition, the IWC wanted to ensure that wages and conditions of labor of domestic shepherders were regulated.

## **2. Definitions**

Pursuant to a request by employers and their representatives, the IWC included additional language in its definition of "Shepherd". The definition continues to specify the duties that are involved in shepherding, and now also includes persons performing the work of a shepherd under an approved job order filed under the provisions federal H-2A regulations, or any successor provisions. Representatives of employees argued against tying the IWC's regulations to the H-2A because prevailing wage surveys may result in a reduction of pay for H-2A workers, or working conditions requirements might be reduced under federal law. The IWC notes, however, that in either case, employers would have to comply with the H-2A as well as the more protective provisions of California law. For example, the IWC added a definition for "Non-shepherding work" because, as discussed below, it also adopted penalties for requiring an employee who is engaged to work as a shepherd to perform non-shepherding agricultural or other duties.

In addition, at the request of representatives of employees, the IWC included a definition for "Open range shepherding". That term is used in describing when mobile housing may be used for shepherd lodging. As discussed below regarding Section 10, Meals and Lodging, the amendments establish different minimum housing standards depending on whether the housing is located on the open range or a more accessible location.

## **4. Minimum Wages**

The IWC added a new paragraph E, which provides that effective July 1, 2001, the minimum wage for shepherders will be \$1,050.00 per month, and increase to \$1,200.00 per month effective July 1, 2002. These figures represent a compromise between the two proposed regulations submitted for public comment.

On the one hand, employers and their representatives supported a minimum wage that would be equal to the wages required by the federal H-2A program. Currently, the H-2A program provides that shepherders receive \$900.00 per month in wages, which is less than the monthly minimum wage in California. In addition, the H-2A program requires employers to provide, inter alia, food, housing, and travel from the employer's home county. Employer representatives testified that wages and benefits provided to shepherders total \$1,623.00 per month, and that costs of labor represent 41% total employer costs. They further testified that rising energy and water costs, declining meat and wool prices, and competition from foreign markets have placed the industry in dire straits. They claimed that any increase in shepherd wages would be devastating to the industry.

On the other hand, employee representatives supported a minimum wage for shepherders that was initially \$2,060.00 per month and then reduced to \$1,600.00 per month with a total of \$411.00 in credits of meals, lodging, a reduction of \$100.00 for one day off per week for four weeks in a month, and indexing the shepherd monthly minimum wage to increases in the general minimum wage per hour. They presented testimony and documentation that there are H-2A workers currently being

paid less than \$900.00 for work days of 13 to 14 hours. Shepherders also testified that they have been provided insufficient and substandard food, and old trailers with no provisions for heat, electricity, or bathroom facilities as housing. Others testified that they were required to pay for tools that employers should be providing. Employee representatives also provided evidence that locking the minimum wage of shepherders to the H-2A program could mean that their wages could be lowered rather than raised. They suggested that the minimum wage with credits they propose is more reasonable and provides employers with an incentive to provide better living and working conditions.

The IWC is cognizant of its duty to ensure that shepherders are paid full compensation for the long hours of hard work that they put in. At the same time, the IWC is sensitive to issues faced by the shepherding industry in California as described above. The IWC therefore, adopted a wage increase implemented over a two-year period to allow more time for employers to adjust and absorb the additional costs.

## **7. Records**

There was general agreement in the two proposed regulations regarding the employee records that employers in the shepherding industry must maintain. Thus employers are required to keep the same records as other employers covered by this Order. In addition, the IWC added two new paragraphs applicable to shepherders. Since both employees and employers acknowledged that there are instances when workers have been required to perform non-shepherding duties, the IWC adopted provisions requiring employers to keep accurate information showing applicable rates of pay for shepherding and any non-shepherding work, all deductions, dates of pay periods, name and social security number (if any) of employee, and name of employer. In addition, employers are required to annually notify the shepherders of their rights and obligations under state and federal law.

## **10. Meals and Lodging**

Unlike most, if not all, other industries in California, employers must provide shepherders with living space and all meals as part of their employment. Therefore, it's the IWC's intent to ensure that shepherders are provided with well-balanced and nutritious foods, as well as decent and sanitary living accommodations, according to prevailing standards. At the same time, the IWC acknowledges that it must take into account the financial constraints that the shepherding industry now faces in California. Also, since shepherders may at times work at fixed locations and at other times out on the open range, the IWC promulgated minimum housing requirements applicable to the location of a shepherd's work site. These minimum requirements represent a compromise between the two proposals submitted for public comment. Consistent with proposals submitted on behalf of employees and employers, the IWC decided that a the monthly meal and lodging benefits required to be provided under the provisions of the H-2A program, or any successor provisions, are the minimum standards that employers must supply to all shepherders in California. Also, when an employee is engaged in open range shepherding, the employer must provide mobile housing that complies with all standards and inspection requirements of the United States Department of Labor then in effect. Housing inspections will be conducted annually by the Employment Development Department, unless the employer receives a written statement from the Employment Department

that there are no inspectors available.

At all times when an employee is not engaged in open range shepherding, the employer is required to provide fixed site housing. Such fixed site housing must comply with the following minimum requirements as more fully described in the regulation: heating, refrigeration, indoor lighting, toilets and bathing facilities, potable hot and cold water, and cooking facilities and utensils. The IWC also made fixed site housing subject to annual inspection and approval by the Employment Development Department, unless the employer receives written notification that there are no inspectors available.

#### **14. Other Working Conditions Applicable to Shepherders**

The IWC added a new Section 14 to this Order that mandates other working conditions as minimum protections for shepherders. Considering its duty to protect the health and welfare of shepherders, as well as the economic stresses that employers now confront, the IWC adopted the additional requirements that received the support of both groups.

Thus, at each work location, employers must provide shepherders with regular mail service; an appropriate form of communication, including but not limited to a radio and/or telephone, to allow them to communicate with employers, health care providers, and government regulators; and visitor access to fixed site housing and, when practical, to mobile housing. If an employee is engaged in open range shepherding, regular mail service means mail delivery at least every seven days. Also, if a shepherd uses a radio, telephone, or other communication device for reasons other than those described above, the employer may charge for such use. It is the intent of the IWC that these requirements will help to ensure that shepherders are not isolated.

#### **17. Penalties**

In implementing the provisions of the "Eight-Hour-Day Restoration and Workplace Flexibility Act," Stats. 1999, ch. 134 (commonly referred to as "AB 60"), the IWC previously decided to make the penalties provisions of Labor Code § 558 applicable to those covered by Order 14. During the hearings on the proposed regulations regarding shepherders, representatives of employees and employers testified that there should be additional penalties for requiring shepherd to perform non-shepherding work.

Witness testified that there are shepherders who have been required to engage in non-shepherding work. Both groups testified that this practice violates the requirements of H-2A job orders. They also agreed that employers should pay domestic and H-2A workers the standard minimum wage under this order as a penalty for such violations. However, they disagreed as to the length of the penalty period. Employee representatives suggested that, if a shepherd does any other work during a week, the penalty should apply for the entire workweek or contract term, whichever is longer. In contrast, employer representatives argued that shepherders should be paid under the standard minimum wage provisions of this order for all actual non-shepherding work performed.

After considering all of the information it obtained on the subject, the IWC decided to promulgate penalties that are enhanced by the number of violations. The penalty for an initial violation of the Wage Order 14 provision prohibiting the use of shepherders for non-shepherding work is one

week's pay computed on the basis of a 60-hour work week and a wage of not less than the current minimum wage in effect. The second violation will result in a penalty of one month's pay computed on the basis of a 252-hour month and a wage of not less than the current minimum wage in effect. Third and subsequent violations will result in a penalty of the cost of the entire contract for an approved H-2A job order. The IWC intends that these increasing penalties will work as an incentive against further violations.