The 2002 Update Of

The DLSE

Enforcement Policies and Interpretations

Manual

(Revised)

ACKNOWLEDGEMENTS

The Division of Labor Standards Enforcement (DLSE) Enforcement Policies and Interpretations Manual summarizes the policies and interpretations which DLSE has followed and continues to follow in discharging its duty to administer and enforce the labor statutes and regulations of the State of California.

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ENFORCEMENT MANUAL REVISIONS			
Section No.	**Date Revised**	**Subject**	**Change**
2.4.1.1	5/2/07	WAGES: Definition of Wage	Added section to conform to ruling in *Murphy v. Kenneth Cole* (2007) 40 Cal.4th 1094
4.3.4.1	5/2/07	PENALTY FOR FAILURE TO PAY WAGES ON TERMINATION: Any Wages	Added section to conform to ruling in *Murphy v. Kenneth Cole* (2007) 40 Cal.4th 1094
6.1	11/22/05	COMPENSATING TIME OFF	Delete reference to O.L. 1996.05.29
7.6	4/28/08	WAGE PAYMENTS – CONDITIONS AND TIME AND PLACE. Wage Payment Where Holidays Occur	Added reference to California Code of Civil Procedure section 12a(a)
9.1.8	9/9/08	METHOD OF PAYMENT OF WAGES: § 213 – Not All Payments Subject To Section 212	Correction of quoted language of Labor Code § 213(d)
9.1.9.4	9/9/08	METHOD OF PAYMENT OF WAGES: Exceptions To Payment Directly To Employee In Case Or Negotiable Instrument.	Correction consistent with provisions of Labor Code § 213(d)
11.1.1	1/9/09	DEDUCTIONS FROM WAGES: Labor Code Section 224	Revisions consistent with enactment of federal Pension Protection Act of 2006
11.1.1.1	1/9/09	DEDUCTIONS FROM WAGES: Labor Code Section 224	New section consistent with enactment of federal Pension Protection Act of 2006
11.1.1.2	1/9/09	DEDUCTIONS FROM WAGES: Labor Code Section 224	New section consistent with enactment of federal Pension Protection Act of 2006
11.1.2	1/9/09	DEDUCTIONS FROM WAGES: Legal Deductions	Revisions consistent with enactment of federal Pension Protection Act of 2006
11.3.1	11/22/05	DEDUCTIONS FROM WAGES: Specific Deductions	Delete reference to O.L. 1993.02.22
11.3.3	1/9/09	DEDUCTIONS FROM WAGES: Allowable Deductions	Revisions consistent with enactment of federal Pension Protection Act of 2006
15.1.1	3/1/06	VACATION WAGES: Prorate Vacation	Deletes reference to O.L. 1988.07.25

Section No.	Date Revised	Subject	Change
15.1.4	11/22/05	VACATION WAGES: Use-It-Or-Lose-It Policies Are Not Allowed	Delete references to O.L. 1993.02.16-1 and O.L. 1993.05.17
15.1.4.1	11/22/05	VACATION WAGES: Time Periods For Use Of Vacation	Delete second sentence and delete reference to O.L. 1993.05.17
15.1.8	11/22/05	VACATION WAGES: DLSE Has The Right To Determine Whether An Employer's Plan Is, In Fact, Subject To ERISA	Delete reference to O.L. 1993.05.17
15.1.9	3/20/07	VACATION WAGES: Statute of Limitations	Amended to conform to current law and delete reference to OL 1991.02.25
15.1.10	3/1/06	VACATION WAGES: Many Issues Arise In Vacation Pay Disputes	Deletes references to withdrawn O.L. 1987.01.14 and O.L. 1988.08.31-1
15.1.13	11/19/13	SABBATICAL LEAVE PROGRAMS	Amended to conform to Paton v Advanced Micro Devices (2011) 197 Cal App 4th 1505
15.1.14	11/19/13	SABBATICAL LEAVE PROGRAMS	Deleted to conform to Paton v Advanced Micro Devices (2011) 197 Cal App 4th 1505
17.3	7/16/08	DISCRIMINATION – PROTECTED RIGHTS: Some Specifically Prohibited Discharges Or Disciplines	Deleted reference to DLSE Guide To Investigating Discrimination Complaint Manual
19.3.1	3/1/06	GRATUITIES AND TIPS: Statute Prohibits Employers Or Their Agents From Taking Or Receiving Tip Money Left For Employee	Added reference to O.L. 2005.09.08 and pertinent language
43.6.3	11/22/05	ENFORCEMENT OF WAGES, HOURS AND WORKING CONDITIONS REQUIRED BY THE INDUSTRIAL WELFARE COMMISSION ORDERS: Workers Employed by Indian Tribes or Businesses Owned by Tribes	Add language: "…for work performed on a federal enclave or where state and civil law jurisdiction has been reserved or retroceded.:
43.6.8	3/1/06	ENFORCEMENT OF WAGES, HOURS AND WORKING CONDITIONS REQUIRED BY THE INDUSTRIAL WELFARE COMMISSION ORDERS: Students	Deletes reference to O.L 1993.09.07

43.8.3	11/19/13	HOUSEHOLD OCCUPATIONS	Added clarifying language that personal attendants may be employed by a third party recognized in the healthcare industry under order 15
45.1.1.1	5/2/07	WORKING CONDITIONS UNDER THE IWC ORDERS: Reporting Time Pay In Connection With Call Back	Added section to conform to ruling in *Murphy v. Kenneth Cole* (2007) 40 Cal.4th 1094

MARCH, 2010

Section No.	Date Revised	Subject	Change
45.2	7/25/08	WORKING CONDITIONS UNDER THE IWC ORDERS: Meal Periods	Added reference to and cited language of Labor Code section 512(a)
45.2.1	7/25/08	WORKING CONDITIONS UNDER THE IWC ORDERS: Employers Must Provide Meal Periods By Making Them Available, But Need Not Ensure That They Are Taken	Replaces previous section 45.2.1 to conform to ruling in *Brinker Restaurant Corp. v. Superior Court of San Diego County (Hohnbaum)*, (2008) ___ Cal.App.4th
45.2.1	12/18/08	WORKING CONDITIONS UNDER THE IWC ORDERS: Employers Must Provide Meal Periods By Making Them Available, But Need Not Ensure That They Are Taken	Changes consistent with Supreme Ct. acceptance to review *Brinker Restaurant Corp. v. Superior Court of San Diego County (Hohnbaum)*, (2008) ___ Cal.App.4th ___
45.2.1	11/19/13	WORKING CONDITIONS UNDER THE IWC ORDERS: Employers Must Provide Meal Periods	Employers must provide meal periods
45.2.1.1	11/19/13	PAYMENT FOR WORK PERFORMED DURING MEAL PERIOD	Added to conform to review *Brinker Restaurant Corp. v. Superior Court of San Diego County (Hohnbaum)*, (2012) 53 Cal.App.4th 1004
45.2.3.2	5/16/07	WORKING CONDITIONS UNDER THE IWC ORDERS: Collective Bargaining Situations	Correction of typographical errors
45.2.3.2	3/20/07	WORKING CONDITIONS UNDER THE IWC ORDERS: Collective Bargaining Situations	Added language and reference consistent with *Bearden v. Borax*, 138 CA 4th 429
45.2.3.2	11/19/13	Collective Bargaining Exceptions	Amended to conform to current statutory exemptions
45.2.6	3/1/06	WORKING CONDITIONS UNDER THE IWC ORDERS: Lunch Time Training or Client Meetings	Corrected incorrect cite to O.L. 2002.03.15 to correct O.L. 2001.03.19
45.2.6	3/20/07	WORKING CONDITIONS UNDER THE IWC ORDERS: Lunch Time Training or Client Meetings	Amended to conform to current law and to delete reference to O.L. 2001.03.19
45.2.7	5/2/07	WORKING CONDITIONS UNDER THE IWC ORDERS: Premium for Failure Of The Employer To Provide The Meal Period	Added sentence at the end of the section to conform to ruling in *Murphy v. Kenneth Cole* (2007) 40 Cal. 4th 1094

45.2.9	7/25/08	WORKING CONDITIONS UNDER THE IWC ORDERS: Premium Is Imposed For Failure to Provide Meal Period In Accordance With Applicable IWC Orders	Section eliminated to conform to ruling in *Brinker Restaurant Corp. v. Superior Court of San Diego County (Hohnbaum)*, (2008) Cal.App.4th

MARCH, 2010

Section No.	Date Revised	Subject	Change
45.2.9	12/18/08	WORKING CONDITIONS UNDER THE IWC ORDERS: Premium Is Imposed For Failure to Provide Meal Period In Accordance With Applicable IWC Orders	Changes consistent with Supreme Ct. acceptance to review *Brinker Restaurant Corp. v. Superior Court of San Diego County (Hohnbaum)*, (2008) ___ Cal.App.4th ___
45.2.9.1	7/25/08	WORKING CONDITIONS UNDER THE IWC ORDERS: Relationship Between Record-Keeping Requirement And Meal Period	Revised to conform to ruling in *Brinker Restaurant Corp. v. Superior Court of San Diego County (Hohnbaum)*, (2008) ___ Cal.App.4th
45.2.10	5/2/07	WORKING CONDITIONS UNDER THE IWC ORDERS: Wage Order 16-2001 Meal Period Requirements	Eliminated last sentence re CBA opt-out
45.3.1.	7/25/08	WORKING CONDITIONS UNDER THE IWC ORDERS: "Major Fraction"	Replaces previous section 45.3.1 to conform to ruling in *Brinker Restaurant Corp. v. Superior Court of San Diego County (Hohnbaum)*, (2008) ___ Cal.App.4th ___; deleted reference to Opinion Letter 1999.02.16
45.3.1.	12/18/08	WORKING CONDITIONS UNDER THE IWC ORDERS: "Major Fraction"	Changes consistent with Supreme Ct. acceptance to review *Brinker Restaurant Corp. v. Superior Court of San Diego County (Hohnbaum)*, (2008) ___ Cal.App.4th ___; reinstates previously withdrawn Opinion Letter 1999.02.16
45.3.3	3/1/06	WORKING CONDITIONS UNDER THE IWC ORDERS: The Rest Period Is A "Net" Ten Minutes	Corrected incorrect cite to O.L. 2002.02.25 to correct O.L. 2002.02.22
46.1.1	3/1/06	HOURS WORKED: The DLSE Interpretation of Hours Works	Deletes reference to O.L. 1994.03.03
46.3	3/1/06	HOURS WORKED: Extended Travel Time	Corrected incorrect cite to O.L. 2002.02.15 to correct O.L. 2002.02.21
46.3.1	3/1/06	HOURS WORKED: Extended Travel Time	Corrected incorrect cite to O.L. 2002.02.15 to correct O.L. 2002.02.21
46.3.2	3/2/06	HOURS WORKED: Different Pay Rate For Travel Time Permissible	Corrected incorrect cite to O.L. 2002.02.15 to correct O.L. 2002.02.21

Section No.	Date Revised	Subject	Change
47.4.2	3/1/06	CALCULATING HOURS WORKED: Difference in Enforcement Positions	Deletes reference to O.L. 1994.03.03
47.5.1.1	3/1/06	CALCULATING HOURS WORKED: May Be Subject To Different Rate of Pay	Corrected incorrect cite to O.L. 2002.02.15 to correct O.L. 2002.02.21
49.1.2.4	5/23/07	COMPUTATION OF REGULAR RATE OF PAY AND OVERTIME: Payments That Are To Be Excluded in Determining "Regular Rate"	Reformatted to delete section 49.1.3 and add as No. 8 in list in 49.1.2.4
49.1.2.4	3/17/10	COMPUTATION OF REGULAR RATE OF PAY AND OVERTIME: Payments That Are To Be Excluded in Determining "Regular Rate"	Added new section 49.1.2.4 (8); renumbered old section (8) to (9)
49.1.3	5/2/07	COMPUTATION OF REGULAR RATE OF PAY AND OVERTIME: Reporting Time Pay, Extra Hour For Failure To Provide Meal Period, Extra Hour For Failure To Provide Break and Split Shift Pay Need Not Be Included	Added language to conform to ruling in *Murphy v. Kenneth Cole* (2007) 40 Cal.4th 1094
49.1.3	5/23/07	COMPUTATION OF REGULAR RATE OF PAY AND OVERTIME: Reporting Time Pay, Extra Hour For Failure To Provide Meal Period, Extra Hour For Failure To Provide Break and Split Shift Pay Need Not Be Included	Section deleted and reformatted as 49.1.2.4, No. 8
49.2.1.2	11/22/05	COMPUTATION OF REGULAR RATE OF PAY AND OVERTIME: Methods Used in Computing Regular Rate of Pay	Deletes reference to O.L. 1993.02.22
50.3	4/28/08	WAGE PAYMENT – SPECIAL CONDITIONS	In No. 6(a), updated hourly wage for employees in computer software fields per SB 929 change to Labor Code section 515.5

Section No.	Date Revised	Subject	Change
50.9.2.1	4/25/06	IWC ORDER EXEMPTIONS State of California: California Code of Regulations, Title 13	Deleted language re must regularly be engaged (50% of time) in driving; substituted entitlement to overtime pursuant to *Crooker v. Sexton Motors, Inc*.
50.9.2.1	12/28/06	IWC ORDER EXEMPTIONS State of California: California Code of Regulations, Title 13	Added language re conforming to California law workday requirement
50.9.2.1	3/20/07	IWC ORDER EXEMPTIONS State of California: California Code of Regulations, Title 13	Correction of minor drafting error
51.6.15	3/1/06	DETERMINING EXEMPTIONS: Any Work Performed In The Time Period Will Preclude Reduction Of The Salary	Added language from Conley v. PG&E that allows for deduction from vacation bank for absences of 4 hours or more
54.4	2/25/09	PROFESSIONAL EXEMPTION: Computer Software Workers	Changed rate of pay consistent with AB 10 - Chapter 753, Statutes of 2008, Labor Code section 515.5(a)(4) and annual adjustment
54.6	2/25/09	PROFESSIONAL EXEMPTION: Physicians	Changed rate of pay consistent with Labor Code section 515.6(a) and annual adjustment
54.8.1	12/28/06	PROFESSIONAL EXEMPTION "Learned" exemption "advanced degree" requirement	Deleted language specifying a degree "above a BA or BS degree." Added language reference to requirements of Section 54.1. Delete reference to O.L. 1992.07.06
54.8.2	12/28/06	PROFESSIONAL EXEMPTION "Professional" Under Order 16-2001	Deleted word "new" in first sentence and changed "Discussed" to "discussed."
54.8.5	12/28/06	PROFESSIONAL EXEMPTION "Learned Professions"	Deleted last two sentences. Deleted footnote. Delete reference to O.L. 1992.07.06
54.10.1	12/28/06	PROFESSIONAL EXEMPTION Work in a recognized field of artistic endeavor	Added language indicating the need to consider all media utilized in artistic endeavors.

Section No.	Date Revised	Subject	Change
56.2	1/30/07	ALTERNATIVE WORKWEEK ARRANGEMENTS Not All IWC Orders Provide For Alternative Workweek Arrangements	Add reference to Wage Order 17.
56.2.1.2	1/30/07	ALTERNATIVE WORKWEEK ARRANGEMENTS Order 15 Employees	Delete 10 hour limitation on proposed alternative workweeks.
56.3.1	1/30/07	ALTERNATIVE WORKWEEK ARRANGEMENTS 12-Hour Day Limit	Revised language to comply with *Mitchell v. Yoplait* (2004) 122 Cal.App.4th Supp 8
56.3.2	1/30/07	ALTERNATIVE WORKWEEK ARRANGEMENTS Employees In The Health Care Industry: Up to 12-Hour Days	Added language to make clear that overtime premium pay is not required between 10 and 12 hours.
56.7	1/30/07	ALTERNATIVE WORKWEEK ARRANGEMENTS Election Procedures	Corrected incorrect reference to 56.6.3
56.7.2	1/30/07	ALTERNATIVE WORKWEEK ARRANGEMENTS Proposal Must Designate A Regularly Scheduled Alternative Workweek Of A Specified Number Of Regularly Recurring Work Days	Revised examples to conform with *Mitchell v. Yoplait* (2004) 122 Cal.App.4th Supp 8
56.7.2.6	1/30/07	ALTERNATIVE WORKWEEK ARRANGEMENTS	Deleted section as inconsistent with *Mitchell v. Yoplait* (2004) 122 Cal.App.4th Supp 8
56.7.2.7	1/30/07	ALTERNATIVE WORKWEEK ARRANGEMENTS Regular Schedule	Deleted language to comply with *Mitchell v. Yoplait* (2004) 122 Cal.App.4th Supp 8
56.7.3	1/30/07	ALTERNATIVE WOOKWEEK ARRANGEMENTS Regular Alternative Schedules Need Not Always Be Four 10-Hour Days	Revised language to comply with *Mitchell v. Yoplait* (2004) 122 Cal.App.4th Supp 8
56.7.4	1/30/07	ALTERNATIVE WORKWEEK ARRANGEMENTS Overview Of Alternative Workweek Requirements	Revised table to comply with *Mitchell v. Yoplait* (2004) 122 Cal.App.4th Supp 8

Section No.	Date Revised	Subject	Change
56.11	11/22/05	ALTERNATIVE WORKWEEK ARRANGEMENTS: Employer May Not Reduce An Employee's Regular Hourly Rate Of Pay As A Result Of Adoption, Repeal Or Nullification Of An Alternative Workweek Arrangement	Added reference to O.L. 2002.01.21
56.11.1	11/22/05	ALTERNATIVE WORKWEEK ARRANGEMENTS: Unilaterally Imposed Alternative Workweek Schedules	Added reference to O.L. 2002.01.21
56.23.1	11/22/05	ALTERNATIVE WORKWEEK ARRANGEMENTS: Occasional Changes in Schedule	Delete sentence beginning: "For enforcement purposes…"
56.23.3.1	11/22/05	ALTERNATIVE WORKWEEK ARRANGEMENTS: Employees In The Health Care Industry	Add "…for a 12-hour shift in any one workday…."; Delete rest of sentence beginning: "…and for the first eight hours…"
56.23.8	12/28/06	ALTERNATIVE WORKWEEK ARRANGEMENTS: Days And Hours Worked Outside Of The Regularly-Scheduled Alternative Workweek	Delete reference to O.Ls 1988.08.31, 1991.04.10, 1993.05.25-1
56.23.8	1/30/07	ALTERNATIVE WORKWEEK ARRANGEMENTS: Days And Hours Worked Outside Of The Regularly-Scheduled Alternative Workweek	Revised language to comply with *Mitchell v. Yoplait* (2004) 122 Cal.App.4th Supp 8
56.25	1/30/07	ALTERNATIVE WORKWEEK ARRANGEMENTS Hours In Excess Of Regular Schedule	Revised language to comply with *Mitchell v. Yoplait* (2004) 122 Cal.App.4th Supp 8
56.26.1	1/30/07	ALTERNATIVE WORKWEEK ARRANGEMENTS Examples Of Illegal Alternative Workweek Schedules	Deleted section as inconsistent with *Mitchell v. Yoplait* (2004) 122 Cal.App.4th Supp 8
56.26.2	1/30/07	ALTERNATIVE WORKWEEK ARRANGEMENTS	Deleted section as inconsistent with *Mitchell v. Yoplait* (2004) 122 Cal.App.4th Supp 8

Section No.	Date Revised	Subject	Change
56.26.3	1/30/07	ALTERNATIVE WORKWEEK ARRANGEMENTS Overtime Hours On A "Regularly Recurring" Basis In Excess Of the Daily Regular Schedule Will Result In Loss Of The Exception	Deleted section as inconsistent with *Mitchell v. Yoplait* (2004) 122 Cal.App.4th Supp 8
56.27	1/30/07	ALTERNATIVE WORKWEEK ARRANGEMENTS DLSE Enforcement Policy	Deleted section as inconsistent with *Mitchell v. Yoplait* (2004) 122 Cal.App.4th Supp 8
56.28	1/30/07	ALTERNATIVE WORKWEEK ARRANGEMENTS	Deleted section as inconsistent with *Mitchell v. Yoplait* (2004) 122 Cal.App.4th Supp 8
Opinion Letter Chart	5/28/09		Delete reference to O.L. 2002.01.21 chart. Correction of oversight – reference not deleted at time of 1/30/07 elimination of Section 56.27

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DIVISION OF LABOR STANDARDS ENFORCEMENT
ENFORCEMENT POLICIES AND INTERPRETATIONS MANUAL

1 INTRODUCTION

1.1 A primary function of the Division of Labor Standards Enforcement (DLSE) is to enforce the State's labor laws regulating wages, hours and working conditions for employees in the State of California. (Labor Code § 95) The Division's enforcement powers, however, are limited by the phrase "the enforcement of which is not specifically vested in any other officer, board or commission."*

1.1.1 Since DLSE has the primary authority to investigate and prosecute all actions for the collection of wages, it is important to understand the concept of wages and the manner in which DLSE has defined and interpreted the law for purposes of this enforcement.

1.1.2 The California Supreme Court has concluded that:

> "Of course, interpretations that arise in the course of case-specific adjudication are not regulations, though they may be persuasive as precedents in similar subsequent cases. Similarly, agencies may provide private parties with advice letters, which are not subject to the rulemaking provisions of the APA. Thus, if an agency prepares a policy manual that is no more than a restatement or summary, without commentary, of the agency's prior decisions in specific cases and its prior advice letters, the agency is not adopting regulations. (Cf. Lab.Code, § 1198.4 [implying that some "enforcement policy statements or interpretations" are not subject to the notice provisions of the APA].) A policy manual of this kind would of course be no more binding on the agency in subsequent agency proceedings or on the courts when reviewing agency proceedings than are the decisions and advice letters that it summarizes.
>
> "The DLSE's primary function is enforcement, not rulemaking. (Lab.Code, §§ 61, 95, 98-98.7, 1193.5.) Nevertheless, recognizing that enforcement requires some interpretation and that these interpretations should be uniform and available to the public, the Legislature empowered the DLSE to promulgate necessary "regulations and rules of practice and procedure." (Labor Code § 98.8.) The Labor Code does not, however, include special rulemaking procedures for the DLSE similar to those that govern IWC rulemaking, nor does it expressly exempt the DLSE from the APA." Tidewater v. Bradshaw (1996) 14 Cal.4th 557, 569-570.

1.1.3 At first glance then, it would appear that DLSE may not interpret the myriad of laws which it must enforce without utilizing the very time consuming process of the Administrative Procedures Act. The Tidewater court did, however, provide that:

> If an issue is important, then presumably it will come before the agency either in an adjudication or in a request for advice. By publicizing a summary of its decisions and advice letters, the agency can provide some guidance to the public, as well as agency staff, without the necessity of following APA rulemaking procedures.

1.1.4 The Supreme Court later expanded on its explanation of the use of agency advice letters in the case of Yamaha Corp. of America v. State Board of Equalization (1998) 19 Cal.4th 1, 21 (concurring opinion, adopted and cited with approval at Morillion v. Royal Packing (2000) 22 Cal.4th 575, 590) when it stated:

---

*The wages, hours and working conditions of public employees are, generally, guided by the provisions of the Government Code or similar statutory authority. Labor Code § 220 was amended effective January 1, 2001, and provides that some public employers are subject to wage, hour and working conditions provisions of the Labor Code. See discussion at Section 12.1.1 of this Manual.

> "Long-standing, consistent administrative construction of a statute by those charged with its administration, particularly where interested parties have acquiesced in the interpretation, is entitled to great weight and should not be disturbed unless clearly erroneous. (Rizzo v. Board of Trustees (1994) 27 Cal.App.4th 853, 861, 32 Cal.Rptr.2d 892). This principle has been affirmed on numerous occasions by this court and the Courts of Appeal...Moreover, this principle applies to administrative practices embodied in staff attorney opinions and other expressions short of formal, quasi-legislative regulations. (See, e.g., DeYoung, supra, 147 Cal.App.3d 11, 19-21, 194 Cal.Rptr. 722 [long-standing interpretation of city charter provision embodied in city attorney's opinions]..."

The Supreme Court gave two reasons why such administrative letters should be entitled to great weight:

> First, "When an administrative interpretation is of long standing and has remained uniform, it is likely that numerous transactions have been entered into in reliance thereon, and it could be invalidated only at the cost of major readjustments and extensive litigation." (Whitcomb Hotel, Inc. v. Cal. Emp. Com., supra, 24 Cal.2d at p. 757, 151 P.2d 233...
>
> Second, as we stated in Moore, supra, 2 Cal.4th at pages 1017-1018, 9 Cal.Rptr.2d 358, 831 P.2d 798, "a presumption that the Legislature is aware of an administrative construction of a statute should be applied if the agency's interpretation of the statutory provisions is of such longstanding duration that the Legislature may be presumed to know of it." As the Court of Appeal has further articulated: "[L]awmakers are presumed to be aware of long-standing administrative practice and, thus, the reenactment of a provision, or the failure to substantially modify a provision, is a strong indication the administrative practice was consistent with underlying legislative intent."

Finally, the Supreme Court in the case of Morillion v. Royal Packing Company 22 Cal.4th 575 at 584, concluded that "advice letters [of the DLSE] are not subject to the rulemaking provisions of the APA." (citing Tidewater, supra, 14 Cal.4th at page 571) The Court then cited two of the Division's advice [opinion] letters regarding the DLSE's interpretation of the term "hours worked". The Court noted that the "DLSE interpretation is consistent with our independent analysis of hours worked."

1.1.5 In a later development concerning the use by the courts of DLSE Opinion Letters, the California courts have opined in the case of Bell v. Farmer's Insurance (2001) 87 Cal.App.4th 805, 815:

> "Advisory opinions... 'while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.' (Yamaha Corp. of America v. State Bd. of Equalization, supra, 19 Cal.4th at p. 14, 78 Cal.Rptr.2d 1, 960 P.2d 1031.) Thus, in Morillion v. Royal Packing Co., supra, 22 Cal.4th at page 584, 94 Cal.Rptr.2d 3, 995 P.2d 139, the court reviewed two DLSE advice letters and found support in the fact that the DLSE interpretation was consistent with its independent analysis. (See also Tidewater Marine Western, Inc. v. Bradshaw, supra, 14 Cal.4th at p. 571, 59 Cal.Rptr.2d 186, 927 P.2d 296.)"

1.1.6 This manual summarizes the policies and interpretations which DLSE has followed in discharging its duty to administer and enforce the labor statutes and regulations of the State of California. The summarized policies and interpretations are derived from the following sources:

1. Decisions of California's courts which construe the state's labor statutes and regulations and otherwise apply relevant California law.

2. California statutes and regulations which are clear and susceptible to only one reasonable interpretation.
3. Federal court decisions which define or circumscribe the jurisdictional scope of California's labor laws and regulations or which are instructive in interpreting those California laws which incorporate, are modeled on, or parallel federal labor laws and regulations.
4. Selected opinion letters issued by DLSE in response to requests from private parties which set forth the policies and interpretations of DLSE with respect to the application of the state's labor statutes and regulations to a specific set of facts.
5. Selected prior decisions rendered by the Labor Commissioner or the Labor Commissioner's hearing officers in the course of adjudicating disputes arising under California's labor statutes and regulations.

1.1.6.1 The particular sources underlying the specified policies and interpretations are indicated in the manual. Where the source is a statute, regulation, or court decision, its citation is set forth in the text; where the source is an opinion letter, the parenthetical abbreviation "(O.L.)" is inserted in the text, and where the source is a prior quasi-adjudicative decision of the Labor Commissioner (adopted as an "Administrative Decision") resulting from an adjudication of a dispute, the parenthetical abbreviation "(A.D.)" is inserted in the text. In the future, where the source is a decision of the Labor Commissioner which has been adopted as a "Precedent Decision", it will be referenced in the manual by the parenthetical abbreviation "(P.D.)".

1.1.6.2 The opinion letters, administrative decisions, precedent decisions and other unreported sources of these interpretations are contained in the companion volume to this manual.

1.1.6.3 Certain opinion letters cited in this manual refer to "Interpretive Bulletins" that were previously issued by DLSE. However, the California Supreme Court, in Tidewater, held that the Division's use of interpretive bulletins violates the provisions of the Administrative Procedures Act to the extent that such bulletins go beyond a simple restatement or summary of existing laws, duly promulgated regulations, judicial decisions, the Division's opinion letters, or administrative decisions. Thus, to the extent that any such interpretive bulletin purports to interpret the law by setting out rules of general application <u>and</u> fails to present such interpretation as a restatement or summary of the above enumerated sources, it is invalid.

2 WAGES.

2.1 Initially, it is necessary to establish that, in fact, an employer-employee relationship exists. The term "employee" is variously defined in the Wage Orders depending on the extent of the protections which the IWC intended (e.g., definition in Wage Order 5, Section 2(F) covering lessees and Section 2(G) defining employee in the Healthcare Industry) . Generally, the term means any person employed by an employer.

2.2 "Employer", Defined: The definition of employer for purposes of California's labor laws, is set forth in the Wage Orders promulgated by the Industrial Welfare Commission at Section 2 (see Section 55.2.1.2 of this Manual), and reads in relevant part as follows:

> "Employer" means any person . . . who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person. (E.g., 8 CCR §11090(2)(F))

2.2.1 As explained in detail at Section 37.1.2 of this Manual, it is possible that two separate employer entities (joint employers) may share responsibility for the wages due an employee. Also, at Section 28 of this Manual, there is a detailed discussion on how to distinguish between an employee and an independent contractor.

2.3 Labor Code § 200.

> As used in this article:
>
> (a) "Wages" includes all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation.
>
> (b) "Labor" includes labor, work, or service whether rendered or performed under contract, subcontract, partnership, station plan, or other arrangement if the labor to be paid for is performed personally by the person demanding payment.

2.4 Definition Of Wage . A wage is defined as money* or other value which is received by an employee as compensation for labor or services performed. It is common to think of "wages" as that amount received by an employee on a designated payday; but the courts have held that the term also includes:

> "...money as well as other value given, including room, board and clothes. (Schumann v. California Cotton Credit Corp. (1930) 105 Cal.App. 136, 140) " '[T]he term 'wages' should be deemed to include not only the periodic monetary earnings of the employee but also the other benefits to which he is entitled as a part of his compensation. [Citations.]' "(Department of Industrial Relations, DLSE v. UI Video Stores, Inc. (1997) 55 Cal.App.4th 1084, 1091)

2.4.1 A case involving a violation of a statutory requirement that prevents an employer from passing on costs to an employee may not, at first glance, appear to involve a claim for "wages"; but, as the court in the UI Video Stores case pointed out, the real effect of such a statute "is to increase the...employees' wages by the amount which in the absence of

---

*Except for the very limited exceptions found in Labor Code § 213, all wages due the employee on a designated payday must be paid in cash or by an instrument negotiable and payable in cash as provided by Labor Code § 212(a)(1) . (See also, Section 9 of this Manual)

2.4.1.1 Premium pay required by the Labor Code and IWC Wage Orders such as overtime premium, meal period premium, rest period premium, reporting time pay and split shift premium are "wages." *Murphy v. Kenneth Cole* (2007) 40 Cal.4th 1094.

2.4.2 The amount of money which is received may be a fixed sum, or it may be ascertained or determined by standard of time, task, piece, commission or by other method of calculation. (Labor Code § 200).

2.4.3 Thus, an amount of compensation may be paid to an employee for labor or services and may be measured by hour, day, week, month, year, or any other subdivision of time (e.g., a yearly "salary").

2.4.4 A wage is also defined as a specified sum or amount which is paid to an employee in exchange for a given time of service to an employer, or a fixed sum which is paid for a specified piece of work (e.g., "piecework").

2.4.5 In the final analysis, wages are considered to be compensation paid to a person who is employed to perform labor or services for another person or entity.

2.5 The analysis used to determine what method of compensation the wage is based on is usually simply. However, there are cases where it is not entirely clear at first glance whether the compensation is based on commissions or piece rate.

2.5.1 **Piece Rate or "Piece Work".** "Work paid for according to the number of units turned out." (AMERICAN HERITAGE DICTIONARY definition.) Consequently, a piece rate must be based upon an ascertainable figure paid for completing a particular task or making a particular piece of goods.

2.5.2 Examples of piece rate plans can be as diverse as the following:

1. Automobile mechanics paid on a "book rate" (i.e., brake job, one hour and fifty minutes, tune-up, one hour, etc.) usually based on the Chilton Manual or similar;

2. Nurses paid on the basis of the number of procedures performed;

3. Carpet layer paid by the yard of carpet laid;

4. Technician paid by the number of telephones installed;

5. Factory worker paid by the widget completed;

6. Carpenter paid by the linear foot on framing job.

2.5.3 A piece rate plan of compensation may include a group of employees who share in the wage earned for completing the task or making the product.

2.5.4 **Commission**. Labor Code § 204.1 defines commissions as: "Compensation paid to any person for services rendered in the sale of such employer's property or services and based proportionately upon the amount or value thereof." *Keyes Motors v. DLSE* (1987) 197 Cal.App.3d 557. If the compensation is based on a percentage of a sale, the compensation plan is a commission. On the other hand, a compensation plan which pays employees for the number of pieces of goods finished, the number of appointments made or the number of procedures completed, is based on a piece rate,

not a commission rate; though such compensation plans often refer to the payment as "commission".

2.5.4.1 Again, as with a piece rate plan, a commission plan may include a group of employees who share in the commissions earned. (See detailed discussion of commissions at Section 34 of this Manual)

2.5.5 Bonus Defined. A bonus is money promised to an employee in addition to the monthly salary, hourly wage, commission or piece rate usually due as compensation. The word has been defined as: "An addition to salary or wages normally paid for extraordinary work. An inducement to employees to procure efficient and faithful service." Duffy Bros. v. Bing & Bing, 217 App.Div. 10, 215 N.Y.S. 755, 758 (1939). Bonuses may be in the form of a gratuity where there is no promise for their payment; or they may be a contractually required payment where a promise is made that a bonus will be paid in return for a specific result (i.e., exceeding a minimum sales or piece quota). (See detailed discussion of Bonuses at Section 35 of this Manual)

2.5.5.1 Piece rate and commission plans may be in addition to an hourly rate or a salary rate of pay. Such plans may also be in the alternative to a salary or hourly rate. As an example, compensation plans may include salary <u>plus</u> commission or piece rate; or a base <u>or</u> guaranteed salary or commission or piece rate whichever is greater.

2.5.5.2 Bonus Plans Distinguished. Bonuses are in addition to any other remuneration rate and are predicated on performance over and above that which is paid for hours worked, pieces made or sales completed. A bonus is paid over and above wages earned for extraordinary work performance or as an inducement to employees to remain in the employ of the employer.

2.6 Wages Not Ordinary Debts . The California and federal courts have established the principle that wages are not ordinary debts. They are preferred over all other claims because of the economic position of the average worker and his/her dependence on the regular payment of wages for the necessities of life. IWC v. Superior Court Kern County (1980) 27 Cal.3d 690; 166 Cal.Rptr. 331 (appeal dism., cert. den. 101 S.Ct. 602; 449 U.S. 1029; Reid v. Overland Machined Products (1961) 55 Cal.2d 203; 359 P.2d 251; 10 Cal.Rptr. 819. In the later case of Boothby v. Atlas Mechanical, Inc. (1992) 6 Cal.App.4th 1595, 1601, the court noted that under California law, wages "are jealously protected by statutes for the benefit of employees."

2.6.1 Both California and federal law prohibit imprisonment for debt (unlawful and violative of individual rights). It should be noted, however, that the courts have upheld criminal cases which involved imprisonment for failure to pay wages when there is the ability to pay. Cases define the analytical framework applicable to claimed violations of the prohibition against imprisonment for debt.

2.6.2 It is not, however, every failure to pay wages which is subject to criminal sanctions. In In re Trombley (1948) 31 Cal.2d 801, the court reviewed the assertion that Labor Code § 216, violated the prohibition against imprisonment for debt. Citing the fraud exception to the imprisonment for debt prohibition, the court noted the prohibition

was "adopted to protect the poor but honest debtor who is unable to pay his debts, and [was] not intended to shield a dishonest man who takes an unconscionable advantage of another." The court recognized that wages were not ordinary debts, that workers are particularly dependent on wages and that it was a matter of essential public policy that workers receive their pay when due. The court stated: "An employer who knows that wages are due, has the ability to pay them, and still refuses to pay them, acts against good morals and fair dealing, and necessarily intentionally does an act which prejudices the rights of his employee. Such conduct amounts to a 'case of fraud' within the meaning of the exception to the constitutional prohibition and may be punished by statute." Trombley's formulation has been applied and expanded in subsequent cases.

2.7 Extension Of Enforcement Coverage Of California Wage Statutes To Some Public Employees. Effective January 1, 2001, Labor Code § 220 has been amended to extend coverage of Division 2, Part 1, Chapter 1, Article 1 (§§ 200-243) to employees of the State of California except §§ 201.5, 201.7, 203.1, 203.5, 204, 204a, 204b, 204c, 204.1, 205, and 205.5.

2.7.1 Note. Labor Code § 220(b) still exempts counties, incorporated cities, towns or other municipal corporations from the provisions of Labor Code §§ 200-211 and 215-219.

2.7.1.1 The above would include such entities as hospital districts, etc. (See DLLE v. El Camino Hospital District (1970) 8 Cal.App.3d, Supp. 30)

3 WAGES PAYABLE ON TERMINATION.

3.1 Labor Code § 201.

> If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately. An employer who lays off a group of employees by reason of the termination of seasonal employment in the curing, canning, or drying of any variety of perishable fruit, fish or vegetables, shall be deemed to have made immediate payment when the wages of said employees are paid within such reasonable time as may be necessary for computation and payment thereof; provided, however, that such reasonable time shall not exceed 72 hours, and further provided that payment shall be made by mail to any such employee who so requests and designates a mailing address therefor.

3.2 The general rules for the payment of wages upon termination are found at Labor Code § 201, et seq. Section 201 provides that in the event an employee is discharged, the wages earned and unpaid at the time of the discharge are due and payable immediately. There is an exception for employees in "seasonal employment in the curing, canning, or drying of any variety of perishable fruit, fish or vegetables" so long as wages of such employees are paid within 72 hours.

3.2.1 Employees in the curing, canning or drying occupations may be paid by mail if the employee so requests and designates a mailing address. The time for payment by mail under this very limited exception will, under California law, be timely if the wages are mailed within seventy-two hours of the termination. (See C.C.P. § 1013(a))

3.2.2 Layoff. If an employee is laid off without a specific return date within the normal pay period, the wages earned up to and including the lay off date are due and payable in accordance with Section 201. (Campos v. EDD (1982) 132 Cal.App.3d 961; 183 Cal.Rptr. 637; see also O.L. 1993.05.04 and O.L. 1996.05.30) If there is a return date within the pay period and the employee is scheduled to return to work, the wages may be paid at the next regular pay day.

3.2.2.1 Sale Of Business Constitutes Discharge. In California, the sale of a business (see Section 40 of this Manual for a discussion of the term "bulk sale") entails certain rights and responsibilities on the part of the employees and the employer. California courts have held that a sale of the business constitutes a termination of the employment and that unemployment benefits are not a prerequisite to the right to receive wages or benefits due the employee at the time of the termination. (Chapin v. Fairchild Camera and Instrument Corp. (1973) 31 Cal.App.3d 192) This result is consistent with Labor Code § 2920(b) and common law contract theories; i.e., a obligor (the employer who owes the wages or benefits) may not substitute another obligor (the buyer) in his or her place without the express written consent of the obligee (the employee).

3.2.3 Labor Code § 201.5 – Motion Picture Production. This section was amended in the 1998 legislative session and as a result, affects <u>all</u> employees engaged in motion picture production. The amended section now requires that <u>all</u> employees in the motion picture industry (not only those at remote locations as under the previous law) who are <u>laid off</u> (employment is terminated but the employee retains eligibility for re-employment) must be paid their final wages by the next regular payday. By contrast,

the section further provides that employees who are discharged must be paid their final wages within 24-hours. The section does not, however, change the requirements of Section 202 respecting employees who quit.

3.2.4 Labor Code § 201.5 covering employees in the motion picture industry now also contains a unique provision that wages due a laid off or discharged employee in the motion picture industry may be paid by mail (note that the mail payment may be at the employer's discretion since there is no requirement that the employee request the payment by mail) and the date of the mailing shall constitute the date of payment for purposes of the section.

3.3 Labor Code § 201.7 – Oil Well Drilling. This section provides an exception from the immediate payment provisions of Labor Code § 201 for employees "engaged in the business of oil drilling." While the Legislative intent language states that the reason for the exception is that "their employment at various locations is often far removed from the employer's principal administrative offices," the section does not limit the exception only to situations where the worker was employed at a distant location. Thus, any worker "engaged in the business of oil drilling" appear to be exempted from the requirement that a discharged employee must be paid immediately.

3.4 Labor Code § 202 – Employee Who Quits:

> If an employee not having a written contract for a definite period quits his employment, his wages shall become due and payable not later than 72 hours thereafter, unless the employee has given 72 hours previous notice of his intention to quit, in which case the employee is entitled to his wages at the time of quitting. Notwithstanding any other provision of law, an employee who quits without providing a 72-hour notice shall be entitled to receive payment by mail if he or she so requests and designates a mailing address. The date of the mailing shall constitute the date of payment for purposes of the requirement to provide payment within 72 hours of the notice of quitting.

3.5 Meaning Of Term: "For A Definite Period". If a written contract contains a specific term of employment (usually one year, but it may be less) and is <u>not</u> terminable by either party except for cause, the contract is one for a definite period of time. If, on the other hand, either party may, during the term of the contract, terminate the employment simply by giving notice of such intention, it is not a written contract for a definite period. (O.L. 1999.09.23)

3.6 Except where otherwise provided by statute, a quitting employees who has given notice of his or her intention to quit 72 hours in advance must be paid at time of termination.

3.7 Payment By Mail: Quitting employees must return to the office or agency of the employer in the county where the work was performed to recover wages after quitting except, of course, where the worker has given 72 hours notice or where the worker has requested payment by mail and provided an address. (Labor Code § 202; see also, Labor Code § 208 and see also Sections 4.3 and 7.4 of this manual)

3.8 Note: Labor Code § 205.5 was amended in the 1997 Legislative session and as a result, all agricultural employees subject to the section who quit their employment (as well as

those who are discharged) are entitled to receive waiting time penalties if they are not paid in a timely manner.

3.9 Extension Of Enforcement Coverage Of California Wage Statutes To Some Public Employees. Effective January 1, 2001, Labor Code § 220 has been amended to extend the coverage of Labor Code §§ 201, 202, 203, 204.2, 206, 207, 208 and 209 to employees of the State of California.

3.9.1 Note. Labor Code § 220(b) still exempts counties, incorporated cities, towns or other municipal corporations from the provisions of Labor Code §§ 200-211 and 215-219.

3.9.1.1 This would include hospital districts, etc. (See DLLE v. El Camino Hospital District (1970) 8 Cal.App.3d Supp. 30)

4 PENALTY FOR FAILURE TO PAY WAGES ON TERMINATION.

4.1 Labor Code Section 203.

> If an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201, 201.5, and 202, and 205.5, any wages of an employee who is discharged or who quits, the wages of such employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but such wages shall not continue for more than 30 days. An employee who secretes or absents himself or herself to avoid payment to him or her, or who refuses to receive the payment when fully tendered to him or her, including any penalty then accrued under this section, is not entitled to any benefit under this section for the time during which he or she so avoids payment.
>
> Suit may be filed for these penalties at any time before the expiration of the statute of limitations on an action for the wages from which the penalties arise.

4.1.1 As stated in the recent California case of Mamika v. Barca (1998) 68 Cal.App.4th 487, 492: "The reasons for this penalty provision are clear. 'Public policy has long favored the "full and prompt payment of wages due an employee.' '[W]ages are not ordinary debts...[B]ecause of the economic position of the average worker and, in particular, his dependence on wages for the necessities of life for himself and his family, it is essential to the public welfare that he receive his pay" promptly.' (Pressler v. Donald L. Bren Co. (1982) 32 Cal.3d 831, 837)... "Section 203 reflects these policy concerns. The statute is designed to 'compel the prompt payment of earned wages; the section is to be given a reasonable but strict construction' [against the employer]. (Barnhill v. Robert Saunders & Co. (1981) 125 Cal.App.3d 1, 7) 'The object of the statutory plan is to encourage employers to pay amounts concededly owed by [them] to [a] discharged or terminated employee without undue delay and to hasten settlement of disputed amounts.' (Triad Data Services, Inc. v. Jackson (1984) 153 Cal.App.3d Supp. 1, 11.)" .

4.1.1.1 The above language reflects the strong view California courts take regarding imposition of the penalty wage provided in Labor Code § 203.

4.2 Willfully. The statute provides the penalty if the employer "willfully" fails to pay the wages due. The definition of "willful" for purposes of Labor Code § 203 has been determined by the California courts and is summarized at Title 8, California Code of Regulations, § 13520:

> A willful failure to pay wages within the meaning of Labor Code Section 203 occurs when an employer intentionally fails to pay wages to an employee when those wages are due. However, a good faith dispute that any wages are due will preclude imposition of waiting time penalties under Section 203.
>
> A 'good faith dispute' that any wages are due occurs when an employer presents a defense, based in law or fact, which, if successful, would preclude any recovery on the part of the employee. The fact that a defense is ultimately unsuccessful will not preclude a finding that a good faith dispute did exist. Defenses presented which, under all the circumstances, are unsupported by any evidence, are unreasonable, or are presented in bad faith, will preclude a finding of a 'good faith dispute'. (8 C.C.R. § 13520) (Emphasis added)

4.2.1 Note. As the C.C.R. states, the "good faith dispute" if successful, would have to preclude any recovery by the employee. In other words, an employer cannot withhold

all of the wages due an employee based on a purported good faith dispute as to a portion of those wages. Any undisputed wages must be paid pursuant to the applicable law.

4.2.2 If it is determined that a good faith dispute exists as to whether any wages are due (even if, after resolution of the dispute wages are found to be due), the employer's failure to pay is not willful, and the employee is not entitled to waiting time penalties. The concept of a good faith defense to Section 203 penalties is supported by existing case law. (Davis v. Morris (1940) 37 Cal.App.2d 269) It must be shown that the employer owes the debt and has failed to pay it. The employer is not denied any legal defense as to the validity of the claim. (Barnhill v. Saunders (1981) 125 Cal.App.3d 1)

4.2.2.1 The civil penalty assessed under Labor Code § 203 does not require that the employer intended the action; merely that the action occurred and it was within the employer's control. (Davis v. Morris (1940) 37 Cal.App.2d 269; 99 P.2d 345)

4.2.3 Termination of Employment. Employment may be terminated by any of the following:

(a) Expiration of its appointed term. (Labor Code § 2920)

(b) Extinction of its subject. (Labor Code § 2920) (See also discussion at 3.2.2.1 of this Manual regarding termination upon sale of business.)

(c) Death of the employee or the employer. (Labor Code §§ 2920, 2921)

(d) The employee's or the employer's legal incapacity to act as such. (Labor Code §§ 2920 2921)

(e) Termination at will by employer when employment is not for a specified period. (Labor Code § 2922)

(f) Termination by employee voluntarily or as a result of willful breach of the employment contract by employer. (Labor Code § 2925)

4.3 Wages Due Quitting Employee. As discussed at Section 3.4 of this Manual, wages due most employees who quit are due within 72 hours after resignation unless 72 hours previous notice was given. Under most circumstances a quitting employee must return to the office or agency of the employer in the county where the work was performed for his or her wages. (See Section 7.4 of this Manual)

4.3.1 There may, however, exist circumstances created by the employer which would prevent an employee from returning for the wages or which would make the return an exercise in futility. (O.L. 1986.09.15) Under those circumstances, the penalty wage provided by Section 203 may apply.

4.3.2 Payment by Mail. Labor Code § 202 provides that an employee may elect to receive termination wages by mail. In those cases, the date of the mailing constitutes the date of payment. In the event that the employer contends that the employee elected to receive termination wages by mail, it is necessary that the employer prove (1) that the employee chose this method of delivery and (2) that the check was received by the

employee. See *Villafuerte v. Inter-Con Security Systems, Inc.* (2002) 96 Cal.App.4th, Supp. 45

4.3.3 Labor Code §§ 201.5 and 201.7 do not require an election by the employee; the employer may choose to pay the wages by mail and the date of mailing will be considered the date of payment. In the event the employer unilaterally chooses to deliver the termination of wages by mail, the employer must not only prove that the letter was mailed to the correct address but, since the employee did not assent to receipt by this method, it must prove that the check was received by the employee. See *Villafuerte v. Inter-Con Security Systems, Inc.* (2002) 96 Cal.App.4th, Supp. 45

4.3.4 **Any Wages**. "Any wages" includes any amount due as wages (see Labor Code § 200, see also, *DIR, DLSE v. UI Video*, 55 Cal.App.4th 1084,1091); but does not include expenses. (*Hagin v. Pac. Gas & Elec.* 152 Cal.App.2d 93).

4.3.4.1 Failure to pay an employee all premium pay required by the Labor Code and Wage Orders as required by Labor Code §§ 201 and 202, such as overtime premium, reporting time pay, meal period/rest period premium, and split shift premium pay, may entitle an employee to waiting time penalties.

4.4 **30 Days**. Penalties continue for up to 30 calendar days. The statutory reference is to 30 actual days' worth of wages. Waiting time penalties for a specific number or days are computed by multiplying the employee's daily wage rate by the specified number of days since the payment of the wages became due.

> "[U]npaid wages continue to accrue on a daily basis for up to a 30-day period. Penalties accrue not only on the days that the employee might have worked, but also on nonworkdays… The critical computation required by section 203 is the calculation of a daily wage rate, which can then be multiplied by the number of days of nonpayment, up to 30 days…[A] somewhat similar method…used to compute overtime compensation, i.e., the employee's regular rate of pay is computed by dividing the total weekly salary by no more than 40 hours (citations)…This method of calculation has been used by a number of courts, but without much analysis." *(Mamika v. Barca* (1998) 69 Cal.App.4th 487, 492-493).

4.5 **Action.** Payment of the wages, or the commencement of an action, stops the penalties from accruing. An action is commenced by filing in court. (See Code of Civil Procedure § 22). Filing a claim with the Labor Commissioner is not considered the filing of an action and does not prevent the penalties from continuing to accrue. *(Cuadra v. Millan* (1998) 17 Cal.4th 855, 72 Cal.Rptr2d 687).

4.6 **Payment Of Wages Not Calculable Until After Termination**. There are situations where wages (i.e., some commissions) are not calculable until after termination and, thus, are not due until that time. The employer has an obligation to pay those wages as soon as the amount is ascertainable and failure to pay those wages at that time will result in imposition of waiting time penalties. (See discussion at O.L. 1999.01.09).

4.6.1 Inability to pay is not a defense to the failure to timely page wages under Sections 201 and 202 and does not relieve the employer of penalties under Section 203. As noted above, the civil penalty assessed under Labor Code § 203 does not require that the employer intended the action; merely that the action occurred and it was within the employer's control. *(Davis v. Morris* (1940) 37 Cal.App.2d 269, 99 P.2d 345).

4.6.1.1 In addition, of course, ignorance of the law is no excuse. (Hale v. Morgan (1978) 22 Cal.3d 388, 396) Thus, failure to comply with the payment sections based on the fact that the employer did not know of the requirements is not an excuse.

4.6.2 The case of Diaz, et al v. Slaten (Placer Co. Sup. Crt. Appl Dept. (1997) unpub. opinion) attached, accurately reflects the DLSE policy. The opinion of the court, adopted the view of the DLSE. (See O.L. 1996.11.20)

4.7 Payment Of Wages By Insufficient Funds Instrument. Any employee who, during the regular course of employment or upon discharge, is paid with a non-sufficient funds instrument is entitled to recover a penalty of one day's pay for each day those wages remain unpaid. The penalty shall not exceed thirty days' of wages. (Labor Code § 203.1)

4.7.1 Penalty Applies To Wages During The Course Of Employment Or At Time Of Termination. It is important to note that the penalty provided in Labor Code § 203.1 applies to any wages paid with a non-sufficient funds instrument. Thus, if an employee is paid during the regular course of employment with a non-sufficient funds check the employee is entitled to recover penalties for each day the wages remain unpaid up to a thirty-day maximum.

4.7.2 If the NSF check is provided for payment of final wages owed pursuant to §§ 201, 201.5, 202, or 205, the employer would be subject to penalties both for payment by NSF check under § 203.1 and for penalties under § 203 for late payment of final wages.

4.7.3 The penalties also apply to non-payment of "fringe benefits". This provision has not been tested in the California courts and the issue of the pre-emptive effect of ERISA may play a role in the final analysis of any case brought under this section.

4.7.4 The penalty provided in Section 203.1 is not applicable if the employee recovers the service charge authorized by Section 1719 of the Civil Code.

5 PAYMENT OF REGULARLY SCHEDULED WAGES.

5.1 § 204 – Payment Of Wages During Course Of Employment:

All wages, other than those mentioned in Section 201, 202, 204.1, or 204.2, earned by any person in any employment are due and payable twice during each calendar month, on days designated in advance by the employer as the regular paydays. Labor performed between the 1st and 15th days, inclusive, of any calendar month shall be paid for between the 16th and the 26th day of the month during which the labor was performed, and labor performed between the 16th and the last day, inclusive, of any calendar month, shall be paid for between the 1st and 10th day of the following month. However, salaries of executive, administrative, and professional employees of employers covered by the Fair Labor Standards Act, as set forth pursuant to Section 13(a)(1) of the Fair Labor Standards Act, as amended through March 1, 1969, in Part 541 of Title 29 of the Code of Federal Regulations, as that part now reads or may be amended to read at any time hereafter, may be paid once a month on or before the 26th day of the month during which the labor was performed if the entire month's salaries, including the unearned portion between the date of payment and the last day of the month, are paid at that time. Notwithstanding any other provision of this section, all wages earned for labor in excess of the normal work period shall be paid no later than the payday for the next regular payroll period.

However, when employees are covered by a collective bargaining agreement that provides different pay arrangements, those arrangements shall apply to the covered employees.

The requirements of this section shall be deemed satisfied by the payment of wages for weekly, biweekly, or semimonthly payroll if the wages are paid not more than seven calendar days following the close of the payroll period.

5.2 Wages must be paid according to a regularly-set schedule. (See Labor Code § 207 regarding Payday Notice requirements.) The Legislature has established the general guidelines for payment in Labor Code § 204. In most cases the employee must be paid at least twice per month within the time set forth in the applicable Labor Code section.

5.2.1 Payment of Overtime Wages. Section 204 permits payment of wages earned for labor "in excess of the normal work period" to be delayed until no later than the payday for the next pay period. Only the payment of overtime premium wages may be delayed to the payday in the following pay period; the straight time wages must still be paid within the time set forth in the applicable Labor Code section in the pay period in which they were earned; or, in the case of employees who are paid on a weekly, biweekly, or semi-monthly basis, not more than 7 (seven) calendar days following the close of the payroll period.

5.2.2 Caveat: Weekly Payment of Wages Covered Under Labor Code § 204b. Note that most workers paid on a weekly basis must be paid pursuant to the provisions of Labor Code § 204 within seven days.

5.2.3 Section 204 also provides exceptions which allow the payment of salary, for those employees who are exempt under the Fair Labor Standards Act, once a month.

5.2.4 Base salary must be paid pursuant to the provisions of Labor Code § 204; however, certain exceptions are provided in the statute for specified extraordinary wages. For instance, if a bonus (see definition at Section 2.5.5 of this Manual) is calculated on a quarterly basis, the bonus need not be paid until the regular payday following the date

upon which the bonus is calculated. (O.L. 1986.12.23) Wages "earned in excess of the normal work period" (i.e., payment for unscheduled overtime work) need not be paid until the following pay period; unless, of course, "regular overtime" or extended hours which is scheduled to occur for a period of time is involved, in which case the wages for these hours must be paid pursuant to Labor Code § 204. (O.L. 1988.05.05) The Opinion Letters listed here, plus O.L. 1993.04.19, present a number of issues which may be raised.

5.2.5 Payment Of Commission Wages. In some instances commission wages are not ascertainable at the time of a sale or transaction and must be calculated based on later developments (i.e., receipt of payment, shipping, etc.) Commission wages are due and payable when they are reasonably calculable.

5.3 § 204(a) – Payment of Wages at Central Place:

> When workers are engaged in an employment that normally involves working for several employers in the same industry interchangeably, and the several employers, or some of them, cooperate to establish a plan for the payment of wages at a central place or places and in accordance with a unified schedule of pay days, all the provisions of this chapter except 201, 202, and 208 shall apply. All such workers, including those who have been discharged and those who quit, shall receive their wages at such central place or places.
>
> This section shall not apply to any such plan until 10 days after notice of their intention to set up such a plan shall have been given to the Labor Commissioner by the employers who cooperate to establish the plan. Having once been established, no such plan can be abandoned except after notice of their intention to abandon such plan has been given to the Labor Commissioner by the employers intending to abandon the plan.

5.3.1 The central place is required to maintain the time records, pay each worker for his or her total time worked in each pay period, and deduct and report taxes.

5.3.2 Both discharged and quitting employees must be paid at the central place. Employers intending to start a central pay plan must provide DLSE with a signed notice to that effect. Wages of such employees may not be assigned. (Labor Code § 300(f); see Section 18.3 of this Manual) Such pay plan cannot be implemented until ten (10) days after notice of the intent to adopt the plan has been received by the Labor Commissioner. The plan may not be abandoned without giving prior written notice to DLSE.

5.3.3 § 204c – Certain Executive, Administrative Or Professional Employees:

> Section 204 shall be inapplicable to executive, administrative or professional employees who are not covered by any collective bargaining agreement, who are not subject to the Fair Labor Standards Act, whose monthly remuneration does not include overtime pay, and who are paid within seven days of the close of their monthly payroll period.

5.3.4 Labor Code § 204c provides an exemption from the provisions of Section 204 for exempt employees and allows such employees to be paid monthly under the limited circumstances set out in the statute. Each of the following circumstances must be met in order for an employee to be subject to Section 204c:

1. Employee not covered by a collective bargaining agreement;

2. Employee not subject to the Fair Labor Standards Act (See regulations at Title 29, Part 541, Code of Federal Regulations for definitions);
3. Employee whose monthly remuneration does not include overtime pay;
4. Employee is paid within seven days of the close of the monthly payroll period.

5.4 § 204.1 – Commissioned Vehicle Salespersons:

Commission wages paid to any person employed by an employer licensed as a vehicle dealer by the Department of Motor Vehicles are due and payable once during each calendar month on a day designated in advance by the employer as the regular payday. Commission wages are compensation paid to any person for services rendered in the sale of such employer's property or services and based proportionately upon the amount or value thereof.

The provisions of this section shall not apply if there exists a collective bargaining agreement between the employer and his employees which provides for the date on which wages shall be paid.

5.4.1 The Legislature enacted Section 204.1 to permit the monthly payment of commission wages by employees employed by employers licensed as vehicle dealers. Mechanics and other employees performing repair or related services are not "commissioned" employees. (See Keyes Motors v. DLSE (1987) 197 Cal.App.3d 557; 242 Cal.Rptr. 873) Also see, Sections 2.5.4 and 34.1 of this Manual.

5.4.2 Section 204.1 does not apply in those cases where there is a CBA which provides a date when commissioned wages shall be paid. (See discussion of law regarding handling of claims for work performed where a CBA is in effect at Section 7.5.2 of this Manual)

5.5 § 204.2 – Wages Of Exempt Employees In Addition To Salary:

Salaries of executive, administrative, and professional employees of employers covered by the Fair Labor Standards Act, as set forth pursuant to Section 13(a)(1) of the Fair Labor Standards Act of 1938, as amended through March 1, 1969, (Title 29, Section 213 (a)(1), United States Code) in Part 541 of Title 29 of the Code of Federal Regulations, as that part now reads, earned for labor performed in excess of 40 hours in a calendar week are due and payable on or before the 26th day of the calendar month immediately following the month in which such labor was performed. However, when such employees are covered by a collective bargaining agreement that provides different pay arrangements, those arrangements will apply to the covered employees.

5.5.1 Section 204.2 sets forth the requirement for pay for work in excess of the normal workweek for Executive, Administrative, and Professional employees of employers covered by the Fair Labor Standards Act. Section 204.2 provides that contract-generated wages earned by these classes of employees for labor performed in excess of 40 hours in a calendar week are due and payable on or before the 26th of the calendar month following the month in which the work was performed. This section does not apply to those employees covered by a collective bargaining agreement that provides for a different pay arrangement.

5.6 § 205 – Certain Occupations Where Employees Receive Room And Board:

In agricultural, viticultural, and horticultural pursuits, in stock or poultry raising, and in household domestic service, when the employees in such employments are boarded and lodged by the employer, the wages due any employee remaining in such employment shall become due and

payable once in each calendar month on a day designated in advance by the employer as the regular payday. No two successive paydays shall be more than 31 days apart, and the payment shall include all wages up to the regular payday. Notwithstanding the provisions of this section, wages of workers employed by a farm labor contractor shall be paid on payroll periods at least once every week on a business day designated in advance by the farm labor contractor. Payment on such payday shall include all wages earned up to and including the fourth day before such payday.

5.6.1 The Legislature has provided in Section 205 that in specified agricultural and domestic occupations paydays may be on a monthly basis when the employee is lodged and boarded by the employer. These provisions are applicable only when the following conditions exist:

1. The employment is in agriculture, viticulture, horticulture, stock raising, poultry raising or household domestic service;
2. The employee is boarded and lodged by the employer;
3. Paydays are designated and are never more than 31 days apart;
4. The wage payments include all wages owed up to the payday.

5.6.2 Employees Of Farm Labor Contractors May Not Be Paid On The Schedule Set Out In Section 205. Employees of farm labor contractors must be paid at least once per week on a business day previously designated by the farm labor contractor. Payment must include all wages earned up to and including the fourth day before such weekly payday.

5.6.3 § 205.5 – Most Agricultural Employees: Excluding those employees mentioned in Labor Code § 205, employees of agricultural employers are required to be paid at least twice each month within seven days of the end of the pay period. Note the statutory change in 1997 which extends the right to penalty wages for covered agricultural employees who quit.

5.6.4 Section 205.5 defines agricultural employees by reference to the definition contained in Labor Code § 1140.4.

6. COMPENSATING TIME OFF.

6.1 For purposes of calculating overtime under the Industrial Welfare Commission Orders, Labor Code § 204.3 has been adopted by the Legislature providing its view of the use of "compensating time off." The adoption of that language has precluded the Division from promulgating or enforcing any other "compensatory time" provisions. Thus, the Division policy concerning compensatory time which had been in effect for many years may no longer be applied. Further, in view of the language now contained in Labor Code § 513, private employers in California (see caveat, below) may not utilize "compensatory time" provisions.

6.1.1 **Caveat:** The provisions of Section 204.3 are patterned on provisions found in 29 U.S.C. § 207(o). It should be noted that these compensatory time provisions are only applicable under the federal law to state and local government employees; the compensating time provisions under federal law are not applicable to employees of private employers. Any employer utilizing the provisions of Section 204.3 should be advised of this caveat as use of the compensating time provisions of the state law may result in violation of the federal law.

6.2 **New "Makeup Work Time" Provisions Adopted By Legislature Are Now Part of IWC Orders Promulgated In 2000.** The IWC incorporated the language of Labor Code § 513 into each of the orders except 14 :

> If an employer approves a written request of an employee to make up work time that is or would be lost as a result of a personal obligation of the employee, the hours of that makeup work time, if performed in the same workweek in which the work time was lost, may not be counted towards computing the total number of hours worked in a day for purposes of the overtime requirements specified in Section 510 or 511, except for hours in excess of 11 hours of work in one day or 40 hours in one workweek. An employee shall provide a signed written request for each occasion that the employee makes a request to make up work time pursuant to this section. An employer is prohibited from encouraging or otherwise soliciting any employee to request the employer's approval to take personal time off and make up the work hours within the same week pursuant to this section.

6.3 **Labor Code § 513 Outlines A "Makeup Work Time" Exception, As Opposed to A Compensating Time Off Provision.** With the adoption by the Legislature of Labor Code § 513 there now exists a system to provide a certain amount of flexibility without compromising the 8-hour day concept.

6.4 See Section 48.2 of this Manual for further guidance regarding "Makeup Work Time."

See Labor Code § 554 regarding exemption of agricultural employees from certain provisions of the Labor Code.

7 WAGE PAYMENT – CONDITIONS AND TIME AND PLACE.

7.1 § 206 – Conceded Wages Must Be Paid Without Condition:

(a) In case of a dispute over wages, the employer shall pay, without condition and within the time set by this article, all wages, or parts thereof, conceded by him to be due, leaving to the employee all remedies he might otherwise be entitled to as to any balance claimed.

(b) If, after an investigation and hearing, the Labor Commissioner has determined the validity of any employee's claim for wages, the claim is due and payable within 10 days after receipt of notice by the employer that such wages are due. Any employer having the ability to pay who willfully fails to pay such wages within 10 days shall, in addition to any other applicable penalty, pay treble the amount of any damages accruing to the employee as a direct and foreseeable consequence of such failure to pay.

7.1.1 Section 206 requires an employer, in case of a dispute over the amount of wages due, to pay, without condition, any amount conceded due in accordance with the time limits set forth in Article 1 of the Labor Code. (See Labor Code §§ 201, 201.5, 201.7, 202, 204, 204b, 204.1, 203.2, 205 and 205.5; Reid v. Overland Machined Products (1961) 55 Cal.2d 203, 207)

7.1.2 No Conditions May Be Put On Payment Of Conceded Wages. This section compels prompt payment of all wages conceded due and expressly precludes the employer from conditionally offering the disputed amount as a means of coercing the employee into settling the disputed wage claim. (Reid v. Overland Machined Products, supra, 55 Cal.2d at 207)

7.1.3 An accord and satisfaction (See Section 31.7 of this Manual for definition) is invalid if entered into in violation of the terms of Section 206. (Reid v. Overland Machined Products, supra, 55 Cal.2d at 208)

7.1.4 The employee has a right to recover damages in a civil action not through DLSE.

7.2 § 206.5 – Release Of Claim Of Wages Illegal Unless Wages Previously Paid:

No employer shall require the execution of any release of any claim or right on account of wages due, or to become due, or made as an advance on wages to be earned, unless payment of such wages has been made. Any release required or executed in violation of the provisions of this section shall be null and void as between the employer and the employee and the violation of the provisions of this section shall be a misdemeanor.

7.2.1 Existence Of Release Does Not Preclude Employee From Pursuing Unpaid Wages. Section 206.5 prohibits an employer from requiring the execution of a release of any wage claim or right to wages due before payment of those wages has been made. In addition, the section provides that any such release is null and void as between the employer and the employee and further, that the violation of this section by the employer is a misdemeanor. The existence of a release does not preclude the employee from pursuing a claim for the wages if the wages, in fact, had not been paid. The question whether the wages, in fact, had been paid, is one of fact and must be determined based on the testimony and information submitted.

7.2.1.1 There are exceptions to the general rule stated above such as supervised settlements in pending Berman Hearing proceedings (permitted by Labor Code § 98.2(e)); stipulated

settlements in court actions where the principles of res judicata, merger or bar apply, and voluntary dismissal with prejudice coupled with a settlement operates to bar a new action.

7.2.2 Settlement By DLSE. (1) If the Division enters into a settlement in a claim for minimum wages or overtime, an employee will be bound if he or she accepts the benefits demanded and obtained through settlement (Labor Code § 1193.5) or the employee consents to bringing the action in which settlement is reached (Labor Code § 1193.6); (2) in the event of a claim for wages of any kind the employee will be bound if he or she agrees to sign the release required by the DLSE as a condition of receiving settlement benefits obtained by DLSE.

7.2.2.1 The DLSE is invested with broad authority to act on behalf of employees in a fiduciary capacity and to generally supervise and oversee settlements for their benefit. (See Labor Code §§ 90-106; 1193.5; 1193.6)

7.3 § 207 – Required Notices Of Paydays And Place Of Payment:

Every employer shall keep posted conspicuously at the place of work, if practicable, or otherwise where it can be seen as employees come or go to their places of work, or at the office or nearest agency for payment kept by the employer, a notice specifying the regular pay days and the time and place of payment, in accordance with this article.

7.3.1 Notice Of Time And Place Of Regular Payday. Under the provisions of this section, employers must post a notice setting forth the schedule of paydays; it must be posted where the employees can see it. There is no specific form required for the payday notice so long as it lists all of the required information. DLSE form 8 may be used.

7.4 § 208 – Place Of Payment Of Wages At Termination:

Every employee who is discharged shall be paid at the place of discharge, and every employee who quits shall be paid at the office or agency of the employer in the county where the employee has been performing labor. All payments shall be made in the manner provided by law.

7.4.1 Section 208 states where wage payments due to discharged or quitting employees are to be made – at the office of the employer in the county where the employee performed the labor.

7.4.2 Discharged Employees. The section specifically states that discharged employees must be paid at the place of discharge.

7.4.3 Quitting Employees. The section provides that employees who quit their employment must be paid at the office or agency of the employer in the county where the employee has been performing labor. (Cf. Section 4.3.1 of this Manual for exception to this rule.)

7.5 § 209 – Wage Payment In Event Of Strike.

In the event of any strike, the unpaid wages earned by striking employees shall become due and payable on the next regular pay day, and the payment or settlement thereof shall include all amounts due the striking employees without abatement or reduction. The employer shall return to each striking employee any deposit, money, or other guaranty required by him from the employee for the faithful performance of the duties of the employment.

7.5.1 Note that there is no provision in this section designating the *place of payment* of the striker's wages. The place of payment must, obviously, be reasonably situated – under the circumstances – to give all of the workers an opportunity to be paid.

7.5.2 **Payment of Wages Due Earned In Collective Bargaining Situation.** The Supreme Court decision in *Livadas v. Bradshaw* 512 U.S. 107, 114 S.Ct. 2068 (1994) makes it clear that under certain circumstances wages owed under the terms of a collective bargaining agreement may be recovered in a claim before the Labor Commissioner. Cf., *Livadas v. Bradshaw* (1994) 865 F.Supp. 642, which is the consent decree incorporating the Division policy for handling claims filed by employees covered by CBAs; the claims **must** be first reviewed by the Legal Section in accordance with this consent decree. (See Section 36.2.2 of this Manual).

7.6 **Wage Payment Where Holidays Occur**. Occasionally, the designated payday will fall on a holiday. The question then arises: When are the employees required to be paid? The DLSE has established an enforcement position which relies on the provisions of Sections 7, 9, 10 and 11 of the California Civil Code and on Section 12a of the California Code of Civil Procedure:

> C.C. § 7: "Holidays within the meaning of this code are every Sunday and such other days as are specified or provided for as holidays in the Government Code of the State of California."
> C.C. § 9: "All other days than those mentioned in Section 7 are business days for all purposes;…"
> C.C. § 10: "The time in which any act provided by law is to be done is computed by excluding the first day and including the last day, unless the last day is a holiday, and then it is also excluded."
> C.C. § 11: "Whenever any act of a secular nature, other than a work of necessity or mercy, is appointed by law or contract to be performed upon a particular day, which day falls upon a holiday, it may be performed upon the next business day, with the same effect as if it had been performed upon the day appointed."
> C.C.P § 12a(a): "If the last day for the performance of any act provided or required by law to be performed within a specified period of time is a holiday, then that period is hereby extended to and including the next day which is not a holiday. For purposes of this section, "holiday" means all day on Saturdays, all holidays specified in Section 135 and, to the extent provided in Section 12b, all days which by terms of Section 12b are required to be considered as holidays.

7.6.1 The following days have been designated as holidays by Government Code: January 1, the third Monday in January, February 12, the third Monday in February, March 31, the last Monday in May, July 4, the first Monday in September, the second Monday in October, November 11, Thanksgiving, the day after Thanksgiving and December 25.

7.6.2 The above statutes have been relied upon by DLSE to allow an employer the option of paying wages due on a Saturday or Sunday (or holiday listed in the Government Code and scheduled as a holiday by the employer) on the next business day.

7.7 **§ 219 – Private Agreement May Not Contravene Pay Provisions.**

> Nothing in this article shall in any way limit or prohibit the payment of wages at more frequent intervals, or in greater amounts, or in full when or before due, but no provision of this article can in any way be contravened or set aside by a private agreement, whether written, oral or implied.

7.7.1 The specified times when wages must be paid, as established by the Labor Code, may not be set aside by a private agreement. Payment of wages at more frequent intervals than those required is permitted.

7.7.2 Note that some of the statutes regarding time and place of payment of wages contain exemptions for CBAs. (See Section 36.2.2 of this Manual for further discussion concerning handling of "opt-out" clauses in CBAs)

8 PENALTIES TO STATE.

8.1 § 210 – Penalty For Failure To Pay Wages During Course Of Employment:

In addition to, and entirely independent and apart from, any other penalty provided in this article, every person who fails to pay the wages of each employee as provided in Sections 204, 204b, 204.1, 204.2, 205, 205.5, and 1197.5, shall be subject to a civil penalty as follows:

(a) For any initial violation, fifty dollars ($50) for each failure to pay each employee.

(b) For each subsequent violation, or any willful or intentional violation, one hundred dollars ($100) for each failure to pay each employee, plus 25 percent of the amount unlawfully withheld. The penalty shall be recovered by the Labor Commissioner as part of a hearing held to recover unpaid wages and penalties pursuant to this chapter or in an independent civil action. The action shall be brought in the name of the people of the State of California and the Labor Commissioner and the attorneys thereof may proceed and act for and on behalf of the people in bringing these actions. All money recovered therein shall be paid into the State Treasury to the credit of the General Fund.

8.1.1 Penalty To State Due For Untimely Payment Of Wages. When an employer fails to pay wages as required by Labor Code §§ 204 (on a regular pay day), 204b (on a regular weekly pay day), 204.1 (on a monthly basis for commission wages), 204.2 (for monthly salaries), 205 (monthly wages to agricultural employees boarded and lodged by an employer, and weekly to employees of farm labor contractors), 205.5 (semi-monthly to agricultural employees) and 1197.5 (equal pay), the employer, under Section 210, is subject to a civil penalty for each such missed or untimely pay day.

8.1.2 Amount Of Penalty. For the first failure to pay wages as required, the employer is subject to the assessment of a penalty of $50 per employee. Subsequent violations subject the employer to the assessment of penalties at the rate of $100 per employee and an additional 25% of the amount paid in accordance with the sections cited above. If the evidence establishes that a good faith dispute existed or that the violation was not intentional, penalties may not be assessed against the employer.

8.1.3 Penalty Recoverable Through Labor Code § 98(a) Process. The penalties provided by Labor Code § 210 may be recovered for the State through a hearing held pursuant to Labor Code § 98(a) et seq.

8.2 § 211 – Recovery Of Penalty In Action Brought By DLSE. The Division has the authority to pursue payday penalties assessed pursuant to Labor Code § 210 through the courts without the use of the hearing process available pursuant to Labor Code § 98(a) et seq. This section requires that a demand be made prior to legal action being brought. Section 211 allows the Division to pursue these penalties without cost and provides for the collection of any fees through any judgment obtained.

8.3 § 225.5 – Additional Civil Penalty:

In addition to, and entirely independent and apart from, any other penalty provided in this article, every person who unlawfully withholds wages due any employee in violation of Section 212, 216, 221, 222, or 223 shall be subject to a civil penalty as follows:

(a) For any initial violation, fifty dollars ($50) for each failure to pay each employee.

(b) For each subsequent violation, or any willful or intentional violation, one hundred dollars ($100) for each failure to pay each employee, plus 25 percent of the amount unlawfully withheld.

The penalty shall be recovered by the Labor Commissioner as part of a hearing held to recover unpaid wages and penalties or in an independent civil action. The action shall be brought in the name of the people of the State of California and the Labor Commissioner and attorneys thereof may proceed and act for and on behalf of the people in bringing the action. All money recovered therein shall be paid into the State Treasury to the credit of the General Fund.

8.3.1 Section 225.5 provides for civil penalties, payable to the state, for violations of Labor Code §§ 212 (paying with non-negotiable instrument), 216 (willful failure to pay wages even though having ability to do so), 221 (collecting back an employee's wages), 222 (failure to pay agreed upon wage rate) or 223 (secretly paying a wage less than required by statute or contract). (See Section 10 of this Manual for discussion of these provisions.)

8.3.2 These penalties are all payable to the State Treasurer and are in addition to any other applicable penalties provided in the Labor Code. Penalties are assessed at $50 per employee not paid in accordance with the cited statutes for the first violation and $100 per employee for subsequent violations plus 25% of the amount withheld (i.e., not timely paid). These penalties may be assessed either as a part of a hearing or through a civil action brought by the Division.

9 METHOD OF PAYMENT OF WAGES.

9.1 § 212 – Payment By Non-Sufficient Funds Instrument Illegal:

(a) No person, or agent or officer thereof, shall issue in payment of wages due, or to become due, or as an advance on wages to be earned:

(1) Any order, check, daft, note, memorandum, or other acknowledgment of indebtedness, unless it is negotiable and payable in cash, on demand, without discount, at some established place of business in the state, the name and address of which must appear on the instrument, and at the time of its issuance and for a reasonable time thereafter, which must be at least 30 days, the maker or drawer has sufficient funds in, or credit, arrangement, or understanding with the drawee for its payment.

(2) Any scrip, coupon, cards, or other thing redeemable, in merchandise or purporting to be payable or redeemable otherwise than in money.

(b) Where an instrument mentioned in subdivision (a) is protested or dishonored, the notice or memorandum of protest or dishonor is admissible as proof of presentation, nonpayment and protest and is presumptive evidence of knowledge of insufficiency of funds or credit with the drawee.

(c) Notwithstanding paragraph (1) of subdivision (a), if the drawee is a bank, the bank's address need not appear on the instrument and, in that case, the instrument shall be negotiable and payable in cash, on demand, without discount, at any place of business of the drawee chosen by the person entitled to enforce the instrument.

9.1.1 **Wages Must Be Paid In Cash Or Instrument Negotiable In Cash**. The wages of workers in California must be paid in cash or other acknowledgment that is payable in cash without discount, upon demand.

9.1.2 The requirements placed on the employer regarding the payment of wages are:

1. Wages must be paid in cash or by an instrument payable in cash money without discount. (See limited exceptions in Labor Code Sections 213(a) and (c).) (See Section 9.1.8 of this Manual)
2. The instrument must show on its face the name and address of some established business within the State of California where it can be cashed, even if the instrument is drawn on an out-of-state financial institution.
3. At the time of issuance, and for 30 days thereafter, the maker must maintain sufficient funds to redeem the instrument or have a credit arrangement with the drawee that provides for its redemption.
4. If the instrument is presented within 30 days and is refused redemption, this constitutes sufficient evidence for a charge of the violation of Section 212. This is not a specific intent criminal statute.
5. It should be noted that in the event the check is drawn on a bank, the address of the bank need not be on the face of the check and the check must be honored at any place of business of the bank in this State.

9.1.2.1 **Payment By Scrip Prohibited.** The DLSE has, on a number of occasions, addressed the issue of payment "in cash" or in an "instrument negotiable in cash". In one such

situation, for instance, a "bonus" offered by the employer for meeting financial performance targets and paid by means of scrip which was redeemable for goods offered in a catalog violated both Labor Code § 212 and § 450. (O.L. 1998.09.14)

9.1.3 Effective January 1, 2001, the provision at Labor Code § 203.1 which provides a penalty for payment of any wages by non-sufficient funds instrument is now extended to employees in all industries. The penalty covers not only wages but also "fringe benefits" paid to any employee.

9.1.3.1 Failure To Pay ERISA Trust. A penalty for failure to pay fringe benefits to an ERISA trust would not be recoverable since this penalty would add a collection tool to that available for recovery under federal law, and such remedy would be pre-empted. (Carpenters So. Cal. Admin. Corp. v. El Capitan (1991) 53 Cal.3d 1041. Deputies are encouraged to check with the assigned attorney regarding fringe benefit collections.

9.1.4 Constitutionality. Labor Code § 212(a) has been found to be constitutional by the courts.

9.1.5 Criminal Proceedings. The case of People v. Turner (1957) 154 Cal.App.2d Supp. 883, gives a broad interpretation to the applicability of Section 212 and makes it clear that the section applies to all instruments when issued in lieu of cash for the payment of wages, and that a violation exists when any one of the elements contained in the section is present. The Turner case holds that knowledge of insufficiency of funds is not essential to the establishment of a violation under this section. It further holds that even though knowledge is not required, the section is constitutional in that it does not purport to inflict punishment for failure to pay wages, but for undertaking to pay wages by the issuance of an instrument which does not conform to Section 212.

9.1.6 In the case of People v. Hampton (1965) 236 Cal.App.2d 795, the court held that the prosecution need only establish a prima facie case by introducing evidence of the issuance of a check for wages which check, when presented for payment, was dishonored by reason of insufficient funds and that there was no credit arrangement with the depositing bank. The defendant must make some showing that the non-negotiable instrument resulted from circumstances "neither foreseeable nor preventable by reasonably prudent investigation or action."

9.1.7 Prosecutions under Section 212(a) are conducted by the appropriate city or district attorney. The Division personnel perform the investigation and prepare the statement of case for the prosecutor.

9.1.8 § 213 – Not All Payments Subject To Section 212:

Nothing contained in Section 212 shall:

(a) Prohibit an employer from guaranteeing the payment of bills incurred by an employee for the necessaries of life or for the tools and implements used by the employee in the performance of his duties.

(b) Apply to counties, municipal corporations, quasi- municipal corporations or school districts.

(c) Apply to students of nonprofit schools, colleges, universities, and other nonprofit educational institutions.

(d) Prohibit an employer from depositing wages due or to become due or an advance on wages to be earned in an account in any bank, savings and loan association or credit union of the employee's choice with a place of business located in this state, provided that the employee has voluntarily authorized the deposit. If an employer discharges an employee or the employee quits the employer may pay the wages earned and unpaid at the time the employee is discharged or quits by making a deposit authorized pursuant to this subdivision, provided that the employer complies with the provisions of this article relating to the payment of wages upon termination or quitting of employment.

9.1.9 **Exceptions To Payment Directly To Employee In Cash Or Negotiable Instrument.** Labor Code § 213 provides some exceptions to the requirements of Labor Code § 212 and DLSE has addressed some of these exceptions. (O.L. 1996.11.12 and O.L. 1994.02.03-1).

9.1.9.1 An employer may guarantee the payment of bills incurred by an employee for the necessities of life or for the tools and implements used by the employee in the performance of his duties.

9.1.9.2 The provisions of Section 212 do not apply to counties, municipal corporations, quasi-municipal corporations, school districts or to students of nonprofit schools, colleges, universities, and other nonprofit educational institutions.

9.1.9.3 An employer may deposit wages due or to become due or an advance on wages to be earned in an account in any bank, savings and loan association or credit union of the employee's choice which is located in the State of California if the employee has authorized such deposit. (See discussion on this issue in O.L. 1994-02.03-1).

9.1.9.4 Note: If an employer discharges an employee or the employee quits, the employer may pay the wages earned and unpaid at the time the employee is discharged or quits by making a deposit authorized pursuant to the provisions of Labor Code section 213(d), provided that the employer complies with the provisions relating to the payment of wages upon termination or quitting of employment.

9.1.10 **Employer Obligation To Pay Wages Earned In Event Recipient Employee Cannot Be Located.** Labor Code § 96.7 provides that the Labor Commissioner is authorized to collect any wages or benefits (vacation pay, severance pay) on behalf of employees in California without assignment, and shall act as trustee of the Industrial Relations Unpaid Wage Fund. The Labor Commissioner is required to make a "diligent effort" to locate the workers and is authorized to remit those wages to: (1) the worker (if found) (2) the worker's lawful representative, or (3) any trust or custodial fund established under a plan to provide benefits. **Note** that there are certain ERISA concerns which arise when payments are made to such trusts.

9.1.11 **Payment of Wages Due Deceased Worker**. DLSE may collect wages due to deceased workers. Such collections are placed in the Unpaid Wage Fund and, as described below, escheat to the State pursuant to law.

9.1.11.1 Probate Code § 13600 provides that in the event of the death of a worker, the surviving spouse or the guardian or conservator of the estate of the surviving spouse may collect salary or other compensation owed by an employer to the deceased worker in an amount not to exceed $5,000.00. Probate Code § 13601(a) sets out the form of affidavit which may be signed by the surviving spouse. DLSE has form affidavits which may be used to notify the employer of the obligation to pay the salary due.

9.1.11.2 Note: Deputies unfamiliar with the Probate forms should contact their assigned attorney through their Senior Deputy.

9.1.12 Escheat To State. In addition, California Code of Civil Procedure also provides that any unclaimed personal property (which would include wages) escheats to the State. Unclaimed wages must be forwarded to the Controller of the State of California within three years after the debt was incurred. (See Code of Civil Procedure §§ 1500 et seq.)

10 FAILURE TO PAY WAGES, WITHHOLDING WAGES — CRIMINAL SANCTIONS

10.1 § 215 – Criminal Sanctions For Violation Of Payment Laws:

Any person, or the agent, manager, superintendent or officer thereof, who violates any provision of Sections 204, 204b, 205, 207, 208, 209, or 212 is guilty of a misdemeanor. Any failure to keep posted any notice required by Section 207 is prima facie evidence of a violation of such sections.

10.2 § 216 – Refusal To Pay Wages:

In addition to any other penalty imposed by this article, any person, or an agent, manager, superintendent, or officer thereof is guilty of a misdemeanor, who:

(a) Having the ability to pay, willfully refuses to pay wages due and payable after demand has been made.

(b) Falsely denies the amount or validity thereof, or that the same is due, with intent to secure for himself, his employer or other person, any discount upon such indebtedness, or with intent to annoy, harass, oppress, hinder, delay, or defraud, the person to whom such indebtedness is due.

10.2.1 The constitutionality of Section 216 has been challenged and upheld in several cases. (In re Oswald (1926) 76 Cal.App. 347; In re Samaha (1933) 130 Cal.App. 116; Sears v. Superior Court (1933) 133 Cal.App. 704, and In re Trombley (1948) 31 Cal.2d 801)

10.2.2 Unlike the elements involved in the assessment of a penalty under Labor Code § 203, the ability to pay is an essential element necessary to prosecute a violation of Section 216.

10.3 § 217 – DLSE Required To Diligently Enforce Labor Laws:

The Division of Labor Law Enforcement shall inquire diligently for any violations of this article, and, in cases which it deems proper, shall institute the actions for the penalties provided for in this article and shall enforce this article.

10.4 § 221 – Employer May Not Collect Or Receive Wages Paid Employee:

It shall be unlawful for any employer to collect or receive from an employee any part of wages theretofore paid by said employer to said employee.

10.5 Section 221 is "declarative of a strong public policy against fraud and deceit in the employment relationship. Even where fraud is not involved, however, the Legislature has recognized the employee's dependence on wages for the necessities of life and has, consequently, disapproved of unanticipated or unpredictable deductions because they impose a special hardship on employees." (Hudgins v. Neiman Marcus Group, Inc. (1995) 34 Cal.App.4th 1109, 1118-1119)

10.5.1 Section 221 Prevents Employer From Recovering Wages Paid To Employee. By enacting section 221, and retaining it as interpreted by the courts and the IWC, the Legislature has prohibited employers from using self-help to take back any part of "wages theretofore paid" to the employee, except in narrowly-defined circumstances provided by statute. This is consistent with the ruling in the case of CSEA v. State of California (1988) 198 Cal.App.3d 374; 243 Cal.Rptr. 602, which held that absent a contrary provision in the law, the attachment and garnishment laws in California prohibit an employer from recovering any wages previously paid to the employee.

10.6 § 222 – Illegal To Withhold Wage Agreed To In Collective Bargaining:

It shall be unlawful, in case of any wage agreement arrived at through collective bargaining, either wilfully or unlawfully or with intent to defraud an employee, a competitor, or any other person, to withhold from said employee any part of the wage agreed upon.

10.7 § 223 – Illegal To Pay Wage Lower Than That Required By Statute Or Contract:

Where any statute or contract requires an employer to maintain the designated wage scale, it shall be unlawful to secretly pay a lower wage while purporting to pay the wage designated by statute or by contract.

10.7.1 The purpose of Section 223 is to prevent fraud in accordance with the underlying policy of law. (Sublett v. Henry's Turk and Taylor Lunch (1942) 21 Cal.2d 273)

11 DEDUCTIONS FROM WAGES.

Labor Code Section 224.

> The provisions of Sections 221, 222 and 223 shall in no way make it unlawful for an employer to withhold or divert any portion of an employee's wages when the employer is required or empowered so to do by state or federal law or when a deduction is expressly authorized in writing by the employee to cover insurance premiums, hospital or medical dues, or other deductions not amounting to a rebate or deduction from the standard wage arrived at by collective bargaining or pursuant to wage agreement or statute, or when a deduction to cover health and welfare or pension plan contributions is expressly authorized by a collective bargaining or wage agreement.
>
> Nothing in this section or any other provision of law shall be construed as authorizing an employer to withhold or divert any portion of an employee's wages to pay any tax, fee or charge prohibited by Section 20026 of the Government Code, whether or not the employee authorizes such withholding or diversion.

11.1.1 The express provisions of Labor Code §224 allow the employer to withhold or divert any portion of wages where the deduction is required or the employer is empowered to do so by federal or state law.

11.1.1.1 This category includes withholdings for federal and state taxes. Also, under the Pension Protection Act of 2006 ("PPA") (Public Law 109-280) which amended provisions of ERISA and the Internal Revenue Code, employers may automatically enroll employees in a defined contribution plan, e.g. 401(k), 403(b), 457 plans, under an automatic contribution arrangement unless the employee elects to not participate (and elects to receive cash payment). Under an automatic contribution arrangement, an employee is treated as though he or she made an elective contribution unless they specifically opt-out of the arrangement or specify a different amount for their contribution. In order for a plan to qualify as an automatic contribution arrangement under federal law, the employer's plan must meet federal statutory requirements, including specified features to insure that the plan provides for automatic deferral of compensation, matching or non-elective employer contributions, and specific notice to employees regarding the automatic contribution, including the right to elect to receive cash payment.

11.1.1.2 A preemption provision in the PPA states that any state law is superseded which directly or indirectly prohibits or restricts the inclusion in any plan of an automatic contribution arrangement (29 U.S.C. §1144(e)(1)) However, as indicated in Section 11.1.1.1 above, Labor Code §224 authorizes diversion of a portion of wages when performed pursuant to federal law, and the state standard is thus not preempted. Additionally, the preemption provision further defines what constitutes an "automatic contribution arrangement" for purposes of preemption. Accordingly, automatic contribution arrangements which do not comply with the federal requirements may be invalid under federal law and also may be a violation of Labor Code §224 if there were no amounts automatically contributed for the employee's elective contribution. If there was no automatic deferral of compensation by the employer under the defined contribution plan, and the claim is against the employer's general assets, DLSE could investigate whether a specific claim is subject to PPA and determine whether it has jurisdiction to recover an unauthorized and unlawful withholding or diversion of wages. (See Section 15.1.8 of this Manual)

11.1.2 **Legal Deductions.** Deductions for insurance premiums, hospital or medical dues or other deductions not amounting to a rebate or deduction from the standard wage under a CBA or required by statute may also be deducted upon written consent of the employee. Deductions for health and welfare or pension payments provided by a CBA are also allowed even without the written consent of the employee. As discussed in Sections 11.1.1.1 and 11.1.1.2, diversion of wages under a *qualified* automatic contribution arrangement for a defined contribution plan is authorized under provisions of federal law (PPA) and, when performed in accordance with federal requirements, does not require prior written authorization of the employee.

11.1.3 **Deductions From Wages**. The courts in California and the United States Supreme Court have held that deductions from wages in effect allow an employer a self-help remedy which is illegal. (*Sniadach v. Family Finance*, 395 U.S. 337 (1969). California law was changed in 1970 to conform to the holding in *Sniadach*. (See C.C.P. § 487.02(c)). See also *Randone v. Appellate Department* (1971) 5 Cal.3d 536 and *CSEA v. State of California* (1988) 198 Cal.App.3d 374; 243 Cal.Rptr. 602.

11.2 **Employer May Not Collect Or Receive Wages Paid Employee**. Labor Code § 221 prohibits an employer from recovering wages paid. This provision prohibits an employer from receiving from an employee any wage paid by the employer to the employee either by deduction or recovery after payment of the wage:

> "It shall be unlawful for any employer to collect or receive from an employee any part of wages theretofore paid by said employer to said employee."

11.2.1 The California courts have held that Section 221 is "declarative of a strong public policy against fraud and deceit in the employment relationship. Even where fraud is not involved, however, the Legislature has recognized the employee's dependence on wages for the necessities of life and has, consequently, disapproved of unanticipated or unpredictable deductions because they impose a special hardship on employees." (*Hudgins v. Neiman Marcus Group, Inc*. (1995) 34 Cal.App.4th 1109, 1118-1119).

11.2.2 **Self-Help By Employers To Recover Unliquidated Sums.** The California case of *Kerr's Catering v. DIR* (1962) 57 Cal.2d 319; 369 P.2d 20; 19 Cal.Rptr. 492, which pre-dated *Sniadach*, made it clear that the California courts look closely at any attempt by employers to recover back wages earned by employees. As the case of *Hudgins v.*

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Neiman Marcus Group, Inc. (1995) 34 Cal.App.4th 1109, 41 Cal.Rptr2d 46, states, an employer who resorts to self-help to take deductions does so at its own risk.

11.2.3 Losses Which Result From Simple Negligence. The courts have held that since shortages and other losses occurring without any fault on the part of the employee or merely as a result of simple negligence are inevitable in almost any business operation, and the employer must bear such losses as an expense of doing business.

11.2.3.1 As the court in Kerr's Catering noted, the employer may, and usually does, either pass these costs on to the customer in the form of higher prices or lower the employees' wages proportionately, thus distributing the losses among a wide group.

11.2.3.2 Discipline As An Alternative. In addition, of course, an employer is free to discipline any employee whose carelessness caused the losses. But the threat of discharge in the event the employee refuses to allow a deduction is not allowed. (See Labor Code § 98.6 which protects an employee who exercises "any right afforded him.") In addition, the courts have determined that a discharge which is a result of a complaint made by an employee about an illegal deduction constitutes a violation of public policy giving rise to a cause of action for wrongful discharge. (Phillips v. Gemini Moving Specailists (1998) 63 Cal.App.4th 563)

11.2.4 Loss Suffered As A Result Of The Dishonest Or Willful Act Or By The Gross Negligence Of Employee. The IWC Orders purport to provide the employer the right to deduct for losses suffered as a result of a dishonest or willful act or through the gross negligence of the employee. Labor Code § 224 clearly proscribes any deduction which is not either authorized by the employee in writing or permitted by law. Again, any employer who resorts to self-help does so at its own risk since even under the proviso contained in the IWC Orders, an objective test is applied to determine whether the loss was due to dishonesty or a willful or grossly negligent act. (O.L. 1993.02.22-2, and 1994.01.27) In the event it is determined that the employee was not guilty of a dishonest or willful act or gross negligence, the employee would be entitled to recover not only the amount of wages withheld, but any waiting time penalties due.

11.2.5 Deductions For Loans Made To Employees. In Barnhill v. Saunders (1981) 125 Cal.App.3d 1, the court concluded that deductions may be made by the employer, with the written consent of the employee, for payments on loans made by the employer to the employee; but "balloon payments" made at the time of termination are not allowed even if the employee has given his or her consent to such payments.

11.2.6 The conclusion reached by the Barnhill court allowing deductions from the wages of employees to repay loans made by the employer to the employee is open to question in view of the provisions of Labor Code § 300. That statute provides that no assignment of future wages may be made unless wages have already been earned except that future wages may be assigned for necessities of life (necessary food, necessary clothing, housing) and such assignment for necessities must be made directly to the person or persons supplying the necessities. In addition, an assignment requires spousal consent unless at least an interlocutory judgment of dissolution has been entered. (See

Discussion of Labor Code § 300 at Section 18 of this Manual). It should be noted that the *Barnhill* decision does not address Labor Code § 300.

11.3 **Any Deduction Must Be For Direct Benefit Of Employee.** Deductions are only permitted for items which are for the direct benefit of the employee – not deductions which in any way benefit the employer either directly or indirectly. (3 Ops.Atty.Gen. 178).

11.3.1 **Specific Deductions**. The Division has addressed the question of deductions made by or suggested by an employer for a number of different reasons. (See O.L. 1994.01.27, dealing with the cost of replacing a lost or stolen payroll check). The position taken by DLSE in denying such recovery has always relied heavily on the decisions in *Barnhill* and, in particular, the later case of *CSEA v. State of California* (1988) 198 Cal.App.3d 374, as well as the U.S. Supreme Court's rationale in *Sniadach*. (O.L. 1991.05.07).

11.3.2 **Deductions Allowed By IWC Orders – Caveat:** Under the IWC Orders in effect prior to January 1, 2000, Section 9 of each Order provided that the employer might "deduct from the employee's last check the cost of an item (uniform, tools, etc.) furnished…in the event said item is not returned." As the courts have stated on a number of occasions, the Legislature enacted Labor Code §§ 400-410 to provide a method whereby the parties to an employment contract may create a bond to insure against loss by the employer and the IWC's rationale in adopting the provisions of Section 9 may not pass judicial scrutiny (See *California State Restaurant Assn. v. Whitlow* (1976) 58 Cal.App.3d 340). DLSE has continued to explain that the agency will enforce the IWC Orders as written. However, employers should be aware that there is a caveat regarding the right of an employer to deduct for unreturned uniforms or tools from the final wages. (See O.L. 1993.04.19-1)

11.3.2.1 **Note: IWC Order 16 Prohibits Deductions By Employers**. It is interesting to note that the newest IWC Order (Effective January 1, 2001) prohibits an employer from making deductions and, further, specifically prohibits any charge by the employer or his agent for cashing a payroll check. In this regard, it should be noted, that DLSE would have determined the charging for cashing a payroll check to be illegal under the provisions of Labor Code § 221 in any event. Thus, such a practice is illegal in any industry or occupation; not just in the occupations covered by Order 16.

11.3.3 **Allowable Deductions**. Note that section 224 also allows deductions when authorized by the employee *in writing* **but** that authorization is limited to (1) insurance premiums, (2) hospital or medical dues, or (3) other deductions not amounting to a rebate or deduction from the wage paid to the employee. Section 224 may not, consequently, be relied upon to allow an employer to deduct an amount from an employee's pay which is for the use or benefit of the employer.

11.3.4 **Deduction for Tardiness**: California Labor Code § 2928 provides:

> No deduction from the wages of an employee on account of his coming late to work shall be made in excess of the proportionate wage which would have been earned during the time actually lost, but for a loss of time less than 30 minutes, a half hour's wage may be deducted.

11.3.4.1 Pursuant to this statute an employer could, for instance, deduct only thirty-five minutes from an employee who was thirty-five minutes late, but could deduct thirty minutes from the wages of an employee who was only five minutes late. Obviously, most employers do not have such a policy since it would encourage employees who were going to be a few minutes late to be at least thirty minutes late since the deduction would be the same in either event.

12 ENFORCEMENT AND COVERAGE OF WAGE STATUTES

12.1 Labor Code § 218.

Nothing in this article shall limit the authority of the district attorney of any county or prosecuting attorney of any city to prosecute actions, either civil or criminal, for violations of this article or to enforce the provisions thereof independently and without specific direction of the division. Nothing in this article shall limit the right of any wage claimant to sue directly or through an assignee for any wages or penalty due him under this article.

12.1.1 Claimants Have Private Right of Action. Section 218 extends the authority to prosecute actions for recovery of wages to district attorneys and prosecuting city attorneys, and permits claimants to sue directly or through an assignee for any wages or penalties that may be due.

12.1.2 Attorney's Fees May Be Recovered in Private Action. Labor Code § 218.5 provides for recovery of attorney's fees to the prevailing party in the event of an action to recover wages brought by a private party.

12.1.3 Amendment Of Labor Code § 220 Reduces Exceptions For State Employees; Continues Exceptions For Other Public Entity Employees.

220. (a) Sections 201.5, 201.7, 203.1, 203.5, 204, 204a, 204b, 204c, 204.1, 205, and 205.5 do not apply to the payment of wages of employees directly employed by the State of California. Except as provided in subdivision (b), all other employment is subject to these provisions.

(b) Sections 200 to 211, inclusive, and Sections 215 to 219, inclusive, do not apply to the payment of wages of employees directly employed by any county, incorporated city, or town or other municipal corporation. All other employments are subject to these provisions. Nothing in sections 200 to 211 and 215 to 219, inclusive, shall apply to the payment of wages of employees directly employed by the State or any county, incorporated city or town or other municipal corporation. All other employments are for the purposes of these sections private employments and subject to the provisions thereof.

12.1.4 Enforcement Coverage Of California Wage Statutes. Effective January 1, 2001, Labor Code § 220 has been amended to extend coverage of Division 2, Part 1, Chapter 1, Article 1 (§§ 200-243) to employees of the State of California except §§ 201.5, 201.7, 203.1, 203.5, 204, 204a, 204b, 204c, 204.1, 205, and 205.5.

12.1.4.1 Note. Labor Code § 220 (b) still exempts counties, incorporated cities, towns or other municipal corporations from the provisions of Labor Code §§ 200-211 and 215-219.

12.1.4.2 The above would include such entities as hospital districts, etc. (See DLLE v. El Camino Hospital District (1970) 8 Cal.App.3d, Supp. 30)

13 MEDICAL OR PHYSICAL EXAMINATION COSTS.

13.1 Labor Code § 222.5 – No Charge For Medical Examination:

> No person shall withhold or deduct from the compensation of any employee, or require any prospective employee or applicant for employment to pay, any fee for, or cost of, any pre-employment medical or physical examination taken as a condition of employment,...

13.1.1 Neither Current Employee Nor Applicant May Be Charged Where Requirement Is Imposed Only by Employer. Labor Code § 222.5 is easier read when divided into its two main parts. The language cited above prohibits an employer from charging an employee or applicant for employment the costs of any pre-employment medical examination which is required by the employer as a condition of employment. The language, by implication, means that an employer must pay the cost of any medical or physical examination required as a condition of employment of any employee, prospective employee or applicant for employment.

> ...nor shall any person withhold or deduct from the compensation of any employee, or require any employee to pay any fee for, or costs of, medical or physical examinations required by any law or regulation of federal, state or local governments or agencies thereof.

13.1.2 Current Employee May Not Be Charged Where Requirement Is Imposed by Law. The second half of the statute, cited directly above, prohibits an employer from requiring any employee to pay the costs of any medical or physical examination required by law. However, medical or physical examinations required by law in the pre-employment period are excluded; an employer may require that an applicant or prospective employee pay the costs of any pre-employment medical or physical examination if the examination is required by law as a condition of employment.

13.1.3 Labor Code § 231 – Driver's License Physical Exam Requirement

> Any employer who requires, as a condition of employment, that an employee have a driver's license shall pay the cost of any physical examination of the employee which may be required for issuance of such license, except where the physical examination was taken prior to the time the employee applied for such employment with the employer.

13.1.4 Driver's License Physical Examination. This section constitutes a limited exception to Labor Code § 222.5 since it provides that the employer must pay the cost of a physical examination required to obtain a driver's license if, as a condition of employment, the worker must have such a license. The section extends this requirement to applicants (except where the physical examination was taken before the employee applied for the employment).

14 WAGE STATEMENT REQUIREMENTS.

14.1 Labor Code § 226.

(a) Every employer shall, semimonthly or at the time of each payment of wages, furnish each of his or her employees, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately when wages are paid by personal check or cash, an itemized statement in writing showing (1) gross wages earned, (2) total hours worked by the employee, except for any employee whose compensation is solely based on a salary and who is exempt from payment of overtime under subdivision (a) of Section 515 or any applicable order of the Industrial Welfare Commission, (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis, (4) all deductions, provided, that all deductions made on written orders of the employee may be aggregated and shown as one item, (5) net wages earned, (6) the inclusive dates of the period for which the employee is paid, (7) the name of the employee and his or her social security number, (8) the name and address of the legal entity that is the employer, and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.

The deductions made from payments of wages shall be recorded in ink or other indelible form, properly dated, showing the month, day, and year, and a copy of the statement or a record of the deductions shall be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California.

An employer that is required by this code or any regulation adopted pursuant to this code to keep the information required by this section shall afford current and former employees the right to inspect or copy the records pertaining to that current or former employee, upon reasonable request to the employer. The employer may take reasonable steps to assure the identity of a current or former employee. If the employer provides copies of the records, the actual cost of reproduction may be charged to the current or former employee.

This section does not apply to any employer of any person employed by the owner or occupant of a residential dwelling whose duties are incidental to the ownership, maintenance, or use of the dwelling, including the care and supervision of children, or whose duties are personal and not in the course of the trade, business, profession, or occupation of the owner or occupant.

(b) Any employee suffering injury as a result of a knowing and intentional failure by an employer to comply with subdivision (a) shall be entitled to recover the greater of all actual damages or fifty dollars ($50) for the initial pay period in which a violation occurs and one hundred dollars ($100) per employee for each violation in a subsequent pay period, not exceeding an aggregate penalty of four thousand dollars ($4,000), and shall be entitled to an award of costs and reasonable attorney's fees.

(c) This section does not apply to the state, or any city, county, city and county, district, or any other governmental entity.

14.1.1 Summary Of Required Information.

A California employer must furnish a statement showing the following information to each employee at the time of payment of wages (or at least semimonthly, whichever occurs first):

1. Gross wages earned;
2. Total hours worked if compensation is based on an hourly rate (except if the employee is employed in a bona fide exempt position and paid a salary);
3. All deductions provided that deductions made on the written orders of the employee may be aggregated and shown as one item;

4. The number of piece rate units earned and the applicable piece rate whenever an employee is being paid on a piecework basis (this section has been interpreted by DLSE to also require the same information for commissioned employees, i.e., commission rate and amount of sales);
5. All applicable hourly rates of pay and the corresponding number of hours an employee worked at each rate during the pay period;
6. Net wages earned;
7. The inclusive dates of the period for which the employee is paid;
8. The name and social security number of the employee;
9. The name and address of the legal entity which is the employer.*

14.1.2 Note: Labor Code Section 226 only sets out the employer's responsibilities in connection with the wage statement which must accompany the check or cash payment to the employee. The requirements of Section 1174 of the Labor Code and the requirements of Section 7 of the applicable IWC Order concerning payroll records also must be met by the employer. See Section 41.2 of this Manual for further discussion of those requirements.

14.1.3 The deductions must be recorded in ink or other indelible form, properly dated showing the month, day and year, and a copy of the deductions must be kept on file by the employer for at least three years.

14.1.4 Both current and former employees have the right to review the employer's records upon giving reasonable notice.

14.1.5 If the employee wants copies of the records a fee may be imposed by the employer to cover the actual costs of reproduction.

14.1.5.1 This section does not apply to an employee employed by the owner or occupant of a residence if the duties of the employee are incidental to the ownership, maintenance or use of the dwelling including the care and supervision of children, or whose duties are personal and not in the course of the trade, business, profession or occupation of the owner or occupant.

14.1.6 Damages may be recovered by the employee. In addition, attorney's fees are recoverable.

14.1.6.1 This section does not apply to public employers.

14.2 Labor Code § 226.3 – Penalties For Failure To Provide Wage Statement:

> Any employer who violates subdivision (a) of Section 226 shall be subject to a civil penalty in the amount of two hundred fifty dollars ($250) per employee per violation in an initial citation and one thousand dollars ($1,000) per employee for each violation in a subsequent citation, for which the employer fails to provide the employee a wage deduction statement or fails to keep the records required in subdivision (a) of Section 226. The civil penalties provided for in this section are in

*There are additional requirements imposed on garment manufacturers. See 8 CCR 13659(c)

addition to any other penalty provided by law. In enforcing this section, the Labor Commissioner shall take into consideration whether the violation was inadvertent, and in his or her discretion, may decide not to penalize an employer for a first violation when that violation was due to a clerical error or inadvertent mistake.

14.2.1 The penalties provided for failure to provide deduction statements as required by Labor Code § 226 are $250 per employee per violation in an initial citation and $1,000 per employee for each violation in a subsequent citation. This means $250 per employee for a first violation and $1,000 per employee for any subsequent violations.

14.2.2 In enforcing this section the Labor Commissioner is to take into consideration whether the violation was inadvertent, and, in his or her discretion, may decide not to penalize an employer for a first violation when that violation was due to a clerical error or inadvertent mistake.

14.2.3 The section is enforced by citation served upon the employer pursuant to the provisions of Labor Code § 226.4.

14.3 Labor Code § 226.4 – Citation Procedures:

If, upon inspection or investigation, the Labor Commissioner determines that an employer is in violation of subdivision (a) of Section 226, the Labor Commissioner may issue a citation to the person in violation. The citation may be served personally or by registered mail in accordance with subdivision (c) of Section 11505 of the Government Code. Each citation shall be in writing and shall describe the nature of the violation, including reference to the statutory provision alleged to have been violated.

14.3.1 The employer may appeal the citation and a hearing must be scheduled. (See Labor Code § 226.5) The employer may seek review of the decision of the hearing officer by filing a writ in Superior Court.

14.3.2 Labor Code § 226.6. A criminal violation may be referred to the city or district attorney against not only the employer, but "any officer, agent, employee, fiduciary, or other person who has the control, receipt, custody, or disposal of, or pays, the wages due any employee, and who knowingly and intentionally participates or aids in the violations of any provisions of Labor Code §§ 226 or 226.2..."

14.4 Garment Manufacturing Record Requirements. Garment manufacturers are required by Labor Code § 2673 to keep the following records for three years:

(a) The names and addresses of all garment workers directly employed by such person.

(b) The hours worked daily by employees, including the times the employees begin and end each work period.

(c) The daily production sheets, including piece rates.

(d) The wage and wage rates paid each payroll period.

(e) The contract worksheets indicating the price per unit agreed to between the contractor and manufacturer.

(f) The ages of all minor employees.

(g) Any other conditions of employment.

15 VACATION WAGES

15.1 Labor Code § 227.3.

> Unless otherwise provided by a collective-bargaining agreement, whenever a contract of employment or employer policy provides for paid vacations, and an employee is terminated without having taken off his vested vacation time, all vested vacation shall be paid to him as wages at his final rate in accordance with such contract of employment or employer policy respecting eligibility or time served, provided, however, that an employment contract or employer policy shall not provide for forfeiture of vested vacation time upon termination. The Labor Commissioner or a designated representative, in the resolution of any dispute with regard to vested vacation time, shall apply the principles of equity and fairness.

15.1.1 **Prorata Vacation**. Labor Code § 227.3, as interpreted by the California Supreme Court in *Suastez v. Plastic Dress-up Co*. (1982) 31 C3d 774, provides employees with the right to vacation pay upon termination of employment when vacation is offered in an employer's policy or contract. Because such vacation entitlements constitute deferred wages which vest as they are earned, any entitlement to vacation is a proportionate right and vests as labor is rendered. Thus, on termination, employees are entitled to a pro rata share of their vacation pay without any reduction or loss based on conditions imposed by the employer. (See *Suastez* decision.) Vacation pay may not be forfeited for failure to take the vacation under a so-called "use it or lose it" policy. (*Boothby v. Atlas Mechanical* (1992) 6 Cal.App.4th 1595, 1601.) The *Suastez* decision makes clear that Section 227.3 requires that, upon termination, an employee must be paid for the pro rata share of his or her vacation which has accrued through the termination date.

15.1.2 **Statute Does Not Require That Employer Provide Vacation.** Neither the statute nor the case law requires that any employer provide vacation benefits; the law only addresses the requirements which a vacation plan, if offered, must meet. (O.L. 1987.05.14).

15.1.3 **Statute Does Not Prevent Probation Periods**. Vacation plans which establish probation periods during which no vacation pay is vested are permitted. If the employer has not promised vacation pay during a probation period, no pro rata portion is due the employee whether or not he or she passes probation. (O.L. 1990.09.24)

15.1.4 **Use-It-Or-Lose-It Policies Are Not Allowed**. Vacation plans may **not** have a "use it or lose it" provision as such provision would be an illegal forfeiture. However, a variant of a "use it or lose it" policy whereby a cap is placed on the amount of vacation which may accrue if not taken is acceptable. (*Henry v. Amrol* (1990) 222 Cal.App.3d Supp. 1; see also O.L. 1986.10.28, 1986.11.04, 1986.12.30, 1988.08.04, 1991.01.07, 1998.09.17)

15.1.4.1 DLSE has repeatedly found that vacation policies which provide that all vacation must be taken in the year it is earned (or in a very limited period following the accrual period) are unfair and will not be enforced by the Division. (See the detailed discussions of this issues at O.L. 1991.01.07 and 1993.08.18)

15.1.5 **Earnings Must Be Proportional**. The anniversary dates on which entitlement to vacation pay are based must provide for an earning of a proportionate share of the agreed vacation. Arbitrary dates or accelerated earning periods which would allow for a disproportionate rate of earning are prohibited. (Such plans could possibly entitle an employee who works only one or two days to the same amount of vacation as an employee who works as long as six months.) (O.L. 1987.03.16, 1988.08.04, 1986.12.30).

15.1.6 **Limited Opt-Out Provision Under A Collective Bargaining Agreement**. Section 227.3 provides an opt-out for employees under a collective bargaining agreement. (*Livadas v. Bradshaw* 512 U.S. 107, 114 S.Ct. 2068 (1994)). Thus, the provisions of the *Suastez* case do not apply where a collective bargaining agreement is the basis for the earned vacation, and, consequently DLSE does not have jurisdiction to determine whether vacation pay is due. However, DLSE may have jurisdiction to determine if waiting time penalties are due for late-paid vacation wages. (See discussion of collective bargaining exception at Section 36.2.2 of this Manual).

15.1.7 **ERISA Preemption**. Employers may have vacation plans or programs subject to control of the federal Employee Retirement Income Security Act of 1974. There are three important factors to be considered in determining whether the employer's vacation plan is subject to the provisions of ERISA:

1. Whether the employer has instituted a legitimate plan in compliance with the requirements of the federal law (i.e., proper documents reporting on the plan and its assets have been completed and filed with the federal authorities). See DLSE Management Memorandum dated July 19, 1993 for a list of the documents required.

2. Whether the employer is paying the vacation benefits <u>through the trust</u> rather than from the general assets of the employer. Again, this information may be obtained from the form which the employer is required to file with the federal authorities (Form 5500, Annual Return/Report of Employee Benefit Plan). These forms are open to public inspection and may be required from an employer to prove the assertion that the vacation pay is subject to an ERISA trust. See DLSE Management Memorandum dated July 19, 1993 for more information.

3. Whether there is some investment and management of the plan's assets. The federal courts have required that in order to show that the plan is pre-empted by the ERISA law, the employer must show not only that there was a "plan" but that the payment of the benefits from the plan could have reasonably come from the trust or that there were any plan assets to invest or manage. (See *Czechowski v. Tandy Corporation*, 731 F.Supp. 406 (N.D. Cal. 1990).

15.1.7.1 DLSE Management Memorandum dated July 19, 1993 contains a detailed discussion of the test and the DLSE enforcement provision.

15.1.8 **DLSE Has The Right To Determine Whether An Employer's Plan Is, In Fact, Subject To ERISA**. DLSE may only accept claims for vacation pay which would be paid out of an employer's general assets and, thus, not subject to ERISA. (*California Hospital Assn. v. Henning*, 770 F.2d 856, modified 783 F.2d 946 (9th Cir. 1985), *cert*. *den*. 477 U.S. 904). But, DLSE has the right to investigate to determine if the vacation plan is an ERISA covered plan in order to establish its jurisdictional parameters. (*Millan v. Restaurant Enterprises Group, Inc*. (1993) 14 Cal.App.4th 477, *rev. den*. 5-19-93; see also DLSE Management Memorandum dated July 19, 1993).

15.1.9 **Statute of Limitations**. The statute of limitations for recovery of vacation pay claims is four years on a contract or obligation in writing in accordance with Code of Civil Procedure section 337(1). As stated in *Wilson v. Wallace* (1931) 113 Cal.App.278, the agreement or obligation to pay wages need not be contained in a signed contract for the four year statute of limitations to be applicable. However, the terms of the agreement must be evidenced in writing. In *Division of Labor Law Enforcement v. Dennis* (1947) 81 Cal.App.2d 306, the court held that the four year statute of limitations is applicable to a claim on a written obligation brought by an employee hired through an oral agreement, where the employee shows that he/she is in the class of persons for whose benefit the obligation is made. A written vacation policy or other similar written documentation which constitutes a unilateral or bilateral agreement by an employer to provide paid vacation to an employee is subject to the four year limitations period. An oral promise to provide paid vacation which is unaccompanied by such written documentation is subject to the two year statute of limitations contained in Code of Civil Procedure section 339. **IMPORTANT NOTE**: While vacation becomes vested as it accrues over time in accordance with the *Suastez* decision, the obligation of the employer to pay vacation wages does not normally occur until the employee takes vacation or his/her employment terminates. The Court of Appeal in *Church v. Jamison* (2006) 143 Cal.App.4th 1568 held that the statute of limitations on accrued vacation pay entitlement begins to run from the date an employer fails to pay vacation pay in breach of contract. In the case of an employee with vested vacation entitlement at termination, this is at the time final wages are due.

15.1.10 **Many Issues Arise In Vacation Pay Disputes**. A series of opinion letters are attached to this Manual which will provide guidance on various discrete situations relating to the interpretation of the *Suastez* decision and the Labor Commissioner's application of the principles of equity and fairness provided in the statute. (O.L. 1994.03.08, 1987.05.11, 1986.11.17, 1986.05.20, 1987.7.13).

15.1.11 **Sale Of Business Constitutes Discharge**. In California, the sale of a business (see Section 40 of this Manual for a discussion of the term "bulk sale") entails certain rights and responsibilities on the part of the employees and the employer. California courts have held that a sale of the business constitutes a termination of the employment and that unemployment benefits are not a prerequisite to the right to receive wages or benefits due the employee at the time of the termination. (*Chapin v. Fairchild Camera and Instrument Corp*. (1973) 31 Cal.App.3d 192) This result is consistent with Labor Code § 2920(b) and common law contract theories; i.e., an obligor (the employer who owes the wages or benefits) may not substitute another obligor (the buyer) in his or her place without the express written consent of the obligee (the employee).

15.1.12 **Confusion Of Vacation Pay With Other Leave Benefits.** DLSE has been asked on numerous occasions to give an opinion regarding the difference between vacation wages and other leave benefits. The DLSE has always opined that leave time which is provided without condition is presumed to be vacation no matter what name is given to the leave by the employer. Such an enforcement policy insures that leave policies which are nothing more than vacation policies under a different name are not instituted as subterfuges to defeat the provisions of Labor Code § 227.3 and the conclusions of the California Supreme Court in *Suastez*. Thus, there must be an objective standard by which it can be established that the leave time is attributable to holidays, sick leave, bereavement leave or other specified leave. Tying the right to take the time to a specific event or chain of events such as allowing a vacation period for the Thanksgiving weekend would suffice to satisfy the test. (See discussion of the test in O.L. 1992.04.27, 1986.10.28, 1986.11.04, 1987.01.14-1).

15.1.12.1 O.L. 1987.03.11 provides an example of application of DLSE policy. That letter analyzes a "sick leave" policy which provided for continuing accrual, but, until at least 80 hours had been accrued, the time could not be used for any purpose except sick leave. After 80 hours had accrued in the sick leave program, the employer policy provided that up to 24 of those hours could be used for "personal compelling business" purposes. In the letter, the DLSE opined that it would consider all time in the sick leave policy to be exempt from the requirements of the Suastez doctrine; but that in the event of the termination of any employee with more than 80 hours of sick leave accumulated, 24 hours (in excess of the 80 hours) would be considered vested as vacation time.

15.1.13 Sabbatical Leave Programs –Under limited circumstances sabbatical leave programs, which are in addition to the normal vacation available to an individual, will not be considered vacation subject to Labor Code section 227.3. In *Paton v Advanced Micro Devices* (2011) 197 Cal.App.4th 1505, the Court adopted the following test to determine whether a sabbatical program is vacation or a sabbatical. Each case has to be decided on its own facts.

1. Leave that is granted infrequently tends to support the assertion that the leave is intended to retain experienced employees. Every seven years is the traditional frequency. Greater or less frequency could be appropriate depending upon the industry or particular company involved.

2. The length of the leave should be adequate to achieve the employer's purpose. The length of the leave should be longer than that "normally" offered as vacation.

3. A legitimate sabbatical will always be granted in addition to regular vacation. This point carries more weight when the regular vacation program is comparable in length to that offered by other employers in the relevant market.

4. A legitimate sabbatical program should incorporate some feature that demonstrates that the employee taking the sabbatical is expected to return to work for the employer after the leave is over.

16 SEVERANCE PAY PROVISIONS.

16.1 Labor Code § 96(h) allows the Labor Commissioner to accept claims for severance pay. However, the federal ERISA law pre-empts DLSE from enforcing claims for severance pay where such severance pay plan is subject to ERISA. (See California Chamber of Commerce v. Simpson, et al, 601 F.Supp. 104 (C.D. Cal. 1985)

16.2 The question, then, is whether the severance pay is subject to ERISA. The DLSE has the authority to determine its own jurisdiction and, based on this principle, Deputies may take claims involving severance pay for the purpose of determining whether DLSE has jurisdiction to enforce the claim.

16.3 A number of recent federal court cases have tested the breadth of ERISA pre-emption in the area of severance pay. In the Ninth Circuit, the case of Bogue v. Ampex Corp., (1992, 9th Cir.) 976 F. 2d 1319, involved a former vice-president of a division of Ampex Corp. who filed suit in state court seeking severance benefits denied him upon his 1988 resignation from the company. Plaintiff claimed he was entitled to severance because he had not been offered "substantially equivalent" employment as provided in the plan. Defendants removed case to federal court on the grounds that the plan was covered by ERISA and the sole remedy was under the federal law. The Ninth Circuit affirmed the judgment of the District Court finding that under the plan the employer was "obligated to apply enough ongoing, particularized, administrative, discretionary analysis to make the program in this case a 'plan'."

16.4 On the other hand, in a more recent case, that same Ninth Circuit held in the case of Delaye v. Agripac, Inc. (1994, 9th Cir.), that a lower court erred in holding that an employer had violated ERISA by not paying employee severance pay when he was discharged. The federal district court had awarded severance benefits on an ERISA theory, but the Ninth Circuit ordered the case remanded to the district court to vacate the judgment and dismiss the action without prejudice to Plaintiff bringing an action in state court in Oregon. Plan stated if employee were terminated "without cause", he was entitled to receive a fixed monthly amount for 12 to 24 months according to a set formula, pay accrued vacation pay, and provide the same accident, health, life and disability insurance he had during employment until he found other employment or until monthly payments under the plan ceased. The court found that there was no ERISA plan because "[S]ending [Plaintiff], a single employee, a check every month plus continuing to pay his insurance premiums for the time specified in the employment contract does not rise to the level of an ongoing administrative scheme."

16.5 Based upon the most recent cases in this area, the Legal Section has developed the table found on page 16-2, supra, which may be used to predict whether the severance program will be found to be an ERISA-covered plan. (Velarde v. Pace Warehouse, Inc., 105 F.3d 1313 (9th Cir.1997)

16.6 It is important, however, that <u>all</u> severance plans be submitted to the Legal Section for review before any further action is taken. The following table is simply designed as a guide to better understand the problem.

16.7 Severance Pay: Does "Plan" Require Ongoing Administration?

FACTORS	MORE LIKELY NOT AN ERISA PLAN	MORE LIKELY IS AN ERISA PLAN
Amount of discretion needed to determine eligibility*	No discretion necessary	case-by-case review required. For instance plan may require determination of what constitutes "substantially equivalent" employment
Number of employee covered	Very few	All employees
Number of payments	One lump sum payment	Continuous periodic payments
Duration of obligation	Short term	Long term (months or even years)
Number of covered benefits	Wages only	Wages plus several other benefits such as medical and out-placement services
Triggering event	one, such as plant closure	Employees become eligible at different times
*Most important factor		

17 DISCRIMINATION — PROTECTED RIGHTS.

17.1 Discrimination Defined. The term "discrimination", in general, means a failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored. (Daly v Exxon Corp. (1997) 55 Cal.App.4th 39, 63 Cal.Rptr.2d 727)

17.1.1 Employees Protected. Any employee who suffers any loss protected by the statutes listed below, may file a complaint with the Labor Commissioner if they meet the criteria set out in the statute.

17.1.2 Time For Filing. Generally, a complaint alleging discrimination and/or retaliation in violation of laws under the jurisdiction of the Labor Commissioner must be filed within six (6) months after the occurrence of the alleged discriminatory and/or retaliatory action (Labor Code § 98.7). The exceptions to the six-month rule are: Labor Code §§ 230(c) and 230.1 (one year); 1197.5 (2 years, 3 years if willful); 2929 (60 days); H&S Code §§ 1596.881 and 1596.882 (90 days).

17.1.3 Enforcement Procedure. The DLSE utilizes the provisions of Labor Code § 98.7 in investigating and enforcing any of the discrimination or retaliation statutes outlined below.

17.1.4 Enforcement Jurisdiction Of The DLSE. The DLSE has jurisdiction over all cases of discrimination involving any of the following statutes*:

- LC 96(k) Protects both employees and applicants for loss of wages as the result of a demotion, suspension, or discharge from employment for lawful conduct occurring during nonworking hours away from the employer's premises .Labor Code § 98.6 effective January 1, 2002, allows an employer and individual employees (or a union on behalf of employees covered by a CBA) to enter into a contract protecting the employer against any conduct otherwise protected under Section 96(k) "that is actually in direct conflict with the essential enterprise-related interests of the employer and where breach of that contract would actually constitute a material and substantial disruption of the employer's operation."
- LC 98.6 For filing or threatening to file a claim or complaint with the Labor Commissioner, instituting or causing to be instituted any proceeding relating to rights under the jurisdiction of the Labor Commissioner, or testifying in any such proceeding, or for exercising (on behalf of oneself or other employees) any of the rights provided under the Labor Code or Orders of the Industrial Welfare Commission, including, but not limited to, the right to express opinions about an alternative workweek election, or supporting or opposing the adoption or repeal of an alternative workweek election. Specific amendments to Labor Code § 98.6, effective January 1, 2002, that extend protection to job applicants does not apply to religious associations specified in the Government Code, state or local law enforcement agencies, and print and broadcast media.

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*Recent legislation has transferred the jurisdiction over complaints alleging discrimination based on sexual orientation from DLSE to the Department of Fair Employment and Housing (DFEH). For other types of discrimination based on race, religion, sex, color, national origin, ancestry, physical handicap, medical condition, marital status, age over 40, or denial of family leave, contact the DFEH. If an employee is being harassed or discriminated against for reasons other than those listed above, they should contact their local law enforcement agency if they have been assaulted, threatened with assault, or feel they are in danger. Other forms of harassment or discrimination generally require the filing of a lawsuit in Civil Court.

- LC 230(a) and (b) Taking time off to serve on a jury or appear as a witness.
- LC 230(c) For discharging or in any manner discriminating or retaliating against an employee who is a victim of domestic violence for taking time off from work to obtain relief or attempt to obtain relief to help ensure his or her health, safety, or welfare, or that of his or her child(ren). (The complaint must be filed within one year from the date of occurrence of the violation.)
- LC 230.1 Protects an employee who is a victim of domestic violence and works for an employer with 25 or more employees who takes time off to seek medical attention, to obtain services from a domestic violence program or psychological counseling, or to participate in safety planning. (The complaint must be filed within one year from the date of occurrence of the violation).
- LC 230.3 Taking time off to perform emergency duty as a volunteer firefighter, reserve police officer or emergency rescue personnel.
- LC 230.4 Protects an employee who is a volunteer firefighter and works for an employer employing 50 or more employees from being discriminated or retaliated against because he or she has taken time off to engage in fire or law enforcement training. The employee is permitted to take up to an aggregate of 14 days per calendar year for such training.
- LC 230.7 and Education Code § 48900.1 Protects employee who as parent or guardian of pupil takes time off to appear in the child's school at the request of the child's teacher.
- LC 230.8 Participation by employee having custody of child (parent, guardian or grandparent) in activity at a child's school or licensed child day care facility up to forty (40) hours per child, per year if employer has more than twenty-five (25) employees.
- LC 232(a) and (b) Discussing or disclosing wages or refusing to agree not to disclose wages.
- LC 233 Using or attempting to exercise the right to use a portion of "sick leave" (as defined in the statute) for attending to illness of child (or child of a domestic partner), parent, spouse or domestic partner.
- LC 432.7 Protects the rights of an applicant for employment or employee from disclosing information concerning an arrest or detention that did not result in conviction, or any information regarding referral to, and participation in, any pretrial or posttrial diversion program.
- LC 752 Ensuring that employees in nonunionized smelters or underground mines a fair and impartial election to establish a workday greater than eight (8) hours.
- LC 1025-1028 Ensures reasonable accommodation for voluntary participation in a drug and/or alcohol rehabilitation program if employer has more than twenty-five (25) employees. (See Section 17.7 of this Manual)
- LC 1041 Ensures reasonable accommodation for seeking literacy education assistance if employed by employer with more than twenty-five (25) workers.
- LC 1101 and 1102 Engaging in a political activity of an employee's choice.
- LC 1102.5 Protects employee disclosing information to a government or law enforcement agency where the employee has reasonable cause to believe that the information discloses a violation of a state or federal statute, or violation or noncompliance with a state or federal regulation.
- LC 1171 Protects persons participating in a national service program (e.g., AmeriCorps), for refusing to work overtime for any legitimate reason.
- LC 1197.5 Forbids being paid at a wage rate less than the rate paid to employees of the opposite sex in the same establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where the payment is made pursuant to a seniority system, a merit system, a system which measures earnings by quantity or quality or production, or a differential based on any bona fide

factor other than sex. (A civil action to recover wages under Section 1197.5(a) may be commenced no later than two years after the cause of action occurs, except that a cause of action arising out of a willful violation may be commenced no later than three years after the cause of action occurs.)

- LC 1198.3 Refusing to work hours in excess of those permitted by the Industrial Welfare Commission Orders. Note: only three (3) IWC Orders put some limit on the number of hours an employee may work.
- LC 2929(b) Provides damages for discharge by reason of the fact that the garnishment of an employee's wages has been threatened, or that his or her wages have been subjected to garnishment for the payment of one judgment. The employee must give notice to his employer of his intention to make a wage claim within 30 days after being discharged, and file a wage claim with the Labor Commissioner within 60 days after being discharged. (See Section 17.5 of this Manual)
- LC 2930 Employer failing to provide an employee with a copy of a shopping investigator's report before discharging or disciplining an employee. (See Section 17.6 of this Manual)
- LC 6310 (1) complaining about safety or health conditions or practices, (2) instituting or causing to be instituted any proceeding relating to the employee's rights to safe and healthful working conditions, or testifying in any such proceeding, or (3) participating in an occupational health and safety committee established pursuant to Labor Code Section 6401.7. (See Section 17.10 of this Manual)
- LC 6311 Refusing to perform work in the performance of which the Labor Code, any occupational safety or health standard or order would be violated where the violation would create a real and apparent hazard to the employee or her or his co-workers. (See Section 17.11 of this Manual)
- LC 6399.7 Complaining or testifying regarding non-compliance with Hazardous Substances Act.
- Health And Welfare Code 1596.881 For (1) complaining about the violation of any licensing or other laws relating to child day care facilities (e.g., staff-child ratios, transportation of children, or child abuse), (2) instituting or causing to be instituted any proceeding against the employer relating to the violation of any licensing or other laws, (3) appearing as a witness or testifying in a proceeding relating to the violation of any licensing or other laws, or refusing to perform work in violation of a licensing or other law or regulation after notifying the employer of the violation. A claim by the employee alleging the violation by the employer of Section 1596.881 shall be presented to the employer within 45 days after the action as to which complaint is made, and presented to DLSE not later than 90 days after the action as to which complaint is made.
- Unemployment Insurance Code 1237 For seeking information from the Employment Development Department (EDD) concerning his or her rights under the Unemployment Insurance Code or the Labor Code, cooperated with any investigation undertaken by EDD, or has testified or is about to testify in any proceeding brought pursuant to the UI Code or the Labor Code. Rights and remedies are the same as those provided in Labor Code § 98.6.
- IWC Orders Expressing an opinion concerning an alternative workweek election or for opposing or supporting its adoption or repeal. (IWC Orders 1 through 13, Section 3(B-2)(8)). (See Section 56.13 of this Manual)

17.2 Wage Discrimination Based On Gender. California has a provision in the Labor Code (§ 1197.5) which is patterned on federal law making payment to an individual in the employer's employ at wage rates less than the rates paid to employees of the opposite sex in the same establishment illegal when the job performance requires equal skill, effort, and responsibility, and which is performed under similar working conditions. One exception is where the payment is made pursuant to a seniority system,

a merit system, a system which measures earnings by quantity or quality of production, or a differential based on any bona fide factor other than sex. (Labor Code § 1197.5(a)).

17.2.1 In order to establish a violation, the work performed must be equal as to skill, effort and responsibility and must be performed under similar working conditions.

17.2.2 The measure of the skill, effort and responsibility must be objective and the proof of such skill, effort or responsibility is upon the employer.

17.2.3 If a difference in wage rate is based on a seniority system, merit system or a system which measures earnings by quantity or quality of production, or any other differential based on a bona fide factor other than gender, the differential is allowed.

17.2.3.1 The seniority, merit or other system must be objective and the fact that the objective criteria was met must be proven by the employer. In the case of a system which measures earnings by quantity (piece rate) or quality of production, the basic criteria for the system must be equally applied to both genders.

17.2.4 Damages for violation of this provision include not only the recovery of any wages lost as a result of the discrimination together with interest on those lost wages, but also liquidated damages in a like amount. Attorney's fees may be recovered in a private action to enforce this section. (Labor Code § 1197.5(g)).

17.2.5 **Statute of Limitations**. Unlike most actions which are based on a right established by the law (minimum wage, overtime, etc., see *Aubry v. Goldhur* (1988) 201 Cal.App.3d 399; 247 Cal.Rptr. 205) there is a two year statute of limitations placed on recovery of wages under this section except if the violation is willful in which case the statute of limitations is extended to three years. (§ 1197.5(h)). Investigations of complaints filed with the DLSE are handled under the provisions of Labor Code § 98.7. The statute of limitations is tolled upon the filing of a complaint with the DLSE. (*Occidental Life Ins. v. EEOC*, 432 U.S. 355 (1977)).

17.2.6 In most cases, an employee who has suffered gender discrimination will file an EEOC or DFEH claim for discrimination on the basis of sex since recovery of compensatory damages is available in those forums. However, relief is available through the DLSE if the employee chooses.

17.2.7 In the event the claimant also files a complaint under the federal law (29 USC § 206), the employee is required to return to the employer the amounts recovered under this statute or the sum recovered under the federal law, whichever is less. (§ 1197.5(i)).

17.3 **Some Specifically Prohibited Discharges Or Disciplines**. Some of the more common complaints received by the DLSE involve employees who are discharged or otherwise disciplined because they take certain actions which are protected by law. A complete list of protected rights under the jurisdiction of the Labor Commissioner are listed above. Following is an outline of the more common complaints and the elements which must be considered.

17.4 Filing Or Threatening To File Claim With Labor Commissioner. Labor Code § 98.6 prohibits any employer from discharging or otherwise discriminating against any employee or job applicant because the employee or applicant has:

1. Filed or threatened to file a bona fide complaint or claim against the employer, or
2. Instituted or caused to be instituted any proceeding under or relating to his or her rights under the jurisdiction of the Labor Commissioner, or
3. Testified or is about to testify in any proceeding, or
4. Exercised <u>any</u> <u>right</u> afforded him or her on behalf of himself or herself or <u>others</u>, specifically including the rights protected by Labor Code §§ 96(k) and 1101 through 1102.5.

17.4.1 A complaint is considered "bona fide" for purposes of this statute when a reasonable person in the circumstances would consider the complaint to be valid and enforceable.

17.4.2 Note that the first two protected activities involve a filing or threat to file or engaging in a proceeding within the jurisdiction of the Labor Commissioner; but activities above numbered 3 and 4 are not so limited. Many activities fall within the gambit of "any right afforded". DLSE has taken the position, for instance, that discussing or complaining to the employer or to others about lack of overtime premium pay, is protected activity under criterion number 4, above. (See also Lambert v. Ackerly, 180 F.3d 997 (9th Cir.1999)

17.5 Discharge For Threatened Garnishment Or Garnishment For <u>One</u> Judgment Prohibited. Labor Code § 2929 prohibits an employer from discharging an employee because of a <u>threatened</u> garnishment of an employee's wages; nor may an employer discharge an employee because of a garnishment for payment of <u>one</u> judgment.

17.5.1 Note that the law by inference does not prohibit the discharge of an employee whose wages are garnished for payment of <u>more</u> <u>than</u> <u>one</u> judgment.

17.5.2 Employee Must Meet Statutory Time Requirements. An employee discharged in violation of Section 2929 must notify his or her employer of intent to file a wage claim to recover lost wages (capped at 30 days) within 30 days of discharge and file a wage claim for such recovery within 60 days of discharge. A complaint for reinstatement will lie under Labor Code § 98.7, and must be filed within six (6) months.

17.6 Discipline Or Discharge On The Basis Of Shopping Investigator's Report. Labor Code § 2930 prohibits either discipline or discharge of an employee based on an adverse report in a "shopping investigator's" report unless the employee is furnished a copy of the report before the interview which results in the discharge or discipline is concluded and before the adverse action takes place.

17.6.1 A shopping investigator is defined as a person licensed pursuant to Business and Professions Code § 7502, and not employed exclusively by the employer.

17.6.2 Violation of Section 2930 would be handled through the procedures set out at Labor Code § 98.7 and the remedies contained therein would apply.

17.7 Drug Or Alcohol Rehabilitation. Labor Code § 1025 requires employers of 25 or more workers to reasonably accommodate employees who voluntarily participate in an alcohol or drug rehabilitation program. Whether or not reasonable accommodation was offered is a question of fact subject to investigation.

17.7.1 The statute requires that the employee must voluntarily enter and participate in the rehabilitation program with reasonable notice of such action given to the employer. If the rehabilitation program is mandated by the court, there is no protection. The statute is designed to encourage voluntary participation.

17.7.2 Complaint Procedure. An employee may file a complaint with the Labor Commissioner if he or she believes that he or she has been denied reasonable accommodation as required by Section 1025. Labor Code §§ 98, 98.1, 98.2, 98.3, 98.4, 98.5, 98.6, and 98.7 shall be applicable to a complaint filed pursuant to this section.

17.8 Freedom Of Political Affiliation. Labor Code §§ 1101 and 1102 prohibit an employer from interfering with an employee's political activities in any manner. The statute forbids interference with the right of an employee to engage in politics (including becoming a candidate) or adopting or not adopting any particular course or line of political action or political activity.

17.9 State Whistleblower Statute. Labor Code § 1102.5 protects employees who disclose information to a governmental or law enforcement agency where the employee has reasonable cause to believe that the information discloses a violation of state or federal statutes, a violation of state or federal statutes, or noncompliance with state or federal regulations.

17.9.1 Note: This statute encompasses the filing of a complaint with the Labor Commissioner's office (also protected under Labor Code §98.6), the filing of a complaint with OSHA (also protected under Labor Code §§ 6310, 6311), the filing of a complaint with Department of Fair Employment and Housing under Government Code Section 12940, et seq., and other complaints or reports to governmental agencies about violations of law under their jurisdiction.

17.10 Protection For Filing Safety Complaint. Labor Code § 6310 forbids an employer taking adverse action against an employee who:

1. Files a written or oral complaint concerning safety or health with any government agency having statutory responsibility for employee safety or health, the employer, or the employee's representative (union, etc.), or
2. Takes any action to institute or causes to be instituted any proceedings under or relating to safety or health in the workplace, or
3. Testifies or agrees to testify in any such proceeding, or
4. Participates in an occupational health and safety committee.

17.11 Refusing To Perform Unsafe Work. Labor Code § 6311 protects an employee who, having a reasonable fear that the performance of work would violate a safety provision of a federal or state safety or health law refuses to perform such work where such performance would create a real and apparent hazard to the employee or to fellow employees. The DLSE follows the definitions and criteria set out in Whirlpool Corp. v. Marshall, 100 S.Ct. 883 (1980) in enforcing these sections.

17.11.1 Note: For purposes of either of these statutes dealing with Occupational Safety and Health, an inmate in a state prison is an employee. (Labor Code § 6304.2)

18 ASSIGNMENT OF WAGES.

18.1 Provisions Of Labor Code § 300. According to the statute – and reiterated by the courts – the purpose of Labor Code Section 300 is to protect employees and their families from assigning wages to the extent that the remaining portion of the wages would severely impair the wage earner's economic well being. These restrictions protect the employee by prohibiting the employer from paying out to "assignees" more of the employee's wages than is permitted by law.

18.1.1 Note: The employer may also be an assignee and the statute recognizes this fact. See Labor Code § 300(g).

18.2 If an employee inadvertently, or through ignorance, exceeds the limits under Section 300 and the employer subsequently makes deductions exceeding Section 300 limitations, a wage claim may result against the employer as such an assignment would be considered an invalid deduction. Assignments are limited to not more that 50% of the employee's wages. (See § 300(c)) This obviously places an obligation on the employer to review each assignment as the employer must accept responsibility for any wage deductions based on the employee's assignment. The provisions of Labor Code Section 300(d) set forth the limits of the employer's responsibility.

18.3 Labor Code Section 300 codifies many, but not all, of the restrictions placed upon the assignment of wages by an employee. The section severely limits the right of employees to assign wages and no assignment is valid unless all of the following are present:

1. The assignment is in a separate writing, signed by the wage earner and specifying the transaction to which the assignment relates.
2. Spousal consent is obtained in writing and attached to the assignment unless the wage earner is legally separated or living separate and apart after an interlocutory judgment of dissolution has been entered and a written statement setting forth those facts is attached to the assignment or a written statement setting forth the fact that the wage earner is single is attached to the assignment.
3. An assignment by a minor is signed by a parent or guardian.
4. The wage earner has made no other assignment involving the same transaction and a written statement to that effect is attached to the assignment.
5. A notarized copy of the assignment together with the required statements is filed with the employer and, at the time of such filing, no other assignment is subject to payment and no court ordered earnings withholding order is outstanding.
6. Not more than fifty percent of the employee's wages may be withheld from any one payroll payment and the assignment is revocable at any time.
7. The wages of an employee who is paid at a central location as set out at Labor Code Section 204a may not be assigned. (See Section 5.3 of this Manual)

18.3.1 Note that these provisions do not apply in assignments for spousal or child support. (See § 300(a))

18.3.2 Does Not Apply To Certain Deductions. Section 300 does not apply to deductions which the employer is requested in writing by the employee to make for the payment of insurance, taxes or contributions to funds or plans providing for death, disability, retirement, etc., or for contributions to charitable, educational, patriotic or similar purposes or for the payment for goods or services furnished by the employer to the employee or the employee's family. (See Labor Code Section 300(g).)

18.3.2.1 Goods Or Services Furnished By The Employer. It should be noted that while the provisions of Section 300 do not apply, inter alia, to deductions for goods and services furnished by the employer to the employee or his family, this particular deduction is only applicable where the goods or services are directly furnished by the employer. These goods or services usually involve rent or food. (See IWC Orders, Section 10, limiting the amount of these deductions)

18.3.2.2 In addition to being limited to goods or services directly furnished by the employer, the deduction must also meet the criteria set out in the case of Barnhill v. Saunders (1981) 125 Cal.App.3d 1; 177 Cal.Rptr. 803.

19 GRATUITIES – TIPS .

19.1 Labor Code § 350

As used in this article, unless the context indicates otherwise:

(a) "Employer" means every person engaged in any business or enterprise in this State, which has one or more persons in service under any appointment, contract of hire, or apprenticeship, express or implied, oral or written, irrespective of whether such person is the owner of the business or is operating on a concessionaire or other basis.

(b) "Employee" means every person including aliens and minors, rendering actual service in any business for an employer, whether gratuitously or for wages or pay and whether such wages or pay are measured by the standard of time, piece, task, commission, or other method of calculation and whether such service is rendered on a commission, concessionaire, or other basis.

(c) "Employing" includes hiring, or in any way contracting for the services of an employee.

(d) "Agent" means every person other than the employer having the authority to hire or discharge any employee or supervise, direct, or control the acts of employees.

(e) "Gratuity" includes any tip, gratuity, money, or part thereof, which has been paid or given to or left for an employee by a patron of a business over and above the actual amount due such business for services rendered or for goods, food, drink, or articles sold or served to such patron. Any amounts paid directly by a patron to a dancer employed by an employer subject to Industrial Welfare Commission Order No. 5 or 10 shall be deemed a gratuity.

(f) "Business" means any business establishment, or enterprise, regardless of where conducted.

19.1.1 The provisions of Labor Code § 350 provide detailed definitions of the terms used in the Article (Labor Code §§ 350 through 356).

19.2 Labor Code § 351.

No employer or agent shall collect, take, or receive any gratuity or a part thereof, that is paid, given to or left for an employee by a patron, or deduct any amount from wages due an employee on account of a gratuity, or require an employee to credit the amount, or any part thereof, of a gratuity against and as a part of the wages due the employee from the employer. Every gratuity is hereby declared to be the sole property of the employee or employees to whom it was paid, given, or left for. An employer that permits patrons to pay gratuities by credit card shall pay the employees the full amount of the gratuity that the patron indicated on the credit card slip, without any deductions for any credit card payment processing fees or costs that may be charged to the employer by the credit card company. Payment of gratuities made by patrons using credit cards shall be made to the employees not later than the next regular payday following the date the patron authorized the credit card payment.

19.2.1 Statutory Scheme Must Be Read Carefully. Particular note should be made of the definition of "gratuity" contained in Section 350, which includes any tip, gratuity, money, or part thereof, which has been paid or given to or left for an employee by a patron of a business over and above the actual amount due the business for services rendered or for goods, food, drink, or artides sold or served to the patron.

19.2.1.1 Note that the amendment to Labor Code § 350 effective January 1, 2001, adds specific language regarding dancers. Also, as explained below, section 351 now prohibits, among other things, the practice of recovering credit card charges incurred by an employer when a tip is left on a credit card.

19.3 Statute Prohibits Employers Or Their Agents From Taking Or Receiving Tip Money Left For Employee. Section 351 prohibits employers and their *agents* (defined, above, as every person other than the employer having the authority to hire or discharge any employee or supervise, direct, or control the acts of employees) from sharing in or keeping any portion of a gratuity left for or given to one or more employees by a patron.

19.3.1 In the case of *Leighton v. Old Heidelberg, Ltd.* (1990) 219 Cal.App.e3d 1062, the Second District Court of Appeal, in a split decision, held that an employer policy mandating a tip pooling arrangement among waiter/waitresses and busboys and bartenders was legal despite the language of Section 351. While, in *Leighton*, the tip pooling policy in question applied to employees who provided "direct" table service, the court recognized that this was a long-standing practice in the restaurant industry. The acknowledgment of prevailing industry practice was also recognized in a DLSE opinion letter interpreting *Leighton* issued in 1998. The DLSE opinion states that it is the correlation with prevailing industry practice "that makes tip pooling a fair and equitable system". (DLSE Opinion Letter No. 1998.12.28-1).

Recognizing that prevailing industry practice is likely to evolve over time as a result of competitive market demands and changing technology, the DLSE in an opinion letter issued in 2005 , interpreted Labor Code section 351 to allow for a tip pool policy requiring the employee receiving the tip to contribute 15% of the actual tips to the tip pool and all money from the tip pool then to be distributed to the other employees in the "chain of service" based on the number of hours they worked, as is consistent with industry custom, <u>provided</u>:

1) Tip pool participants are limited to those employees who contribute in the chain of the service bargained for by the patron, pursuant to industry custom [examples of employees included in "chain of service" provided in Opinion Letter], and

2) No employer or agent with the authority to hire or discharge any employee or supervise, direct, or control the acts of employees may collect, take or receive any part of the gratuities intended for the employee(s) as his or her own. (also see Definitions for "Employer" and "Agent", Cal Labor Code section 350). (See DLSE Opinion Letter 2005.09.08).

19.3.2 **No Wage Deductions For Gratuities.** Additionally, this section prohibits employers from making wage deductions from gratuities, or for using gratuities as direct or indirect credits against the employee's wage and now specifically disallows a recovery of credit card charges incurred by the employer.

19.3.3 Employment agreements allowing an employer to employ so-called "tip credits" (allowed under federal law) against wages owed to an employee are illegal under California law. (*Henning v. IWC and California Restaurant Assn.* (1988) 46 Cal.3d 1262; 252 Cal.Rptr. 278)

19.3.4 **Note**: Section 351 was amended effective January 2, 2001, and no longer provides an exemption which allows employers to take or receive the gratuities left for employees where there is no charge made for the service. For claims involving the prior language Deputies should refer to the 1998 edition of this Manual for guidance.

19.3.5 **Service Charge Is Not A Gratuity**. A charge which must be paid added to a customer's bill for the service is not a gratuity and may be received and disbursed by the employer without limit by Labor Code § 351m *et seq*. (O.L. 1994.01.07 and 2000.11.02). On the other hand, if the "service charge" or "added gratuity" is waivable or negotiable, or couched in terms of being less than a fixed amount which must be paid, the charge is not an added "charge" to the bill and payment is gratuitious.

19.4 Labor Code § 353.

> Every employer shall keep accurate records of all gratuities received by him, whether received directly from the employee or indirectly by means of deductions from the wages of the employee or otherwise. Such records shall be open to inspection at all reasonable hours by the department.

19.4.1 Section Requires Employer To Keep Records. This Section requires the employer to keep accurate records of any gratuity received by him through any means. Gratuities received through credit cards would fall within these recordkeeping requirements. Since the employer is obligated to keep the records, the burden of proof regarding amounts due employees from credit card charges would be on the employer.

19.5 Labor Code § 356.

> The Legislature expressly declares that the purpose of this article is to prevent fraud upon the public in connection with the practice of tipping and declares that this article is passed for a public reason and can not be contravened by a private agreement. As a part of the social public policy of this State, this article is binding upon all departments of the State.

19.5.1 Statutory Scheme Has Public Purpose. The Legislature has declared that the provisions of this Article, dealing with tips, is to prevent fraud upon the public and cannot be contravened by private agreement.

19.5.2 California courts have determined that an employer policy of crediting tips of restaurant employees against their minimum wage violates Labor Code § 351 and that damages are recoverable under Business and Professions Code § 17200 as an unfair business practice. (Application Group, Inc. v. Hunter Group, Inc. (1998) 61 Cal.App.4th 881, 907-908; Hudgins v. Neiman Marcus (1995) 34 Cal.App.4th 1109, 1126-1127)

19.6 Credit Card Charges As Tips. As noted above, under the amended statute, an employer cannot offset the cost of credit card charges which may be incurred by an employer against tips paid by the patron on the credit card. This addition is in keeping with a decision of the 1st District Court of Appeal which held that any cost of doing business must be borne by the employer and not the employee. (Hudgins v. Neiman Marcus (1995) 34 Cal.App.4th 1109) Inasmuch as credit card purchases are common, the cost of credit card charges are a cost of doing business. Thus this decision had been interpreted by DLSE to prohibit any deduction from the wages of employees by the employer to recover costs incidental to tips left for employees.

20 EMPLOYEE BONDS – REQUIREMENTS AND LIMITATIONS.

20.1 Cost Of Bond Or Photograph. If a bond or photograph of an employee or applicant is required by any employer, the cost thereof shall be paid by the employer. (Labor Code § 401) This covers any situation where either the employer or a third person requires a photograph or a bond (purchased from a bonding company) guaranteeing the performance of the duties or obligations of the employee. This is typical in certain employments involving the handling of large sums of money, goods or commodities.

20.2 Cash Bond – Labor Code § 402:

> No employer shall demand, exact,, or accept any cash bond from any employee or applicant unless:
>
> (a) The employee or applicant is entrusted with property of an equivalent value, or
>
> (b) The employer advances regularly to the employee goods, wares, or merchandise to be delivered or sold by the employee, and for which the employer is reimbursed by the employee at regular periodic intervals, and the employer limits the cash bond to an amount sufficient to cover the value of the goods, wares, or merchandise so advanced during the period prior to the payment therefor.

20.3 Cash Bonds must be deposited in a savings account in a bank authorized to do business in California. The account must be set up in such a way that the amount deposited can only be withdrawn by the joint signatures of both the employer and the employee (or applicant), the sum may not be co-mingled with other money of the employer, and the agreement concerning the bond must be in writing. The money in such an account is not subject to a money judgment obtained against either the employer or the employee or applicant except in an action between the employer or employee or applicant, their successors and assigns. The amount held in the bond account (plus any interest accrued) must be returned to the employee or applicant upon the return of the money or property to the employer, subject only to the deduction necessary to balance accounts between the employer and employee. (Labor Code § 403).

20.3.1 A Written Agreement Concerning The Bond Is Required By The Statute. The DLSE will enforce any term of such an agreement which is not abusive, unfair or in derogation of the spirit of the statute. This agreement may, for instance, provide for recovery of damages done to the goods. Such recovery may be made from the bond if both the employer and employee agree on the amount of damages; or, in the event there is no agreement, either party may sue to recover the bond amount from the account in which case the issue of damages would be decided by the trier of fact.

20.4 The California Supreme Court has found that "Labor Code sections 400 through 410 set out in detail the employee's bond law, and the manner in which a cash bond may be exacted from an employee to cover merchandise entrusted to him"... deductions "from wages due appear to be in contravention of the spirit, if not the letter, of the employee's bond law." (Kerr's Catering v. DIR (1962) 57 Cal.2d 319, 327-328)

21 CONTRACTS AND APPLICATIONS FOR EMPLOYMENT.

21.1 Labor Code § 407:

> Investments and the sale of stock or an interest in a business in connection with the securing of a position are illegal as against the public policy of the State and shall not be advertised or held out in any way as a part of the consideration for any employment.

21.1.1 This provision of the Labor Code prohibits any employer from advertising that any employment opportunity is based upon a purchase of stock or an interest in a business or requiring such a purchase as a condition of employment. The DLSE takes the position that any purchase of stock or interest in a business as a condition of continued employment is likewise prohibited.

21.2 Employment Applications Must Be Filed With Labor Commissioner. Labor Code § 431 provides that in the event an applicant for employment must sign an application for employment, the employer must have a copy of the form of such application on file with the Labor Commissioner's office. The Division policy requires that all such applications received by DLSE staff must be forwarded to the Office of the Chief Counsel.

21.2.1 Labor Code § 432 provides that either an employee or an applicant has the right to obtain a copy of any employment instruments he or she is required to sign. Employment instruments include any document dealing either directly or indirectly with employment or continued employment.

21.3 Polygraph Tests And Similar Tests – Labor Code § 432.2: Employers are prohibited from requiring an applicant for employment or any employee to take a polygraph, lie detector or similar test and if an employer "requests" an employee to take such a test, the employee must be advised, in writing, of his right not to take such a test.

21.3.1 Certain psychological tests may or may not meet the criteria of Section 432.2 ("similar test or examination"); but in any event those tests may constitute an invasion of privacy under article I, section 1, of the California Constitution absent a showing of a compelling interest by the employer. (Central Valley Chapter 7th Step Foundation, Inc. v. Younger (1989) 214 Cal.App.3d 145, 151, 162-165) In addition to any enforcement action taken by the DLSE, claimants with complaints regarding use of so-called psychological testing should also be cautioned to contact private counsel.

21.4 Remedy For Refusal To Take Test. Since the requirement to take a polygraph or similar test is forbidden, no adverse action may be taken by the employer against an applicant for employment or employee who refuses to submit to such a test. (§ 98.6)

21.5 Contracts Void As Against Public Policy – Labor Code § 432.5:

> No employer, or agent, manager, superintendent, or officer thereof, shall require any employee /or applicant for employment to agree, in writing, to any term or condition which is known by such employer, or agent, manager, superintendent, or officer thereof to be prohibited by law.

21.5.1 Every person is charged with the responsibility of knowing the law; thus, it is not a defense for an employer to contend that they had not read or were unaware of the law.

22 PURCHASES BY EMPLOYEES – PATRONIZING EMPLOYER.

22.1 Labor Code § 450:

(a) No employer, or agent or officer thereof, or other person, may compel or coerce any employee, or applicant for employment, to patronize his or her employer, or any other person, in the purchase of any thing of value.

(b) For purposes of this section, to compel or coerce the purchase of any thing of value includes, but is not limited to, instances where an employer requires the payment of a fee or consideration of any type from an applicant for employment for any of the following purposes:

(1) For an individual to apply for employment orally or in writing.

(2) For an individual to receive, obtain, complete, or submit an application for employment.

(3) For an employer to provide, accept, or process an application for employment.

22.1.1 Illegal To Require Payment To Apply For Employment. Note that recent legislation makes it illegal for an employer in California to charge a fee to an employee for applying for employment, receiving an application for employment or for providing, accepting or processing an application for employment. This had been a common practice in the air transport industry. (See O.L. 2002.01.22)

22.2 Requirement That Employee Patronize Employer Or Third Party Prohibited. Any other requirement by an employer that an employee patronize the employer or a third person in the purchase of anything of value is prohibited by this statute.

22.2.1 The provisions of Section 450 do not preclude an employer from "prescribing the weight, color, quality, texture, style, form and make of uniforms required to be worn by his employees." (Labor Code § 452) The fact that the employer may prescribe the uniform does not relieve the employer of the obligation to pay the cost of the uniform (DIR, DLSE v. UI Video, 55 Cal.App.4th 1084, 1091), the statute simply permits the employer to designate the store where the goods may be purchased.

22.3 Varied Circumstances Surrounding Enforcement Of Section 450. As the Division's responses to inquiries evidences, the question of the applicability of Section 450 arises often and in sometimes unique factual circumstances. The DLSE has opined that the section precludes an employer from requiring that an employee: pay for a safety orientation program required on a particular job site (O.L. 1993.01.19-2), purchase insurance coverage for an automobile used for business purposes (O.L. 1993.02.22-3), pay for uniforms required by the employer, purchase a truck to be used by the employee in the business (O.L. 1997.01.02), or pay for a bank account as a condition of receiving incurred expenses by direct deposit (O.L. 1997.03.21-2). The employee must show that there is a cost involved to the employee before Section 450 is applicable. For instance, the code section does not preclude an employer from requiring that an employee make application for a specific credit card if no costs are involved in maintaining that credit card (O.L. 1997.02.21-2).

22.4 Costs Of Recovering Tips Left On Credit Cards. See Section 19.6 of this Manual for discussion regarding prohibition on employer's recovering costs of tips left for an employee on a credit card.

23 CONTRACTS AGAINST PUBLIC POLICY.

23.1 There are a number of statutes in the Labor Code which specifically prohibit contracts between employers and employees on certain subjects. Examples of actions which have been declared to be against "public policy" are:

1. Any contract to release a claim for wages entered into before those wages have been paid (Labor Code § 206.5);
2. Contracts which would deprive employee of tips (Labor Code § 356);
3. Contract to abrogate the provisions of Labor Code § 405 dealing with use of bond to pay for property entrusted to employee;
4. Investment in business prohibited as inducement to employ (Labor Code § 407);
5. Waiver of Talent Agency Act provisions (Labor Code § 1701.19);
6. Waiver of any provision of Labor Code requiring employer to indemnify his employee for expenses incurred in employment (Labor Code 2804);
7. Contract which allows discharge for garnishment (Labor Code § 2929);
8. Failure to secure workers' compensation insurance (Labor Code § 3712).

23.2 Union Organization: The announced public policy of the State of California (as found in Labor Code §§ 921 and 923) provides that freedom to organize is guaranteed. Section 923 states:

> "Negotiation of terms and conditions of labor should result from voluntary agreement between employer and employees. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers, the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. Therefore it is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

23.2.1 Any agreement which interferes with the right of employees to organize is void as against public policy.

23.2.2 Labor Code § 922 provides that coercion to enter an agreement not to join or to become a member of any labor organization as a condition of securing or continuing in employment is a misdemeanor.

23.2.3 See also, Section 31.3.1, et seq. of this Manual for further discussion regarding contracts in derogation of public policy.

24 SOLICITATION OF EMPLOYEES BY MISREPRESENTATION

24.1 Offering employment based on intentional misrepresentations is a violation of Labor Code Section 970. The Labor Commissioner has jurisdiction to hear claims arising from a violation of Labor Code § 970. (See Labor Code § 96(d))

24.1.1 Labor Code § 970 prevents employers from inducing employees to move to, from, or within California by misrepresenting the nature, length or physical conditions of employment. (Tyco Industries, Inc. v. Superior Court (1985) 164 Cal.App.3d 148, 155) While originally adopted to protect migrant workers from the abuses heaped upon them by unscupulous employers and potential employers – especially involving false promises made to induce migrant workers to move in the first instance – the courts have construed sections 970 and 972 to apply to other situations as well. (Munoz v. Kaiser Steel Corp. (1984) 156 Cal.App.3d 965, 980). Nothing in the statute restricts application of the statutory language to any particular class or kind of employment. (Ibid., at 980)

The apparent purpose of sections 970 and 972 is to protect potential employees from being solicited to change employment by false representations concerning the nature or duration of employment. The statutory scheme is particularly addressed to preventing employers from inducing potential employees to move to a new locale based on misrepresentations of the nature of the employment. (Tyco Industries, Inc. v. Superior Court, supra, 164 Cal.App.3d at 155) The relocation of the employee's residence is required in order to state a cause of action. (Eisenberg v Alameda Newspapers, Inc. (1999) 74 Cal App 4th 1359)

24.2 Remedy. Double damages are the remedy for violation of section 970. Thus, double any cost incurred by the employee in changing employment (and residence) is recoverable.

24.3 Labor Code § 973 prohibits advertisement or other solicitation of employees during a strike, lockout or other trade dispute unless the advertisement contains a plain and explicit mention in such advertisement or solicitation that a strike, lockout or labor disturbance exists. The section explains in detail the procedure which must be followed if such advertising is undertaken. The DLSE will take action to enforce this section. (O.L. 1993.05.04-2)

24.4 Labor Code § 976 prohibits any advertisement offering employment as a salesman, broker or agent which is willfully designed to mislead any person as to compensation or commissions which may be earned, or falsely represents the compensation or commissions which may be earned.

24.5 Labor Code §§ 1010-1018 prohibits misrepresentation of union affiliation by means of false labels, buttons, cards, etc.

25 CONSTRUCTION INDUSTRY CONTRACTORS' REQUIREMENTS.

25.1 Labor Code § 1021. Any person who does not hold a valid state contractor's license issued pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, and who employs any worker to perform services for which such a license is required, shall be subject to a civil penalty in the amount of one hundred dollars ($100) per employee for each day of such employment. The civil penalties provided for by this section are in addition to any other penalty provided by law.

25.2 Labor Code § 1021.5 provides that in the event a licensed construction industry contractor "willingly and knowingly" enters into a contract with any person to perform services for which a license is required and that person does not hold a license(or meet the requirements of independent contractor pursuant to the provisions of Labor Code § 2750.5), the licensed contractor is subject to a penalty of $100.00 for each person so contracted with. California courts have concluded that a DLSE Hearing Officer may consider the contractor's failure to make reasonable efforts to ascertain whether the subcontractor was licensed to warrant an inference that the contractor knew the unlicensed status of the subcontractor. (Wang v. DLSE (1986) 219 Cal.App.3d 1152, 1158-1159)

25.2.1 Note: When an investigation by the division determines that an employer has violated Section 1021, 1021.5, 1197, or 1771, or otherwise determines that an employer may have failed to report all the payroll of the employer's employees as required by law, the division shall advise the Insurance Commissioner and request that an audit be ordered pursuant to Section 11736.5 of the Insurance Code.

25.2.2 Contractors Employed Exclusively On Federal Projects. It is not within the jurisdiction of the Labor Commissioner (or the State of California) to require that a person performing work on an exclusively federal project have a state contractor's license. (Gartrell Const. Inc. v Aubry (1991, CA9 Cal) 940 F2d 437)

26 EMPLOYEE PRIVILEGES AND IMMUNITIES.

26.1 Labor Code § 1025, Alcohol And Drug Rehabilitation: Employers of more than 25 employees (on a regular basis) are required to "reasonably accommodate any employee who wishes to voluntarily enter and participate in an alcohol or drug rehabilitation program, provided that this reasonable accommodation does not impose an undue hardship on the employer."

26.1.1 The Legislature has announced its intent in adopting this statute:

> "It is the intent of the Legislature that employers subject to this act reasonably accommodate employees by providing time off necessary to participate in an alcoholic rehabilitation program when this will not impose an undue hardship on the employer. In determining whether providing the necessary time off would impose an undue hardship it is the intent of the Legislature that the size and type of the employer and facility, the nature and cost of the accommodation involved, notice to the employer of the need for the accommodation, and any reasonable alternative means of accommodation be considered." (1984, Ch. 1103)

26.1.2 An employer must take reasonable efforts to safeguard the privacy of the employee as to the fact that he or she has enrolled in an alcohol or drug rehabilitation program. (Labor Code § 1026)

26.1.3 Note that an employer is not responsible for paying an employee for absences occasioned by entry into an alcohol or drug rehabilitation program, but the employee may use sick leave to which he or she is otherwise entitled to pay for such leave. (Labor Code § 1027)

26.1.4 An employee may file to recover lost wages or for reinstatement with the Labor Commissioner if the employer denies reasonable accommodation.

26.2 Labor Code § 1040, *et seq.*, Employee Literacy Education Assistance Act: Every employer regularly employing more than 25 employees must "reasonably accommodate any employee who reveals a problem of illiteracy and requests employer assistance in enrolling in an adult literacy education program, provided that this reasonable accommodation does not impose an undue hardship on the employer."

26.2.1 The employer must make reasonable efforts to safeguard the privacy of the employee as to the fact that he or she has a problem with illiteracy (Labor Code § 1042)and an employee may not be discharged based solely on the revelation of a problem with literacy so long as the employee satisfactorily performs his or her work.

26.2.2 Note that an employer is not obligated to pay for the time an employee is off to enroll or participate in an adult literacy education program. (Labor Code § 1043)

26.3 Labor Code § 1050, Preventing Re-employment By Means Of Misrepresentation: It is illegal for an employer (or any person, agent or officer thereof) to prevent the re-employment of an employee who has left the employer's service either by discharge or voluntary quit. An employee who is damaged by an employer's untruthful statements may recover treble damages. (Labor Code § 1054)

26.3.1 Truthful Statement. It is not illegal, however, for an employer to furnish, upon special request (i.e., a specific request for information regarding that employee), a truthful statement concerning the reasons for termination. (Labor Code § 1053)

26.3.1.1 In the past, it was not unheard of for employers to put a special mark or signal on letters of recommendation or answers to requests for information which, to the initiated, conveyed a meaning different from that conveyed by the plain words of the letter or message. The Legislature made any such mark or sign or the fact that the information was furnished without there being a "special" request, prima facie evidence of a violation of the statute. (Labor Code § 1053)

26.3.1.2 Certain investment companies and investment advisers are exempt from the provisions of Labor Code §§ 1050 et seq. Deputies are advised to seek help from the Legal Section.

26.4 Labor Code §§ 1101 And 1102, Freedom Of Political Affiliation: Employers may not make, adopt or enforce any rule, regulation or policy which forbids or prevent employees from engaging or participating in politics or from becoming candidates for public office; nor may an employer control or direct or tend to control or direct the political activities of employees. The employer is further prohibited from coercing or influencing or attempting to coerce or influence employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity.

26.4.1 By inference (See Labor Code § 1106) the provisions of Labor Code §§ 1101 and 1102 are not applicable to public entity employees. However, under the federal and state Constitutions, public employees, like others, have the right to speak freely and effectively on public questions as well as the inseparable and cognate right to petition the government for a redress of grievances. (California Teachers Assn. v Governing Board (1996) 45 Cal.App.4th 1383, 53 Cal.Rptr. 2d 474). Labor Code § 96(k) which took effect January 1, 2000, prohibits public employers from discriminating against public employees for engaging in lawful activity during non-work hours away from the employer's premises.

26.4.2 Applicants Covered. Employers cannot be permitted to evade the salutary objectives of a statute by indirection. Thus, although Labor Code §§ 1101 and 1102, prohibiting employers from interfering with an employee's political activities, refers only to employees, the prohibition protects applicants for employment as well as on the job employees. (Gay Law Students Asso. v Pacific Tel. & Tel. Co. (1979) 24 Cal.3d 458, 156 Cal.Rptr. 14) Under the amendments to Labor Code § 98.6, effective January 1, 2002, Labor Code § 96(k) now protects job applicants against discrimination for engaging in lawful conduct away from the employer's place of business.

26.4.3 Labor Code § 1102.5, Prohibition Against Retaliation for Disclosure of Information to Government or Law Enforcement Agencies: Employers may not take any action to prevent an employee from disclosing information to a government or law enforcement agency where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or violation or noncompliance with a state or federal regulation.

26.4.3.1 Note that this section does not apply to situations involving the lawyer-client or the physician-patient privileges.

26.4.3.2 State and local employees are protected as well as employees of private employers.

27 PROHIBITED OR LICENSED OCCUPATIONS.

27.1 Industrial Homework.

27.1.1 Labor Code § 2651 prohibits the manufacture by industrial homework of the following articles:

1. Articles of food or articles for use in connection with the serving of food or drink;
2. Articles of wearing apparel;
3. Toys and dolls;
4. Tobacco;
5. Drugs and poisons;
6. Bandages and sanitary goods;
7. Explosives, fireworks, and articles of like character, and
8. Articles, the manufacture of which by industrial homework is determined by the Division to be injurious to the health or welfare of the industrial homeworkers within the industry or to render unduly difficult the maintenance of existing labor standards or enforcement of labor standards established by law or regulation for factory workers in the industry.

27.1.1.1 Section 2650 of the Labor Code provides the definitions to be used in enforcement of the industrial homework provisions.

27.1.2 Note that articles not specifically mentioned above may be manufactured by persons employed in their home, provided that both the "employer" and the homeworker are licensed pursuant to § 2658.

27.1.2.1 An "employer" for purposes of the industrial homeworker statutes is "any person who, directly or indirectly or through an employee, agent, independent contractor, or any other person, employs an industrial homeworker. (§ 2650(b)) To "employ" for purposes of this statutory scheme, means "to engage, suffer or permit any person to do industrial homework, or to tolerate, suffer, or permit articles or materials under one's custody or control to be manufactured in a home by industrial homework." (§ 2650(g))

27.2 Garment Manufacturing. Workers in the garment industry are afforded special protections under the provisions of Labor Code § 2670, et seq. which requires that all persons engaged in garment manufacturing be registered with the Labor Commissioner.

27.2.1 The Division has adopted regulations dealing with garment manufacturing. These regulations are found at 8 C.C.R. § 13630, et seq.

27.2.2 Any person engaged in the business of garment manufacturing who contracts with any other person similarly engaged who has not registered with the commissioner or does not have a valid bond on file with the commissioner, as required by Section 2675, shall be deemed an employer, and shall be jointly liable with such other person for any violation of Section 2675 and the sections enumerated in that section.

27.2.3 These sections include liability for unpaid wages and penalties.

27.2.4 Additional Protections For Garment Workers. As of January 1, 2000, garment workers were afforded additional protections pursuant to AB 633. Labor Code § 2673.1 was added and provides that the minimum wage and overtime wages earned by persons engaged in garment manufacturing are to be guaranteed by garment manufacturers who contract with the workers' employer. The legislation also provides for liquidated damages, attorney fees and successor liability. In addition, DLSE is required to investigate and make a Finding and Assessment on each claim filed under the legislation. (See Labor Code §§ 2673.1, et seq. and 8 CCR §§ 13630, et seq.)

27.3 Farm Labor Contractors. This licensed occupation is regulated by the Labor Commissioner pursuant to Labor Code § 1682, et seq.

27.3.1 Definition Of Farm Labor Contractor. The term means any person who, for a fee, employs workers to render personal services in connection with the production of any farm products to, for, or under the direction of a third person, or who recruits, solicits, supplies, or hires workers on behalf of an employer engaged in the growing or producing of farm products, and who, for a fee, provides in connection therewith one or more of the following services: furnishes board, lodging, or transportation for those workers; supervises, times, checks, counts, weighs, or otherwise directs or measures their work; or disburses wage payments to these persons.

27.3.2 Any grower or farm labor contractor who enters into a contract or agreement in violation of this section shall be subject to a civil action by an aggrieved worker for any claims arising from the contract or agreement that are a direct result of any violation of any state law regulating wages, housing, pesticides, or transportation committed by the unlicensed farm labor contractor. The court shall grant a prevailing plaintiff reasonable attorney's fees and costs. (Labor Code § 1695.7(c)(2))

27.4 Talent Agents. This licensed occupation is regulated by the Labor Commissioner pursuant to the provisions of Labor Code § 1700, et seq.

27.4.1 Talent Agency means a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists, except that the activities of procuring, offering, or promising to procure recording contracts for an artist or artists shall not of itself subject a person or corporation to regulation and licensing under this chapter. Talent agencies may, in addition, counsel or direct artists in the development of their professional careers. (Labor Code § 1700.4(a))

27.4.2 Artists means actors and actresses rendering services on the legitimate stage and in the production of motion pictures, radio artists, musical artists, musical organizations, directors of legitimate stage, motion picture and radio productions, musical directors, writers, cinematographers, composers, lyricists, arrangers, models, and other artists and persons rendering professional services in motion picture, theatrical, radio, television and other entertainment enterprises. (Labor Code § 1700.4(b))

27.4.2.1 Petitions to determine controversies are filed with the Licensing Section in San Francisco. The hearings in connection with those petitions are heard by attorneys in the Division's Legal Section.

28 INDEPENDENT CONTRACTOR vs. EMPLOYEE.

28.1 Labor Code § 2750, Contract Of Employment: "The contract of employment is a contract by which one, who is called the employer, engages another, who is called the employee, to do something for the benefit of the employer or a third person."

28.2 Burden Of Proof. The party seeking to avoid liability has the burden of proving that persons whose services he has retained are independent contractors rather than employees. In other words, there is a presumption of employment. (Labor Code § 3357; S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations (1989) 48 Cal. 3d 341 at pp. 349, 354.)

28.3 Multi-Factor Borello Test. In determining whether an individual providing service to another is an independent contractor or an employee, there is no single determinative factor. Rather, it is necessary to closely examine the facts of each service relationship and to then apply the "multi-factor" or "economic realities" test adopted by the California Supreme Court in Borello, supra, 48 Cal.3d 341.

28.3.1 The Test Prior To Borello. Prior to Borello, the leading case on this subject was Tieberg v. Unemployment Insurance Appeals Bd. (1970) 2 Cal.3d 943, which held that "the principle test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired." Under this test, "if the employer has the authority to exercise complete control, whether or not that right is exercised with respect to all details, an employer-employee relationship exists." Empire Star Mines Co. v. Cal. Emp. Com. (1946) 28 Cal.2d 33, 43.

28.3.2 Control As A Factor. Borello brought about a sharp departure from this overriding focus on control over work details. The growers who were found to be employers by the Borello court did not have the contractual authority to exercise supervision over work details, yet the court ruled that they retained "all necessary control" over their operations. The simplicity of the work, or the existence of a piece-rate based payment system, may make it unnecessary for an employer to assert direct control over work details and the employer may retain "all necessary control" by indirect means.

28.3.2.1 "The 'control' test, applied rigidly and in isolation, is often of little use in evaluating the infinite variety of service arrangements." (Borello, 48 Cal.3d at p. 350) While the right to control the work remains a significant factor, the Borello court identified the following additional factors that must be considered:

1. Whether the person performing services is engaged in an occupation or business distinct from that of the principal;
2. Whether or not the work is a part of the regular business of the principal;
3. Whether the principal or the worker supplies the instrumentalities, tools, and the place for the person doing the work;
4. The alleged employee's investment in the equipment or materials required by his task;
5. The skill required in the particular occupation;
6. The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision;
7. The alleged employee's opportunity for profit or loss depending on his managerial skill;

8. The length of time for which the services are to be performed;
9. The degree of permanence of the working relationship;
10. The method of payment, whether by time or by the job;
11. Whether or not the parties believe they are creating an employer-employee relationship.

28.3.2.2 Factors Cannot Be Applied Mechanically. These "individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations." These factors must be applied "with deference to the protective legislation," in a manner that will effectuate the provisions of the Labor Code, in view of the history and fundamental purposes of the legislation. (Borello, supra, 48 Cal.3d at pp. 351, 353) For example, in the application of minimum wage legislation, "employees are those who as a matter of economic reality are dependent upon the business to which they render service." Real v. Driscoll Strawberry Associates, 603 F.2d 748, 754 (9th Cir.1979).

28.3.3 Application Of Economic Realities Test: In Yellow Cab Cooperative v. Workers Compensation Appeals Bd. (1991) 226 Cal.App.3d 1288, the court held that taxi drivers who pay a daily lease fee to a taxi company for the right to drive a taxi are employees rather than independent contractors, despite the company's contention that the drivers did not have to take radio calls, could drive wherever they wanted, could use the taxi to run personal errands or carry non-paying passengers, and could choose to work whenever they wanted. The court, while noting the absence of control over work details, reasoned that "to the extent [a driver's] freedom might appear to exceed that of a typical employee, it was largely illusory. If he wanted to earn a livelihood, he had to work productively and that meant carrying paying passengers." (Yellow Cab Cooperative, 226 Cal.App.3d at p. 1299) The absence of control over details is of no consequence "where the principal retains pervasive control over the operation as a whole, the worker's duties are an integral part of the operation, the nature of the work makes detailed control unnecessary, and adherence to statutory purpose favors a finding of [employment]." (Id., 226 Cal.App. at p. 1295)

28.3.3.1 Investment As A Criteria. A disproportionate level of investment by the employer is a factor that points towards an employer/employee relationship. For example, in a typical taxi lease arrangement, the taxi company owns the vehicle and the medallion, and pays for liability insurance, a radio dispatch system, towing, taxi repairs and maintenance. The driver pays a daily or weekly lease fee and may be responsible for filling the taxi with gasoline before returning it.

28.3.3.2 Business Of Employer As A Factor. Ownership of the vehicle used to perform the work may be a much less important factor in industries other than transportation. Even under the traditional, pre-Borello common law standard, a person making pizza deliveries was held to be an employee of the pizzeria, notwithstanding the fact that the delivery person was required to provide his own car and pay for gasoline and insurance. Toyota Motor Sales v. Superior Court, 220 Cal.App.3d 864, 876. "The modern tendency is to find employment when the work being done is an integral part of the regular business of the employer, and when the worker, relative to the employer, does not

furnish an independent business or professional service." (Borello, supra, 48 Cal.3d at p. 357)

28.3.3.3 Labels Not Dispositive. The existence of a written agreement purporting to establish an independent contractor relationship is not determinative. "The label placed by the parties on their relationship is not dispositive, and subterfuge will not be countenanced." (48 Cal.3d at p. 349) The Labor Commissioner, and the courts, will look behind any such agreement in order to examine the facts that characterize the parties' actual relationship.

28.3.3.4 Length Of Service. The fact that a person may be hired to work for only a short period of time is also, obviously, not always a determinative factor. The so-called "share farmers", found to be employees in Borello, were engaged to provide services during the course of a sixty-day harvest season. Despite the seemingly temporary nature of this arrangement, the court observed that their seasonal positions are "permanently integrated into the [grower's] business."

28.3.3.5 Effect Of Tax Status. The fact that a person who provides services is paid as an independent contractor, that is, without payroll deductions and with income reported by an IRS form 1099 rather than a W2, is of <u>no</u> significance whatsoever in determining employment status. "An employer cannot change the status of an employee to one of an independent contractor by illegally requiring him to assume a burden which the law imposes directly on the employer." Toyota Motor Sales v. Superior Court (1990) 220 Cal.App.3d 864, 877.

28.4 Services For Which A Contractor's License Is Required. Labor Code section 2750.5 provides, in its entirety:

> There is a rebuttable presumption affecting the burden of proof that a worker performing services for which a license is required pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, or who is performing such services for a person who is required to obtain such a license is an employee rather than an independent contractor. Proof of independent contractor status includes satisfactory proof of these factors:
>
> (a) That the individual has the right to control and discretion as to the manner of performance of the contract for services in that the result of the work and not the means by which it is accomplished is the primary factor bargained for.
>
> (b) That the individual is customarily engaged in an independently established business.
>
> (c) That the individual's independent contractor status is bona fide and not a subterfuge to avoid employee status. A bona fide independent contractor status is further evidenced by the presence of cumulative factors such as substantial investment other than personal services in the business, holding out to be in business for oneself, bargaining for a contract to complete a specific project for compensation by project rather than by time, control over the time and place the work is performed, supplying the tools or instrumentalities used in the work other than tools and instrumentalities normally and customarily provided by employees, hiring employees, performing work that is not ordinarily in the course of the principal's work, performing work that requires a particular skill, holding a license pursuant to the Business and Professions Code, the intent by the parties that the work relationship is of an independent contractor status, or that the relationship is not severable or terminable at will by the principal but gives rise to an action for breach of contract.

> In addition to the factors contained in subdivisions (a), (b), and (c), any person performing any function or activity for which a license is required pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code shall hold a valid contractors' license as a condition of having independent contractor status.
>
> For purposes of workers' compensation law, this presumption is a supplement to the existing statutory definitions of employee and independent contractor, and is not intended to lessen the coverage of employees under Division 4 and Division 5.

28.4.1 For Purposes Of Workers' Compensation Coverage, Labor Code § 2750.5 establishes that if a person performs services for which a contractor's license is required (pursuant to Chapter 9 of Division 3 of the Business and Professions Code) and the person does not have such a license, there is an irrebuttable presumption that the individual is an employee. If such a person has a license, there is still a rebuttable presumption that the person is an employee, rather than an independent contractor, unless the above-listed factors contained in subdivisions (a), (b) and (c) can be satisfied.

28.4.2 The Courts Have Addressed The Application Of Section 2750.5, both within and outside the workers' compensation coverage context, to situations involving individuals who have contracted without a license:

28.4.2.1 Outside The Workers' Compensation Coverage Context, the case of Fillmore v. Irvine (1983) 146 Cal.App.3d 649, stands for the clear proposition that an unlicensed contractor cannot rely on the provisions of Labor Code section 2750.5 to remedy the fact that he is unlicensed. Thus, he is barred from maintaining an action for recovery of any "compensation for the performance of any act or contract" under the provisions of Business and Professions Code § 7031. The appellate court (overruling the trial court) found that:

> "While this provision of section 2750.5 may serve a salutary purpose of providing broad workers' compensation coverage to those injured on the job, (citation omitted) the provision results in untoward consequences when it is applied to determinations under sections 7031 and 7053 ... Thus, if section 2750.5 were applied to determinations under sections 7031 and 7053, every unlicensed person performing work on a job would be characterized as an employee and not an independent contractor. This result would repeal by implication section 7031's ban on recovery by an unlicensed contractor. (Fillmore, supra, at 657)"

28.4.2.2 The Fillmore case was reviewed by the California Supreme Court to the extent that the Court ordered the Reporter of Decisions to publish all portions of the opinion except Part IV, which the Court found did not meet the criteria for publication. Thus, the Court impliedly agreed with the above analysis, which is found in Part II.

28.4.2.3 It must be noted, however, that this would not protect a contractor who takes the position that one who is clearly an employee is, in fact, an unlicensed contractor.

28.4.2.4 Within the workers' compensation coverage context, the Fillmore court clearly indicated that section 2750.5 would apply. More importantly, in State Compensation Insurance Fund v. W.C.A.B. (Meier) (1985) 40 Cal.3d 5 at 11, the Supreme Court specifically held:

> We have concluded that section 2750.5, including the penultimate paragraph, must be interpreted as applying to workers' compensation cases. (emphasis added)

29 OBLIGATIONS OF EMPLOYERS.

29.1 Employer Must Exercise Ordinary Care In Dealing With Employee. Employers must indemnify employees for all losses caused by the employer's want of ordinary care. (Labor Code § 2800) The rule is well established in California that an employer is under a duty to furnish a safe working place for his employees. This duty requires the employer to exercise ordinary care and "to make a reasonably careful inspection at reasonable intervals to learn of dangers, not apparent to the eye". Cordler v. Keffel, 161 Cal. 475, 479, 119 P. 658, 660; Fogarty v. Southern Pacific Co., 151 Cal. 785, 795, 91 P. 650; see Carbbe v. Mammoth Channel Gold Mining Co., 168 Cal. 500, 503, 143 P. 714; Russell v. 179 Pacific Can Company, 116 Cal. 527, 531, 48 P. 616; Alexander v. Central Lumber & Mill Co., 104 Cal. 532, 539, 38 P. 410; PROSSER, Torts (1941) p. 507; Rest., Agency, § 503.

29.1.1 In addition to this general statutory obligation, the Legislature has added a specific section dealing with safeguarding musical instruments located on the employer's premises. (Labor Code § 2800.1)

29.1.2 Note that the employer must exercise ordinary care and is responsible to the employee for any damages which result from the lack of ordinary care.

29.2 Labor Code § 2802, Employer Must Indemnify Employee for All Losses Incurred in Direct Consequence of Discharge of Duties:

> (a) An employer shall indemnify his or her employee for all necessary expenditures of losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful.

29.2.1 The test for recovery under section 2802 is whether the expense or loss was incurred within the course and scope of employment. In determining whether, for purposes of indemnification, an employee's acts were performed within the course and scope of employment, the courts have looked to the doctrine of respondeat superior. Under that doctrine, an employer is vicariously liable for risks broadly incidental to the enterprise undertaken by the employer--that is, for an employee's conduct that, in the context of the employer's enterprise, is "not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business." Rodgers v. Kemper Constr. Co. (1975) 50 Cal.App.3d 608, 619, 124 Cal.Rptr. 143; accord Mary M. v. City of Los Angeles (1991) 54 Cal.3d 202, 209, 285 Cal.Rptr. 99; Perez v. Van Groningen & Sons, Inc. (1986) 41 Cal.3d 962, 968, 227 Cal.Rptr. 106, 719 P.2d 676.)

29.2.2 No Vicarious Liability. An employer is not vicariously liable for an employee's conduct if the employee substantially deviates from his course of duty so as to amount to a complete departure. DeMirjian v. Ideal Heating Corp. (1954) 129 Cal.App.2d 758, 766, 278 P.2d 114. However, acts that are necessary to the comfort, convenience, health, and welfare of the employee while at work, though personal and not acts of service, do not take the employee outside the scope of his employment. Alma W. v. Oakland Unified School Dist. (1981) 123 Cal.App.3d 133, 139, 176 Cal.Rptr. 287; DeMirjian, supra, 129 Cal.App.2d at p. 765, 278 P.2d 114.) Moreover, an employee's

conduct may fall within the scope of his employment even though the act does not benefit the employer, even though the act is willful or malicious, and even though the act may violate the employer's direct orders or policies. (Mary M. v. City of Los Angeles, supra, at 54 Cal.3d 202, 209)

29.2.2.1 Not All Damages Incurred By Employee Are Recoverable. The California cases have consistently held that under the doctrine of respondeat superior, sexual misconduct falls outside the course and scope of employment. (Lisa M. v. Henry Mayo Newhall Memorial Hospital (1995) 12 Cal.4th 291, 48 Cal.Rptr.2d 510 [hospital not liable for sexual battery on patient by technician]; Jeffrey E. v. Central Baptist Church (1988) 197 Cal.App.3d 718, 722, 243 Cal.Rptr. 128 [church not liable for child molesting by Sunday school teacher]; Alma W. v. Oakland Unified School Dist., supra, 123 Cal.App.3d 133, 140-142, 176 Cal.Rptr. 287 [school district not liable for rape of student by janitor].) In line with that authority, the California Supreme Court has held that an employer has no obligation to indemnify a sexual harasser, even though the acts occurred during work hours on the employer's premises. (Farmers Ins. Group, supra, 11 Cal.4th 992, 47 Cal.Rptr.2d 478, 906 P.2d 440)

29.2.3 Most Common Issues Arising Within The Employment Context are situations where the employer requires, as a condition of employment, that the employee furnish tools or equipment or underwrite costs in order that the employee may discharge his or her duties.

29.2.3.1 Examples. The provisions of Section 2802 cover a multitude of situations and care should be used in determining whether the loss to the employee is covered by that section. For instance, if an employer requires that an employee open a bank account in order to receive his or her pay by direct deposit, the employer must pay the employee for any cost involved in opening or operating that bank account. A same conclusion would be required if expenses were involved. (O.L. 1997.03.21-2) Costs of insurance required by an employer are recoverable under the provisions of Section 2802. (O.L. 1993.02.22-3) (See also issues discussed in O.L. 1991.08.30 and 1994.08.14)

29.2.3.2 It should be noted that the IWC Orders allow an employer to require that employees furnish "hand tools and equipment" if the hand tools and equipment are "customarily required by the trade or craft". The DLSE has concluded that in the phrase "hand tools and equipment", the word "hand" is an adjective which modifies both the word "tools" and the word "equipment". As the Labor Commissioner opined in 1984, an automobile is not the type of equipment contemplated in the IWC Orders.

29.2.3.3 IWC Definition Of Hand Tools And Equipment Consistent With DLSE View. In its Statement As To The Basis for the recently adopted wage orders, the IWC states that the term "hand tools and equipment" is to be read narrowly 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."

29.2.3.4 Costs which are incurred in training leading to licensure pursuant to a statute (real estate, etc.) are not, usually, the responsibility of the employer. (O.L. 1994.11.17)

29.2.4 IRS Mileage Allowance. DLSE has opined that use of the IRS mileage allowance will satisfy the expenses incurred in use of an employee's car in the absence of evidence to the contrary.

29.2.5 Award Of Attorney's Fees And Interest. Both interest and attorney's fees incurred in claims and actions to enforce 2802 are recoverable and may be awarded by either the courts or the Labor Commissioner to an employee (but not the DLSE or employer) who prevails in such an enforcement claim or action. (Labor Code § 2802(c))

29.2.6 Note: The provisions of Labor Code § 2800 and 2802 may not be altered or waived by private agreement. (Labor Code § 2804)

30 RESERVED.

31 CONTRACTS - GENERALLY.

31.1 Deputies are often called upon to interpret the provisions of employment contracts to determine the rights and liabilities of the parties. As will be evident, there are many provisions of general contract law which are not applicable to employment contracts because of statutory protections of employees in general. However, many of the rules of contract law (some dating to the English Common Law upon which California rules are based) have relevance in interpreting modern employment contracts. Any questions regarding the application of contract law should be referred to the Legal Section.

31.2 Various statutory provisions and case law principles form the area of contract law in California. Generally, a contract is an agreement between two or more persons which creates an obligation to do or not do a particular thing. In the area of employment contracts both general principles of contract law and special factors may apply to determine terms and enforcability of a contract.

31.2.1 In California, a contract is defined by statute as "an agreement to do or not to do a certain thing." (Civil Code § 1549). Four essential elements of a contract are (1) parties capable of contracting; (2) (mutual) consent; (3) a lawful object, and (4) a sufficient cause or consideration (Civil Code § 1550)

31.2.2 Formation - A contract can only be created following an offer and acceptance by capable parties. An offer is a communication made by someone (the offeror) which creates in the person to whom the offer is made (the offeree) the power to form a contract by accepting the offer in an authorized manner.

31.2.3 Types Of Contracts - A contract is either express or implied (Civil Code § 1619). An express contract is one which the terms are stated in words, written or oral, (Civil Code § 1620) and an implied (in-fact) contract is one which the existence and terms are manifested by conduct (Civil Code § 1621). Both types of contracts are based upon the intention of the parties and are distinguishable only by how the parties actually manifested their assent, i.e., by words or through their conduct. (Blaustein v. Burton (1970) 9 Cal.App.3d 161, 88 Cal.Rptr. 319)

31.2.3.1 An example of an implied-in-fact contract is one where the employer announces to a group of applicants that he/she is willing to pay $15 per hour to the first ten persons who report to the docks to unload the ship "Gallant." None of the first ten workers ever expressly agree to the wage but their reporting to the docks under those circumstances creates an implied in-fact contract whereby they are entitled to recover $15 for every hour they work.

31.2.3.2 Note: A contract may also be "implied in-law" by the courts under equitable principles in order to prevent unjust enrichment by one party at the expense of the other. These implied in-law contracts, also called "quasi-contracts," are <u>not</u> true contracts since they may lack an essential element, e.g., consent. See, Section 33 of this manual for further discussion of contracts implied in-law.

31.2.4 Ascertainable Parties Capable Of Contracting. It is essential that the parties exist and be identifiable. (Civil Code § 1558).

31.2.4.1 All persons are capable of contracting, except minors, persons of unsound mind, and persons deprived of civil rights. (Civil Code § 1556).

31.2.4.2 Generally, minors may enter into contracts for employment but such contracts may be subject to disaffirmance by the minor. (Civil Code § 1557, Family Code §§ 6700, 6710 et seq.) A minor may enforce his/her rights by civil action or proceedings in the same manner as an adult but a guardian must conduct the action or proceeding. (Family Code§ 6601)

31.2.5 Mutual Assent. In order for a binding contract to arise there must be mutual assent (consent) between the parties (Civil Code § 1565) such that each must intend to enter into the contract under the same terms and conditions (Civil Code § 1580). Historically, this element has been referred to as the "meeting of the minds" but this phrase, to the extent it connotes a subjective understanding of the parties has been replaced with the "objective theory" for determining whether mutual assent exists. In determining mutual assent, the inquiry is a factual one.

31.2.5.1 Consent must be free, mutual, and communicated by each to the other by words or conduct. (Civil Code §§ 1565, 1581). Consent is not mutual unless all agree upon the same thing in the same sense. (Civil Code § 1580)

31.2.5.2 Apparent consent is not free when it is obtained through duress, menace, fraud, undue influence, or mistake. (Civil Code §§ 1567-1578). A contract based upon consent obtained through these means is voidable, but may be ratified by a subsequent valid consent. (Civil Code § 1588)

31.2.6 "Objective Theory" Determines Mutual Assent: Whether there exists expressed mutual assent is tested under an "objective theory." The reasonable meaning of the words and acts of the parties (as a reasonable person in the position of the parties would view them) controls in determining mutual assent. This is an external standard which is to be distinguished from an internal standard which focuses on the states of mind of the parties, unexpressed intentions, or (subjective) understanding. Merced County Sheriff's Employees' Assn. V. Merced (1987) 188 Cal.App.3d 662, 672, 233 Cal.Rptr. 519, 525-6; Meyer v. Benko (1976) 55 Cal.App.3d 937, 127 Cal.Rptr. 846 901-2.

31.2.6.1 There is no meeting of the minds while the parties are negotiating terms of the agreement. To be final, the agreement must extend to all of the material terms the parties intend to produce. Stephan v. Maloof (1969) 274 Cal.App.2d 843, 79 Cal.Rptr. 461. One engaging such preliminary negotiations will not be bound (obligated to perform as stated) unless he/she has misled the other party.

31.2.7 Offer And Acceptance. Manifestation (Expression) of Assent - The expression of mutual assent is generally achieved through the making of an offer (by an offeror) communicated to an offeree and an acceptance by the offeree communicated to the

offeror. See Moorpark v. Moorpark Unified School Dist. (1991) 54 Cal.3d 921, 930, 1 Cal.Rptr.2d 896.

31.2.7.1 An offer is described as a manifestation (expression) of willingness to enter into a bargain so made as to justify another person in understanding that his assent to that bargain is invited and will conclude the bargain. (Restatement 2d, Contracts, §24) The legal effect is that it creates a power of acceptance to enter into a contract. In order to be valid, an offer must contain a promise or commitment that is communicated to an offeree. Preliminary negotiations, an invitation to make an offer or bid, or statements of future intentions generally do not contain sufficient words of commitment. (See, American Aeronautics Corp. v. Grand Central Aircraft Co. (1957) 155 Cal.App.2d 69, 317 P.2d. 694) Again, the test is going to be whether a person in the offeree's shoes would have reasonably understood that the offeror was proposing an agreement.

31.2.7.2 Incapacity, e.g., by death, insanity, of the offeror (Civil Code § 1587(4)) terminates or revokes the offer even if the offeree has no knowledge of it. Fritz v. Thompson (1954) 125 Cal.App.2d 858, 863, 271 P.2d 205, 209). Also, the destruction of the thing essential to performance prior to an acceptance, terminates or revokes the offer.

31.2.7.3 An offer may be accepted only by a person to whom the offeror intended to create a power of acceptance and the acceptance must be the "mirror image" of the offer. If the response by the offeree conflicts with the terms of the offer, it is generally considered a rejection of the offer and counteroffer. (Civil Code § 1585)

31.2.8 Offer for bilateral contract. If an offer can reasonably be interpreted to exchange a promise for a return promise, it is an offer for a bilateral contract. Acceptance is effective when communicated and both parties are bound to perform their respective promises. (Chicago Bridge & Iron Co. v. Industrial Accident Comm. (1964) 226 Cal.App.2d 309, 318, 38 Cal.Rptr. 57, 63)

31.2.9 Offer for unilateral contract. If an offer requests an act or forbearance to act on the part of the offeree without any requirement of a return promise, it is an offer for a unilateral contract and acceptance is effective when the act is completed. The offeree may choose to act or not act and will not be liable under contract for failing to perform or for abandoning performance once commenced because there is no enforceable promise to perform.

31.2.9.1 Offer which invites acceptance (or is ambiguous as to acceptance) by a return promise or act on the part of the offeree. The offeree may accept the offer by either promising to perform what the offer requests or by rendering performance, as the offeree chooses. (Restatement 2d, Contracts, §§ 32, 62) The beginning of performance operates as a promise to complete performance.

31.2.9.2 An offer will be terminated by a direct, unqualified rejection by the offeree. However, there may be instances where the offeree's response does not constitute a total rejection but merely proposes an alternative bargain and explicitly does not reject the original offer.

31.2.10 Duration Of Offer And Revocation. If an offer contains a time limit within which it must be accepted, the offer terminates at the end of the stated period and an attempted acceptance after that time is merely a counteroffer. If no time limit is stated in the offer, the lapse of a reasonable time without acceptance will revoke or terminate the offer. (Civil Code § 1587)Generally, offers are revocable at the will of the offeror prior to the time of acceptance. (Civil Code § 1586). Limited exceptions may exist making the offer irrevocable in specific situations:

31.2.10.1 Commencing Performance In Unilateral Contracts. A unilateral contract is where the offeror makes a promise in exchange for an act. The offeree does not exchange with a promise but is free to act or not act. (Compare with a bilateral contract which consists of an exchange of promises to perform.). Acceptance of the offer can only be made by full performance. However, where the offeree begins to perform, the courts will treat the offer as being temporarily irrevocable. (Restatement 2d, Contracts, § 45(1)) (See Lucien v. Allstate Trucking (1981) 116 Cal.App.3d 972, case involved a promise of a bonus which, the court found, amounted to an offer of a unilateral contract which could not be revoked after performance by the employee had begun.)

31.2.10.2 Example: A states to B "I will pay you $25.00 to load this truck now." A does not seek "a promise" from B to load the truck, but instead, has offered his promise to pay in exchange for B's act of loading the truck. If B begins to load the truck, A's offer is temporarily irrevocable.

31.2.11 Changed Conditions Of Employment. An at-will employee who continues to work after the employer gives notice of changed terms of employment will be deemed to have accepted the changed terms. Digiacinto v. Ameriko-Omserv Corp. (1997) 59 Cal.App.4th 629.

31.2.12 Option Contracts. The offeror grants the offeree an option to enter into the contract if the offeror has given some consideration for the offer. The consideration given by the offeree makes the offer irrevocable. (Lowe v. Massachusetts Mut. Life Ins. Co. (1976) 54 Cal.App.3d 718, 725, 127 Cal.Rptr. 23, 26)

31.2.12.1 Detrimental reliance by action or part performance to an ambiguous offer. If the offer does not make clear whether the offer calls for a promise or performance by the offeree, the offeree has a choice of accepting by promise or performance. If he/she begins performance, the offeree is protected against revocation of the offer by the offeror. Under this doctrine, commencement of performance constitutes acceptance of the offer and the offeree is bound to complete performance. (Restatement 2d, Contracts, § 63)

31.2.12.2 Offers made non-revocable by statute, e.g., "firm offers" by merchants to sell goods. (Commercial Code § 2205)

31.2.13 When Offer Or Acceptance Effective. Unless otherwise provided in the offer, acceptance is effective upon proper dispatch. (Civil Code § 1583; Restatement 2d, Contracts, § 63(a)). Thus, putting the acceptance in the mail would normally constitute an acceptance of the offer. This rule applies even if the acceptance is lost in trans-

mission so long as the offeree has chosen a reasonable manner of sending his acceptance. The rule is designed to protect the offeree against revocation while his acceptance is in transit. (Restatement 2d, Contracts, § 64, Comment a.)

31.2.13.1 Even if an unreasonable means of sending the acceptance is used or the acceptance is misaddressed, it is still effective upon dispatch if it is received within the time which a properly dispatched acceptance would normally have arrived. If it is not received within this time period, then it is effective only when actually received by the offeror. (Restatement 2d, Contracts, §§ 67, 68; Commercial Code § 1201(37))

31.2.14 Silence cannot constitute an acceptance of an offer to enter into a bilateral contract since acceptance must be communicated. An exception applies where there is a relationship between the parties or a previous course of dealing pursuant to which silence would be understood as acceptance. (Southern California Acoustics Co. v. C.V. Holder, Inc. (1969) 71 Cal.2d 719, 722, 79 Cal.Rptr. 319, 322 - listing by a contractor of the subcontractors he intends to retain cannot reasonably be construed as an expression of acceptance of the subcontractor's bid)

31.2.15 Lawful Object (Civil Code § 1550): Every contract must have a lawful object. (Civil Code § 1550) The object of a contract is the thing which is agreed by the party receiving the consideration to do or not do. (Civil Code § 1595) The object must be lawful when the contract is made, and possible and ascertainable by the time the contract is to be performed. (Civil Code § 1596)

31.2.16 Object Of Contract May Not Be In Conflict With Statute Or Public Policy. The object of the contract must not be in conflict with express statutes, public policy or express statutes though not expressly prohibited, or otherwise contrary to good morals. (Civil Code § 1667) (See also, Section 23 of this Manual)

31.2.16.1 The effect of a contract that does not have a lawful object is that it is void. (Civil Code § 1598) Since an illegal contract is void at the outset, it cannot be ratified by any subsequent act, and no person can be estopped (prevented) to deny its validity, nor can the illegality be waived by stipulation in the contract. (Cook v. King Manor and Convalescent Hospital (1974) 40 Cal.App.3d 782, 793, 115 Cal.Rptr. 471, 478)

31.2.17 Severability. Where a contract has several distinct objects one of which is unlawful and at least one of which is lawful, the contract is void as to the unlawful one and valid as to the rest. (Civil Code § 1599)

31.2.18 Generally, a contract made in violation of a regulatory statute is void since the courts will not lend their aid to enforcement of illegal agreements or one against public policy. However, the bargain made by a party in furtherance of his wrongful purpose is enforceable against him by a party who is innocent of the wrongful purpose. (Tri-Q v. STA-HI Corp. (1965) 63 Cal.2d 199, 219-20, 45 Cal.Rptr. 878)

31.3 Private Parties May Not Agree To Alter Statutory Duties. (De Haviland v. Warner Bros. Pictures (1944) 67 Cal.App.2d 225, 235-236; Imel v. Laborers Pension Trust Fund for No. Calif. (9th Cir. 1990) 904 F.2d 1327, cert den. 498 U.S. 939) This principle of law is

particularly important in dealing with employment contracts. (See Section 23 of this Manual)

31.3.1 Common examples of the above rule occur when either the employer or the employee (or both of them in conjunction) agree, for instance, to payment of less than the minimum wage; or payment of less than a premium for overtime; or payment of less than the established prevailing wage on public works jobs. Such a contract is void.

31.3.2 Any Remedial Provision In The Law written for the protection of an employee may not be violated by agreement of the employee. (Civ. Code §§ 1668 and 3513)

31.3.2.1 An example of this rule is illustrated by a recent trend in provisions contained in employment contracts which purport to relieve an individual providing information regarding an applicant. Labor Code § 1050 provides a criminal penalty for anyone who "by any misrepresentation prevents or attempts to prevent" a former employee from obtaining employment. Any provision which would waive that provision would be void as against public policy. More important, a statement to the effect that an individual would have no liability would be misleading and could cause that individual to be less careful about what he or she says. (See O.L. 1994.06.21)

31.3.2.2 When a statute prohibits or attaches a penalty to doing an act, the act is void even though the statute does not expressly pronounce it so. The imposition by a statute of a penalty implies a prohibition of the act referred to and a contract provision founded upon such act is void. (Kerr's Catering Service v. Dept. of Industrial Relations (1962) 57 Cal.2d 319, 328, 19 Cal.Rptr. 492, 497 – employer's deductions from wages contravened the spirit if not the letter of employee's bond law contained in Labor Code 400-410); Quillian v. Lion Oil Co. (1979) 96 Cal.App.3d 156, 157 Cal.Rptr. 740. [Note: as a corollary, a contract of employment is deemed to include applicable provisions of the Labor Code. Lockheed Aircraft v. Superior Court (1946) 28 Cal.2d 481, 171 P.2d 21]

31.3.2.3 A subsequent change in the law, including repeal of the applicable statute, does not validate the previously void contract because the contract was void at the inception; also, any amendment (or repeal) of a statute generally does not have retroactive effect so as to retroactively validate a previous illegal contract. (Interinsurance Exchange Auto. Club v. Ohio Casualty Ins. Co. (1962) 58 Cal.2d 142, 23 Cal.Rptr. 592)

31.4 Potentially Illegal Contract Provisions.

31.4.1 Payment of less than minimum wages. The minimum wage for employees fixed by the Industrial Welfare Commission is the minimum wage to be paid to employees, and the payment of a lesser wage is unlawful. Labor Code § 1197. (See also, Labor Code § 1194)

31.4.2 Obviously, if the statutory obligation increases (i.e., a raise in minimum wage) a contract which provides less than the new minimum would, to that extent, be void and the new minimum wage must be paid. (Barrentine v. Arkansas-Best Freight System, 450 U.S. 728 (1981))

31.4.3 Hours of work and conditions of labor. The maximum number of hours of work and the standard conditions fixed by the Industrial Welfare Commission shall be the maximum

hours and standard conditions of labor for employees. Employment of any employee for longer hours than those fixed by the IWC order or under conditions of labor prohibited by the order is unlawful. (Labor Code § 1198)

31.4.4 *Timely payment of wages.* Labor Code § 219 prohibits private parties from contravening any portion of the Labor Code which regulates the payment of wages.

31.5 Sufficient Consideration To Support A Contract. There may be mutual promises existing between parties, but in order for a promise to be "enforceable," there must be consideration. Every executory contract requires sufficient consideration (Civil Code § 1550).

31.5.1 "Consideration" may be either a benefit conferred or agreed to be conferred upon the promisor or some other person, or a detriment suffered or agreed to be suffered by the promisee or some other person. (Civil Code §§ 1605, 1606)

31.5.1.1 Historically, consideration was defined as a legal benefit received by the promisor or a legal detriment incurred by the promisee. Legal detriment was defined as doing (or promising to do) that which one is not obligated to do, or forbearing (or promising to forebear) from doing that which one has a legal right to do.

31.5.1.2 In traditional unilateral contracts, consideration may include payment of money, transfer of property, and performance of work in reliance of promise to pay.

31.5.1.3 Example: Continuing services of an employee is consideration for an employer's promise to pay a pension in the future. *Hunter v. Sparling* (1948) 87 Cal.App.2d 711, 722, 197 P.2d 807, 814.

31.5.1.4 Example: After giving oral notice of intent to quit, employer enacted regulations for generous severance and other benefits. Because of change, employee stayed for additional one and one-half months and was terminated. Since the purpose of the benefits was to induce employees to stay (and was not simply offers of gifts), it constituted a unilateral contract offer which employee accepted by continuing employment. (*Chinn v. China Nat. Aviation Corp.* (1955) 138 Cal.App.2d 98, 291 P.2d 91 - court found that such benefits are designed to make employees content, cause employees to forego efforts to seek other employment, avoids labor turnover, and are an advantage to both employer and employee).

31.5.1.5 Example: Where the employer pays and the employee accepts a fixed salary, the normal implication is that all services are compensated for thereby; but where the parties agree that an additional amount shall be paid, such agreement, if supported by consideration consisting of either the employee's entry upon the service, or his continuing therein when not otherwise bound to continue, is enforceable. *Sabatini v. Hensley* (1958) 161 Cal.App.2d 172, 175-176.

31.5.1.6 In bilateral contracts, the promise of one party is consideration for that of the other party (or third person). (Restatement 2d, Contracts, § 75)

31.5.1.7 The modern approach is that consideration is any performance which is "bargained for." A bargain is the exchange on which each party views his promise or performance

as the price of the other's promise or performance. (See, Restatement 2d, Contracts, §§ 72, 75) Generally, there is no requirement that the "value" of the consideration be in equal value to the promise or performance received in return, leaving it to the parties to judge the desirability of the bargain.

31.5.1.8 A gross inequality between the respective promises (or performance), however, may be evidence of fraud, duress, unconscionability or mistake. (Restatement 2d, Contracts § 79, comment e). However, since such inequality is only evidence of unconscionability, it does not directly establish a lack of consideration. See Section 32.2, below, for discussion of voiding a contract or terms therein for unconscionability.

31.5.1.9 A written instrument (more than an informal letter) is presumptive evidence of consideration. (Civil Code § 1614). The presumption is, however, rebuttable.

31.5.1.10 Insufficient consideration can also be a promise which is void due to illegality (Civil Code § 1607). See Section 31.2.15, above, for discussion of a lawful object of a contract.

31.6 Promissory Estoppel. A doctrine based in equity which may, in limited circumstances, be a "substitute" for consideration, i.e., applied where there is a lack of consideration, is promissory estoppel. A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. (Restatement 2d, Contracts, § 90(1)).

31.6.1.1 Promissory estoppel is inapplicable if there were neither a clear promise nor any reliance and substantial detriment on the part of the promisee. (Southern California Acoustics Co. v. Holder (1969) 71 Cal.2d 719, 723, 79 Cal.Rptr. 319, 323 - no promise by general contractor who used subcontractor's bid but did not subsequently accept subcontractor's bid; Blatt v. University of So. Calif. (1970) 5 Cal.App.3d 935, 943, 85 Cal.Rptr. 601 - detrimental reliance)

31.6.1.2 Consideration which is <u>not</u> generally sufficient includes: acts or forbearance previously performed, i.e., "past consideration" (Simmons v. Calif. Institute of Technology (1949) 34 Cal.2d 264, 272, 209 P.2d 581, 585 - past employment of promisor not consideration for subsequent promise); promise to perform an existing legal duty under contract under statute (Civil Code § 1605); and a compromise of a wholly invalid claim (Orange County Foundation v. Irvine Co. (1983) 139 Cal.App.3d 195, 200, 188 Cal.Rptr. 552, 555).

31.6.1.3 In the employment context, illustrations of insufficient consideration of a preexisting legal (contractual) duty owed to the promisee cover two kinds of cases: (1) where a person agrees to pay more for a performance already owed to him, and (2) where a person agrees to take less on a debt already owed to him.

31.6.1.4 Example: A (employer) agrees to pay B (employee) more money for a performance on a specific job which is already owed to A, for which B previously promised to perform at a lower rate. Under the general rule, there is no consideration for the subsequent promise to pay a higher rate and such promise would be unenforceable. However, a

slight difference between the duties which had been originally promised and the actual duties for the specific job to be performed would be sufficient consideration making the promise to pay the higher rate enforceable.

31.6.1.5 Example: A (employer) promised to pay B (employee) $10.00 per hour. After B works 8 hours, A offers to pay B only $50.00. Aside from being void under the provisions of Labor Code § 206.5, there is no consideration due to the preexisting contractual duty, and thus, B's agreement to accept the lower rate would be unenforceable. Also, since B already performed prior to the subsequent offer, his performance constituted "past consideration" which is also insufficient consideration.

31.6.1.6 Although there is no consideration for the compromise of a wholly invalid claim, consideration may be sufficient in a compromise of a claim (debt) where the claim is in fact doubtful because of uncertainty as to the facts or law, or, where the forbearing (compromising) party believes that the claim or defense may be fairly determined to be valid. (Restatement 2d, Contracts, § 74(1))

31.6.1.7 A revived or reaffirmed promise to pay a debt otherwise barred by the statute of limitations or a bankruptcy is sufficient consideration and is enforceable since the promisor is undertaking a new promise to pay upon which he is not otherwise obligated due to the statute of limitations or bankruptcy.

31.6.1.8 A valid release supported by new consideration given to the debtor by the creditor effectively extinguishes an obligation; or if the release is made in writing it may be with or without new consideration. (Civil Code § 1541) The execution of DLSE Form 51 and the acceptance of the sum set out in the release extinguishes the claimant's wage claim(s) and forecloses the claimant's right to bring any other action to recover any part of the amount claimed. (But see, Labor Code § 206.5 at Section 7.2 of this Manual)

31.7 Accord And Satisfaction: An accord is an (independent) agreement to accept something different from or less than that which the person agreeing to accept (creditor) is entitled in order to extinguish an obligation. (Civil Code § 1521) Acceptance, by the creditor, of the consideration of an accord extinguishes the obligation, and is called satisfaction. (Civil Code § 1523)

31.7.1 Payment of uncontested amounts. Generally, in the case of a dispute over the total money due on a contract and it is conceded by the parties that part of the money is due, the debtor may pay, without condition, the amount conceded to be due, leaving the other party all remedies to which he might otherwise be entitled as to any balance claimed. (Civil Code § 1525) However, with respect to payment of wages, "[I]n case of a dispute over wages, the employer shall pay, without condition and within the time set by this article, all wages, or parts thereof, conceded by him to be due, leaving the employee all remedies he might otherwise be entitled to as to any balance claimed." (Labor Code § 206(a))

31.7.2 Labor Code § 206.5, however, prohibits an employer from requiring execution of a release of any claim or right on account of wages due, or to become due, or made as an advance on wages to be earned, unless payment of such wages has been made; and

further, provides that any such release in violation of the above provisions is null and void as between the employer and the employee. (See Section 7.2 of this Manual)

31.7.2.1 Restrictive Endorsement on payment by check or draft. In the case of a disputed claim, payment by a check or draft which contains a restrictive endorsement ("payment in full") does not constitute an accord and satisfaction if either (1) the creditor (employee) protests against accepting the tender in full payment by striking out or deleting the restrictive notation, or (2) the acceptance of the check or draft was inadvertent or without knowledge of the notation. (Civil Code § 1526) Acceptance of the check by the creditor (employee) will constitute an accord and satisfaction when the check is issued pursuant to or in conjunction with a release. A thorough discussion of the effect of the California statute is found in a case decided by the federal courts: Red Alarm v. Waycrosse, Inc., 47 F.3d 999 (9th Cir.1995)

32 CONTRACT INTERPRETATION - GENERALLY

32.1 Generally, the language of a contract is to govern its interpretation if the language is clear and explicit and does not involve an absurdity. (Civil Code § 1638) For the purpose of ascertaining the intention of the parties to a contract where the intent is otherwise doubtful or uncertain, the rules of interpretation provided in Civil Code §§ 1635-1663 will be applied. (Civil Code § 1637). Additionally, however, courts will sometimes apply special rules, e.g., interpretation against forfeiture (See Sections 34.4 and 34.5 of this Manual for discussion on forfeiture)

32.1.1 The words of a contract are to be given their ordinary and popular sense, rather than their strict legal meaning unless the words are used by the parties in a technical sense or if a special meaning is given to them by usage. (Civil Code § 1644) Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense. (Civil Code § 1645)

32.1.2 All applicable laws in existence when the agreement is made become a part of the contract as fully as if incorporated therein. (Mulder v. Casho (1964) 61 Cal.2d 633, 637; 39 Cal.Rptr. 705) stands for the proposition that the applicable statute is an "implied-in-law" term in the contract and cannot be waived or defeated by agreement of parties; Lockheed Aircraft v. Superior Court (1946) 28 Cal.2d 481, 171 P.2d 21: a contract of employment is deemed to include applicable provisions of the Labor Code.

32.1.3 Inconsistencies. Where general and specific provisions are inconsistent, the specific provision will control (Code of Civil Procedure § 1859) However, the main purpose of the parties is to be given effect and words which are wholly inconsistent with its nature, or with the main intention of the parties are to be rejected. (Civil Code § 1653)

32.1.4 Usage Or Custom may be utilized to explain the meaning or imply terms where no contrary intent appears from the terms of the contract. (Civil Code § 1655)

32.1.5 Where ambiguous, extrinsic (external of the contract) evidence may be used to show the meaning of the term "compensation for services." (Ranier Credit v. Western Reliance (1985) 171 Cal.App.3d 255; 217 Cal.Rptr. 291)

32.1.6 In cases of ambiguity not resolved under the rules of interpretation, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. (Civil Code § 1654) The rule applies with particular force in the case of a contract of adhesion. (Graham v. Scissor-Tail, Inc. (1981) 28 Cal.3d 807, 819)

32.2 Contract Interpretation: Adhesion Contracts, Unconscionability. Contracts of adhesion are contracts which are drafted by one party usually reduced to a standardized form which uses "boilerplate" language and is presented to the other party without any real opportunity for negotiation. Such contracts are not automatically void, voidable, or unconscionable, but are subject to greater scrutiny in interpretation and enforcement in order to modify or nullify harsh terms which defeat the reasonable expectations of the parties. (See, Wheeler v. St. Joseph Hospital (1976) 63 Cal.App.3d 345, 356, 133 Cal.Rptr. 775, 783)

32.2.1 In Graham v. Scissor-Tail, Inc. (1981) 28 Cal.3d 807, 820, 171 Cal.Rptr.604, 612, the Supreme Court stated that there were two judicially imposed limitations on the enforcement of adhesion contracts or provisions therein.

32.2.2 First, an adhesion contract which does not fall within the reasonable expectations of the weaker or "adhering" party is not enforceable against him.

32.2.2.1 Example: Insurance company refused to defend insured in civil case for willful assault due to exclusion in policy for defense of actions for damages caused intentionally or at the direction of the insured. Judgment was obtained by injured party against the insured. The insurance company is liable for cost of defense and amount of judgment rendered against insured on grounds of adhesion contract since policy deemed to require defense in suit which potentially seeks damages covered by the policy. No one could tell until the suit was over whether the liability is covered or not (e.g., the injured party may only prove negligence which is covered by the policy. Gray v. Zurich Insurance Co. (1966) 65 Cal.2d 263, 54 Cal.Rptr. 104.*

32.2.3 Second, a principle of equity applicable to all contracts generally - is that a contract or provision, even if consistent with the reasonable expectations of the parties will be denied enforcement, of it is unduly oppressive or "unconscionable." Graham v. Scissor-Tail, Inc. (1981) 28 Cal.3d 807, 819, 171 Cal.Rptr.604.

32.2.3.1 Example: In Graham, a concert promoter was required to sign (artist's) union form contract which designated union as sole arbitrator of all disputes. The court held the arbitration provision unconscionable as a matter of law since the provision did not achieve minimum levels of integrity required of a contractually structured substitute for judicial proceedings. The court found that the designation of one whose interest is closely allied with one of the parties as the arbitrator (not neutral) was to such extent illusory. In Graham v. Scissor-Tail, Inc., the Supreme Court provided that among the factors which would have a profound impact on the reasonable expectations of the "adhering party" is the extent to which the contract in question may be said to be one affecting the public interest. Since the payment of wages is a matter affecting the public interest, a provision on an adhesion contract which adversely affects, impedes, or contravenes the prompt payment of wages would be suspect. (See also, Labor Code § 219 which provides that the provisions of § 200 et seq. cannot, in any way, be contravened or set aside by private agreement whether written, oral, or implied)

32.2.4 Legislation Regarding Unconscionable Provisions In Contracts. Civil Code § 1670.5 applicable to actions regarding unconscionable contracts or provisions therein which are so one-sided. If a court determines, as a matter of law, that a contract or provision therein is found to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may limit the application of the unconscionable provision as to avoid any unconscionable result. (Civil Code § 1670.5)

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*The Gray case has been distinguished by many cases but is basically still good law.

32.2.4.1 More recently, an attempt to harmonize the doctrine of unconscionability adopted in Civil Code § 1670.5 (based upon the UCC doctrine) and Graham v. Scissor-Tail has provided that the unconscionability doctrine has both "procedural" and "substantive" elements. Both elements must be present in order for the doctrine to apply. Stirlen v. Supercuts, Inc. (1997) 51 Cal.App.4th 1519, 60 Cal.Rptr.2d 138.

32.2.4.2 Procedural element. Focuses on two factors - "oppression" and "surprise." Oppression arises from an inequality of bargaining power which results in no real negotiation and the absence of meaningful choice. Surprise involves the extent to which the supposedly agreed upon terms of the bargain are hidden in the form drafted by the party seeking to enforce the disputed terms.

32.2.4.3 Substantive element. Some cases focus on whether the terms of the contract are so harsh or one-sided as to "shock the conscience"; other cases focus on whether the terms are overly harsh and not justified by the circumstances. (Cf. American Software, Inc. v. Ali (1996) 46 Cal.App.4th 1386, 54 Cal.Rptr.2d 477 and Ellis v. McKinnon Broadcasting Co. (1993) 18 Cal.App.4th 1796; 23 Cal.Rptr.2d 80.)

32.2.5 Illustrations Of Unconscionability.

32.2.5.1 A binding arbitration clause in employment agreement of vice-president which restricts remedies to contract damages is unconscionable within meaning of Civil Code § 1670.5. Stirlen v. Supercuts, Inc. (1997) 51 Cal.App.4th 1519, 60 Cal.Rptr.2d 138.

32.2.5.2 An arbitration clause in consumer loan contracts made in California which requires that participatory hearings to resolve disputes be held in Minnesota, and which requires advance payment of substantial hearing fees is unconscionable. Patterson v. ITT Consumer Financial (1993) 14 Cal.App.4th 1659, 18 Cal.Rptr.2d 563.

32.3 Contract Interpretations – Forfeitures. Contracts which contain forfeitures are not favored by the courts, and if an agreement can be reasonably interpreted to avoid it, the court should do so. Universal Sales Corporation, Ltd. v. California Press Mfg. Co. (1942) 20 Cal.2d 751, 128 P.2d 665.

32.3.1 A condition involving a forfeiture must be strictly interpreted against the party whose benefit it was created. (Civil Code § 1442.)

32.3.2 Neither law nor equity looks with favor upon forfeitures and will not enforce them unless the right thereto is clear and certain. Unless no other interpretation is reasonably possible, a contract should not be construed so as to effect or provide for a forfeiture. Milovich v. City of Los Angeles (1941) 42 Cal.App.2d 364, 373-374, 108 P.2d 960, 965.

32.4 Use Of Good Faith And Fair Dealing. An employer having the unilateral right to modify an employment contract would be required to use good faith and fair dealing when exercising its discretion to modify the contract of employment. (Perdue v. Crocker National Bank (1985) 38 Cal.3d 913)

32.4.1 In the case of Hansen v. E. M. Hundley Hardware (1963) 220 Cal.App.2d 409, wherein the employer did not require the customer to pay, the selling salesman was still entitled to recover the commission. The court applied common law contract principles and held

that the implied covenant of good faith and fair dealing imposes upon the employer the duty not to do anything which would deprive the employee of the benefit of the contract.

33 CONTRACTS, IMPLIED-IN-LAW (QUASI-CONTRACTS)

33.1 Under rare circumstances, courts will apply equitable principles in order to prevent inequity or unjust enrichment by one party at the expense of another. This may occur where there is an insufficient basis for enforcing an agreement under ordinary contract principles.

33.1.1 Under a special equity doctrine, the law implies a promise to pay for benefits or services rendered even though no such promise was ever made or intended. McCall v. Superior Court (1934) 1 Cal.2d 527, 531, 36 P.2d 642; Kossian v. American Nat. Ins. Co. (1967) 254 Cal.App.2d 647, 651, 62 Cal.Rptr. 255. These implied in-law contracts, also called quasi-contracts, are distinct from true contracts since they lack an essential element such as consent, either express or implied. Additionally, unlike the contractual remedy for damages, e.g., wages, a quasi-contractual remedy is in the nature of restitution, or quantum meriut, for the reasonable value of the benefit or services.

33.1.2 A benefit to another is ordinarily required (cf., Unilogic v. Burroughs Corp. (1992) 10 Cal.App.4th 612, 627, 12 Cal.Rptr.2d 741). However, the mere fact that a person's acts benefit another is not itself sufficient to require the other to make restitution. Marina Tenants Association v. Deauville Marina Development Co. (1986) 181 Cal.App.3d 122, 134, 226 Cal.Rptr. 321.

33.1.3 Ordinarily, it must appear that the benefits were conferred by mistake, fraud, coercion, or request, since these factors can make the benefit unjust. Conversely, in the absence of these factors, although there is enrichment, it may not be unjust. Dinosaur Development v. White (1989) 216 Cal.App.3d 1310, 1316, 265 Cal.Rptr. 525.

33.1.4 Quasi-contractual recovery for services rendered under the quasi-contractual theory is restricted. Some fault on the part of the defendant is necessary to make him liable for the value of the (un)wanted services. For example, fraud or innocent material misrepresentation, or acceptance of the services after knowledge of the mistake without informing the plaintiff of it may be sufficient to invoke the doctrine. See Wal-Noon Corp. V. Hill (1975) 45 Cal.App.3d 605, 611, 119 Cal.Rptr. 646.

33.1.5 When encountering the terms and concepts discussed above, both careful examination of the facts and consultation with the assigned attorney are necessary.

34 COMMISSION WAGE PROVISIONS.

34.1 Definition Of "Commission Wages". The term "commission wages" has been defined in the case of Keyes Motors, Inc. v. DLSE (1988) 197 Cal.App.3d 557; 242 Cal.Rptr. 873, which held that commissions arise from the sale of a product, not the making of a product or the rendering of a service. The court further held that in order to be a commission, the compensation must be a percentage of the price of the product or service which is sold. (See also, O.L. 1983.11.25; see also Section 2.5.4 of this Manual.) The California Supreme Court in Ramirez v. Yosemite Water Co., Inc. (1999) 20 Cal.4th 785, reiterated that the definition of commissions in Section 204.1 applies to all employees receiving commissions.

34.1.1 This chapter is limited to addressing certain salient legal matters pertaining to compensation arrangements involving commissions. The multitude of commission plans precludes an exhaustive treatment of the subject, and the failure to address various matters germane to commission arrangements is not intended to be and should not be construed as exclusionary.

34.1.2 Variations Sometimes Confused With Commission Plans. A plan which simply relies upon a "percentage" of some sum such as the cost of the goods sold or the services rendered by an establishment does not constitute a "commission wage"; the worker receiving the commission must be principally involved in selling the goods or the services upon which the commission is measured. Many of the plans which simply equate "commission" with "percentage" are, if carefully reviewed, revealed to be nothing more than piece rate plans. Other plans which call for the employees to share in a percentage of the gross (or net) profits of the store are usually found to be nothing more than a hybrid hourly pay plan whereby the hourly rate is based on a percentage of the profit and may, for that reason, vary from week to week. These pay plans, based on percentages, are not per se, illegal*

34.1.3 Bonus Plans Distinguished. Bonuses are sometimes confused with commission wages. In order to qualify as a "commission", the scheme must meet the requirements of a "commission wage" as set out in the Keyes Motors case. Bonuses are not predicated upon the price of a particular product or service, but are usually based on reaching a minimum amount of sales or making a minimum number of pieces, and can be distinguished from a commission by that fact. Many times a bonus is paid to individuals who are not engaged in sales at all and is also, distinguishable by that fact.

34.1.4 Commission Pool Arrangements. Arrangements where the commission payable to the worker is based upon a "pool" arrangement whereby a group of employees, all of whom are engaged principally in selling the products or services upon which the commission percentage is based, share in the "pool" constitute a valid commission plan.

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*Any pay plan which is based upon profit should be reviewed within the parameters set out by the court in the case of Quillian v. Lion Oil (1979) 96 Cal.App.3d 156; 157 Cal.Rptr. 740, which disallows certain deductions from employee's wages for losses considered to be in the regular course of business.

(But see, Hudgins v. Neiman Marcus (1995) 34 Cal.App.4th 1109, which discusses illegal deductions from such plans.)

34.2 Draws Against Commissions. If an employee receives a draw against commissions to be earned at a future date, the "draw" must be equal at least to the minimum wage and overtime due the employee for each pay period (unless the employee is exempt, i.e., primarily engaged in outside sales). Although the draw may be reconciled against earned commissions at an agreed date or when the commission is earned, the draw is considered the basic wage and is due for each period the employee works even though commissions do not equal or exceed the amount of the draws, unless there is a specific agreement to the contrary. (Agnew v. Cameron (1967) 247 Cal.App.2d 619; 55 Cal.Rptr. 733.) Advances may only be recovered at termination if there is a specific written agreement to that effect and only to the extent that the advances exceed the minimum wage and overtime requirements. (Agnew, supra, and IWC Orders; see also O.L. 1987.03.03, 1991.05.07)

34.2.1 Reconciliation Of Draws Against Commissions. Reconciliation of draws against commissions are to be construed according to the contract of employment but must be completed within a reasonable time depending upon the transactions involved.

34.3 Computation Of Commissions. Commission computation is based upon the contract between the employer and the employee. The commission may be based on either gross sales figures or net sales figures. As discussed below, certain criteria cannot be considered when reaching the "net" sales figures. If the element upon which the deduction from the gross sales is based is predicated upon a cost which is attributable to the employer's cost of doing business, the element may not be used.

34.3.1 Computation of commissions frequently relies on such criteria as the date the goods are delivered or the payment is received. Sometimes, the commission of the selling salesperson is subject to reconciliation and chargebacks if the goods are returned. If these conditions are clear and unambiguous, they may be utilized in computing the payment of the commissions. (O.L. 1993.03.08)

34.4 Commission Plans Which Provide Forfeitures. Hudgins v. Neiman Marcus Group, Inc. (1995) 34 Cal.App.4th 1109, 41 Cal.Rptr2d 46, reviewed a commission plan which provided that the salesperson's commission was based on a calculation of a percentage of the individual's gross sales less returns, taxes, gift wrap and alterations. The court found nothing wrong with the commission plan until it was explained that "Returns consisted of all merchandise originally sold by the salesperson and returned during the pay period with adequate documentation to ascertain the identity of the original salesperson, plus the 'prorated unidentified returns' received back by Neiman Marcus in the salesperson's 'home base'". It was the "prorated unidentified returns" which the court found were a forfeiture. (O.L. 1990.10.01)

34.4.1 Commission Plans May Not Involve Calculation Which Includes Costs Attributable To Doing Business. "Unidentified returns" included, among other categories, all returns for which the absence of identification could have been the result

of customer negligence or misconduct; returns for which the original salesperson can be identified but had not been employed by Neiman Marcus in the past six months; returns of merchandise that was purchased at another Neiman Marcus store where the salesperson cannot be identified, and returns on defective merchandise, customer abuse, etc. The court held such a commission program was illegal in California, citing Kerr's Catering v. DIR (1962) 57 Cal.2d 319; 19 Cal.Rptr. 492 and Quillian v. Lion Oil (1979) 96 Cal.App.3d 156; 157 Cal.Rptr. 740. (see also O.L. 1990.10.01, 1993.02.22)

34.4.2 Commission Plans May Not Provide For Deductions From Wages Earned. The Neiman Marcus court held that Labor Code § 221 has been interpreted by the California courts to prohibit deductions from an employee's wages for cash shortages, breakage, loss of equipment, and other business losses that may result from the employee's simple negligence. The court also cited Barnhill v. Saunders (1981) 125 Cal.App.3d 1; 177 Cal.Rptr. 803, which held that deductions of this nature would, as the DLSE has long held, "unjustifiably provide employers with self-help remedies that are not available to other creditors." Such deductions, the court further noted, contravene the public policy expressed in sections 400 through 410 of the Labor Code.

34.5 Commission Forfeitures Found To Be Illegal. Dana Perfumes v. Mullica (9th Cir.1959) 268 F.2d 936. In this case the contract provided no commissions for "sales or shipments on orders" subsequent to termination. The employee made large sales in the fall for Christmas and the employer terminated him before delivery. The contract was prepared by the employer and, thus, was most strictly construed against the employer. The court found that the commissions were due. An ambiguous contractual provision which an employer asserts establishes a partial or total forfeiture of post-termination commissions will be strictly interpreted against the forfeiture.(Cal. Civ. Code Section 1442.) Two recent California cases have considered challenges to explicit post-termination forfeiture provisions in commission agreements on the ground of unconscionability. A holding of unconscionability requires findings of both procedural and substantive unfairness. Ellis v. McKinnon Broadcasting Co.(1993) 18 Cal. App.4th 1796,1803-04. In McKinnon the court found procedural unconscionability where the employer did not present the written commission agreement to Ellis until 2 weeks after he had commenced employment and after he had moved in reliance on an oral offer of employment which did not mention the post-termination forfeiture provision. The McKinnon court also found substantive unconscionability on the basis that the amount of earnings forfeited by Ellis under the provision indicated it to be commercially unreasonable. By contrast, in American Software Inc. v. Ali (1996) 46 Cal.App.4th 1386, no procedural unconscionability was found where:(1) the proposed written commission agreement was presented to Ali prior to her acceptance of employment;(2) Ali had the agreement reviewed by an attorney; and (3) Ali successfully renegotiated several terms of the proposed agreement, but did not propose modification to the forfeiture provision of which she was aware of at the time she signed the negotiated agreement. The American Software court, under these circumstances, found that the forfeiture of all

commissions 30 days after termination did not "shock the conscience" and held that the agreement was not unconscionable*.

34.6 Common Law Of Contracts Also Supports Payment Of Commission. There are a number of contract cases based on the common law as adopted in California which hold that if the employee is the procuring cause of the sale, he or she is entitled to the commissions. The term, "He who shakes the tree is the one entitled to gather the fruit" is used to describe the concept. (See Willison v. Turner Resilient Floors (1949) 89 Cal.App.2d 589; 201 P.2d 406) The court in Wise v. Reeve Electronics, Inc. (1960) 183 Cal.App.2d 4; 6 Cal.Rptr. 587, held that where the employee was the procuring cause of a sale, he is entitled to the commission "irrespective of the fact that the principal himself, or through others, may have intervened."

34.7 Commissions Where Employee Terminates. Generally, if the contract for the commissions is clear and unambiguous and there are substantial duties which must be performed in order to complete the sale, the employee who voluntarily terminates without accomplishing those tasks is not entitled to recover. (Hudgins v. Neiman Marcus Group, Inc., supra, 34 Cal.App.4th 1109, 1120) Note that non-recovery is limited to cases involving questions of when a commission has been earned by a terminated employee on a "sale" transaction that is not an instantaneous event (as in the context of retail sales) but, rather, is "completed" over a relatively long period of time during which the sales agent may be required to perform additional services for the customer. (Hudgins v. Neiman Marcus Group, Inc., supra, 34 Cal.App.4th 1109, 1121)

34.8 Commissions Where Employer Terminates Employee. Where the termination is not a quit, but a discharge, the employee has been prevented from completing the duties and may be able to recover all or a pro rata share of the commissions. (O.L. 1993.03.08)

34.8.1 The use of common law doctrines such as "prevention" and "impossibility of performance" may be asserted by any employee as a basis for recovering commissions despite having failed to perform all of the conditions precedent otherwise required.

34.9 Payment Of Commissions Upon Termination Of Employment. A commission is "earned" when the employee has perfected the right to payment; that is, when all of the legal conditions precedent have been met. The provisions of any contract notwithstanding, California courts will not enforce unlawful or unconscionable terms and will construe any ambiguities against the person who wrote the contract (usually the employer) to avoid a forfeiture. (See O.L. 1999.01.09)

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*The cases cited (American Software and Ellis v. McKinnon) appear to be irreconcilable but, in fact, turn on the question of what each of the courts viewed as unconscionable.

35 BONUSES.

35.1 Bonus Defined. A bonus is money promised to an employee in addition to the salary, commission or hourly rate usually due as compensation. The word has been variously defined as "An addition to salary or wages normally paid for extraordinary work. An inducement to employees to procure efficient and faithful service." Duffy Bros. v. Bing & Bing, 217 App.Div. 10, 215 N.Y.S. 755, 758 (1926). Bonuses may be in the form of a gratuity where there is no promise for their payment; or they may be required payment where a promise is made that a bonus will be paid in return for a specific result.

35.2 Voluntary Termination Before Vesting Where Bonus Is Consideration For Continued Employment. An employee who voluntarily leaves his employment before the bonus calculation date is not entitled to receive it if the employer has expressly qualified its promise of a bonus on a requirement of continued employment. Lucien v. All States Trucking (1981) 116 Cal.App.3d 972, 975. This has been the rule ever since Peterson v. California Shipbuilding Corp. (1947) 80 Cal.App.2d 827, 831, 183 P.2d 56. The California rule is in accord with the prevailing view that where a definite bonus or profit-sharing plan has been established and forms part of the employment contract, the employee is not entitled to share in the proceeds where he leaves the employment voluntarily prior to vesting. (See cases collected at 81 A.L.R.2d 1062, at p. 1082, et seq.; see also, O.L. 1993.01.19)

35.3 If Employer Has Not Conditioned Bonus On Employment At Time Of Payment. Where the promise of a bonus is not expressly conditioned on continued employment an employee who voluntarily leaves employment may be entitled to the bonus if other applicable conditions have been satisfied. Thus, in Hill v. Kaiser Aetna (1982) 130 Cal.App.3d 188, an employee who resigned on January 3, 1978, was held to be vested in his right to a bonus for calendar year 1977 where: (1) the bonus plan did not expressly require continued employment, and (2) the bonus was an inducement for continued employment. Id., at 196.

35.4 The Promise Of A Bonus Becomes A Unilateral Contract. The California courts (Lucien v. All States Trucking, supra) have adopted the view explained by the Oregon courts in Walker v. American Optical Corporation (Or.1973) 509 P.2d 439, 441: that a specific bonus plan normally becomes binding as a unilateral contract when the employee begins performance, in the sense that the plan then cannot be revoked by the employer. (See discussion of unilateral contract at Section 31.2.10.1 of this Manual)

35.4.1 In Chinn v. China Nat. Aviation Corp. (1955) 138 Cal.App.2d 98, 291 P.2d 91 the court held that if the bonus is part of the inducement for the initial or continuing employment (see also Sabatini v. Hensley (1958) 161 Cal.App.2d 172, 326 P.2d 622; Hunter v. Ryan (1930) 109 Cal.App. 736, 293 P. 825) and where the employer, in announcing the plan, did not expressly qualify his promise to pay on any requirement of continued employment, the bonus is earned by the employee remaining in the employment of the employer.

35.4.2 Illegal Conditions. Ware v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1972) 24 Cal.App.3d 35, 100 Cal.Rptr. 791, involved a profit-sharing plan containing a provision that an employee who voluntarily terminated his employment and went to work for a competitor forfeited his rights to benefits under the plan. The court held that the forfeiture clause was invalid as it was contrary to the strong public policy against contracts by which anyone is restrained from engaging in a lawful profession, trade or business. (See Business & Professions Code § 16600)

35.4.3 Implied Contract For Bonus. The regular payment of the bonus in past years may ripen into an implied contract for compensation in the absence of a specific contract. (D.L.S.E. v. Transpacific Transportation Co.(1979) 88 Cal.App.3d 823; cf. Simon v. Riblet Tramway Co., 8 Wash.App. 289, 505 P.2d 1291, 66 A.L.R.3d 1069, cert. den. 414 U.S. 975, 94 S.Ct. 289, 38 L.Ed.2d 218). However, in order to be actionable, there must be some objective criteria upon which the bonus is based.

35.4.4 Discretionary Bonus. Bonuses which are completely discretionary, based on no objective criteria and are not routine, would not, of course, give rise to an implied bonus contract.

35.5 Termination Of The Employment By The Employer. Common law contract theories will not allow one party to the contract to prevent the other party from completing the contract. If the employee is discharged before completion of all of the terms of the bonus agreement, and there is not valid cause, based on conduct of the employee, for the discharge, the employee may be entitled to recover at least a pro-rata share of the promised bonus. (O.L. 1987.06.03)

35.6 Criteria Used To Establish Bonus. As discussed in Sections 17.3.3, 17.3.4 of this Manual, the courts have held that shortages or other ingredients not within the control of the employee and which are usually considered a cost of doing business may not be deducted when calculating a bonus. (Quillian v. Lion Oil (1979) 96 Cal.App.3d 156; 157 Cal.Rptr. 740)

35.7 Calculation Of "Regular Rate Of Pay" Where Bonus Is Involved. When calculating the regular rate of pay for purposes of overtime calculation under the IWC Orders, non-discretionary bonuses must be calculated into the formula. This is discussed in detail in the Section of this Manual dealing with calculation of regular rate of pay. (See Section 49 of this Manual; see also O.L. 1991.03.06)

36 EFFECT OF ARBITRATION AGREEMENTS.

36.1 California Law. Section 229 of the Labor Code addresses the effect of arbitration agreements on the right of individuals to invoke state law remedies to collect unpaid wages due under state law. Section 229 provides:

> Actions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate. This section shall not apply to claims involving any dispute concerning the interpretation or application of any collective bargaining agreement containing such an arbitration agreement.

36.2 Collective Bargaining Agreements With Arbitration Clauses: The second sentence of section 229 takes statutory cognizance of the collective bargaining process by explicitly recognizing that in certain contexts the existence of a collective bargaining agreement with an arbitration clause will qualify an employee's right to insist upon a judicial or administrative forum for the resolution of a claim for unpaid wages. The exact scope of that restriction on the right to access the Labor Commissioner's office or the courts was delineated by the United States Supreme Court in Livadas v. Bradshaw (1994) 512 U.S. 107 ("Livadas").

36.2.1 In Livadas, the Supreme Court held that, as a matter of federal law, where an employee covered by a collective bargaining agreement with an arbitration clause invokes the jurisdiction of the Labor Commissioner to enforce a state law claim for wages, the Commissioner may not withhold the jurisdiction the Commissioner would otherwise exercise in the case of non-union employees unless the claim is preempted by federal law under the provisions of Section 301 of the federal Labor Management Relations Act ("LMRA"). The Court thus construed the abstention policy of the second sentence of sentence 229 as coextensive with the grounds for preemption under LMRA.

36.2.2 In the aftermath of Livadas, and to implement its directives, the Labor Commissioner agreed to a published consent decree of the United States District Court for the Northern District of California, which sets out the procedure to be followed by the Commissioner in determining whether preemption under LMRA §301 deprives the Labor Commissioner of jurisdiction. (The consent agreement can be found at Livadas v. Bradshaw (N.D. Cal.1994) 865 F. Supp.642). The procedural steps are the following:

> (1) Initially, applying federal precedents, the Labor Commissioner must inquire whether the claim has its source in state law independent of the collective-bargaining agreement (Hawaiian Airlines, Inc. v. Norris (1994) 512 U.S. 246; Lingle v. Norge Division of Magic Chef, Inc. (1988) 486 U.S. 399), or whether it is grounded on the provisions of and obligations imposed by the collective bargaining agreement (Allis-Chalmers Corp. v. Lueck (1985) 471 U.S. 202). In the latter eventuality, the claim is entirely preempted.
>
> (2) Next, if the claim is based on an independent state law right, the Labor Commissioner must ascertain whether the right being asserted has an "opt out" provision (e.g. Labor Code § 227.3) which has been invoked by the parties pursuant to the collective bargaining process. If so, once again there is complete preemption.

(3) Assuming no "opt-out" provision exists or that it has not been invoked, the Labor Commissioner must then determine whether processing the claim will require a reference to the collective-bargaining agreement and, if so, whether the claim can be resolved by merely consulting the agreement to obtain undisputed information, or whether an interpretation or application of the agreement will be required before the claim may proceed.

36.2.2.1 As explained in the consent decree, a state law claim for waiting time penalties under Labor Code § 203 may first require interpretation of the collective bargaining agreement in order to determine the correct rate of pay, e.g., $10.00 per hour or $12.00 per hour, for purposes of accurately calculating the amount of penalties due. In such a case, there is partial preemption and the claim will be held in abeyance pending a grievance or arbitral resolution of the contract matter in dispute. Once the matter has been resolved, the Commissioner will proceed to process the claim, and for that purpose will rely on the interpretation reached through the grievance or arbitration procedure.

36.2.2.2 If, as in Livadas, simply consulting the collective-bargaining agreement will provide the needed information, i.e., the undisputed rate of pay for purposes of calculating waiting time penalties, there is no preemption and the Commissioner will proceed with immediate processing of the claim.

36.3 Federal Arbitration Act Restrictions. The first sentence of Labor Code § 229 provides that an agreement to arbitrate statutory wage claims will not deprive an employee of the right to resort to the Labor Commissioner or the courts to enforce a claim for unpaid wages. If, however, such an agreement is covered by the provisions of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq., then the first sentence of section 229 is preempted and cannot be invoked by the employee. (Perry v. Thomas (1987) 482 U.S. 483.) The FAA does not apply to contracts involving intrastate or local activities which do not "affect" interstate commerce. (Bernhardt v. Polygraphic Co. of America (1956) 350 U.S. 198)

36.3.1 An agreement covered by the FAA will displace the provisions of the first sentence of section 229 only if the statutory claim for unpaid wages is subject to arbitration under the terms of the arbitration clause contained in the agreement. (Gilmer v. Interstate/ Johnson Lane Corp. (1991) 500 U.S. 20) Thus, an examination of the arbitration clause must be made in order to determine its scope and coverage with respect to the specific claim.

36.3.2 Federal Arbitration Act Covers Most Employment Situations. The United States Supreme Court has determined that the FAA exclusion for "contracts of employment" (9 U.S.C. §1) extends only to employees engaged in the transportation of goods or services across state or international boundaries. (Circuit City Stores, Inc. v. Adams (2001) 532 U.S. 105) Thus, most employment contracts would be subject to the provisions of the FAA and agreements to arbitrate are valid.

36.3.2.1 Revocable Arbitration Agreements. The U.S. Supreme Court has held that arbitration agreements are enforceable "save upon such grounds as exist at law or in equity

for the revocation of any contract." Gilmer, supra; First Options of Chicago, Inc. v. Kaplan (1995) 514 U.S. 938; Doctor's Assocs., Inc. v. Casarotto (1996) 517 U.S. 681. On remand from the Supreme Court in the Circuit City case, the Ninth Circuit at 279 F.3d 889 (9th Cir.2002) reiterated that revocable arbitration agreements include those which, under California state law, are found to be both procedurally and substantively unconscionable. The Ninth Circuit cited the California Supreme Court's decision in Armendariz v. Foundation Health Psyhcare Services, Inc. (2000) 24 Cal.4th 83, 89.

36.3.2.2 Current Law Regarding Arbitration Clauses. Unless the arbitration agreement is found to be both procedurally and substantively unconscionable and, thus, unenforceable under California law, the federal law requires that the arbitration agreement be adhered to. Under California law, a contract is unenforceable if it is both procedurally and substantively unconscionable. Armendariz, supra. When assessing procedural unconscionability, the trier of fact is to consider the equilibrium of bargaining power between the parties and the extent to which the contract clearly discloses its terms. Stirlen v. Supercuts, Inc. (1997) 51 Cal.App.4th 1519. A determination of substantive unconscionability, on the other hand, involves whether the terms of the contract are unduly harsh or oppressive.

36.3.2.3 California courts have found a number of arbitration clauses to be unconscionable and, based thereon, have refused to enforce such clauses:

Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal.4th 83. Arbitration clause that curtailed employee's remedies under California Fair Employment and Housing Act, by precluding the recovery of punitive damages, prospective damages, and attorney fees, was contrary to public policy in that it rendered arbitral forum inadequate for the vindication of employee's statutory rights. In addition, fact that arbitration obligation was not mutual but applied only to claims of employee made arbitration clause unconscionable. Agreement to arbitrate was therefore unenforceable as unconscionable.

Stirlen v. Supercuts, Inc. (1997) 51 Cal.App.4th 1519. Binding arbitration clause in employment agreement of managerial employee which restricted remedies to contract damages was an unconscionable contract within the meaning of Civil Code § 1670.5 and, therefore, void under state law and the Federal Arbitration Act.

Patterson v. ITT Consumer Financial (1993) 14 Cal.App.4th 1659. Arbitration clause contained in consumer loan contracts in California which required that participatory hearings to resolve disputes be held in Minnesota and which also required advance payment of substantial hearing fees was unconscionable and would not be enforced.

37 LEGAL ENTITIES

37.1 In order for an action to be prosecuted, there must be some entity aimed at by the processes of the law, and against whom the court's judgment is sought. *Tanner v. Estate of Best* (1940) 40 Cal.App.2d 442, 445. Administrative "actions" or "proceedings" are not self-executing and require ultimate judicial action in the form of an appeal or clerk's judgment for enforcement. Legislative and judicial rules regarding entities and their designations are aimed at satisfying due process considerations, and thus, make it critical that the proper entity be ascertained and designated in any action taken by an agency.

37.1.1 The various forms of business entities may be analyzed by closely examining their respective characteristics and formalities required for formation/management. Once identified after an examination under a specific situation, the business entity must be properly designated. Designating a party on a pleading or citation requires naming the "legal entity" being sued followed by an identification of the entity's "legal capacity" to be sued.

37.1.2 "Employer". Initially, it is important to note that there may be more than one entity responsible for the payment of wages or other benefits. The broad definition of "employer" for purposes of wage and hour law (see Section 2.2 of this manual) potentially allows more than one person to be liable for unpaid wages and penalties. Courts have found joint liability for unpaid wages against multiple employers in various contexts. *Real v. Driscoll Strawberry Association* (9th Cir. 1979) 603 F.2d 748, 754 (wage claim against joint employer decided under the Federal FLSA wage and hour laws); *Bonnette v. California Health and Welfare Agency* (9th Cir. 1983) 704 F.2d 1465, 1470 (wage claim decided in favor of employees against joint employer under the Federal F.L.S.A. wage and hour laws); *Michael Hat Farming Co. v. Agricultural Labor Relations Bd.* (1992) 4 Cal.App.4th 1037, 6 Cal.Rptr.2d 179. ("It is established that some farming operations have multiple, joint agricultural employers", citing *Rivcom Corp. v. Agricultural Labor Relations Bd.* (1983) 34 Cal.3d 743, 768-769).

37.2 Sole Proprietors. This term refers to a natural person who directly owns a business and who is responsible for its debts. All profits belong to the business owner (sole proprietor) and there is general unlimited personal liability for losses. The business owner has total management authority but may act through agents or employees. If the owner is married, community property is also put at risk because community property is liable for the contract obligations of either spouse incurred during the marriage. Family Code § 910(a).

37.2.1 Formalities: Except for complying with any applicable licensing requirements, no formalities are required to engage in business as a sole proprietor. If the business is conducted under a name which does not show the owner's surname or implies additional owners, the owner is required to file a certificate of fictitious business name and publish the notice as required under Business & Professions Code § 17900, *et seq.* The only consequence of failing to comply is that the owner is barred from maintaining

any legal action to enforce an obligation owing to the business until the certificate is filed. B&P § 17918.

37.2.2 Designation: A sole proprietor should be designated in an administrative action in his or her individual name, rather than solely in the business name. A fictitious business name is not a separate legal entity. Although it is sufficient to state only the name of the individual in a sole proprietorship, it is common practice to show the business name following the individual's name:

-JOHN SMITH, individually doing business as JOHN'S BAR-B-Q, or

-JOHN SMITH, individually dba JOHN'S BAR-B-Q,

-JOHN SMITH, an individual dba JOHN'S BAR-B-Q

But not, JOHN SMITH, individually and dba JOHN'S BAR-B-Q (This is not correct because a "dba" is not a separate legal entity such that John Smith can be sued as a "dba")

37.2.3 General Partnerships. A general partnership is an association of two or more persons (or other business entities) to carry on as co-owners in a business for profit. Corp. Code § 16202(a). Partners can be individuals, other partnerships, associations, or corporations. As a legal entity, it can hold and convey legal title to real property in its own name. It can sue and be sued in the partnership name. CCP § 369.5; Corp. Code § 16307(a). In most other respects, however, it is simply a form of co-ownership by several persons who together own the business assets and who are personally liable for all business debts. Corp. Code § 16306(a). Each partner is jointly and severally liable for the debts and obligations of the partnership and each partner is deemed the agent of the partnership in dealing with third persons while carrying on partnership business. And while partners may agree to share loses or pay debts in differing proportions, third persons are not bound by such agreements and are entitled to recover in full from any one or more partners. (Such partner would then be entitled to contribution or indemnification from the others) Corp. Code § 16401(b).

37.2.4 Generally, each partner has equal right to participate in the management and control of the business. No partner has the right to receive compensation for services performed for the partnership (they, however, share business profits) unless the partners otherwise agree in writing or by conduct. Corp. Code § 16401(h).

37.2.5 Formalities: No particular formalities are required to form a general partnership and may be even based upon an oral agreement (provable under a preponderance of the evidence standard of proof). If the partnership name does not include the name of each general partner, or whose name suggests the existence of additional owners, it must comply with the fictitious business name statute (B&P 17900, et seq.)

37.2.6 Designation:

A&B Enterprises, a general partnership; John Smith and Joe Brown, each individually and as general partners of A&B Enterprises, a general partnership

- B&C Transport, a general partnership dba B&C Trucking; John Smith, an individual and general partner of B&C Transport, a general partnership

Note: If only the partnership is named, the personal assets of the individual partners may not be able to be reached in the enforcement of the judgment.

Cavaet: The California prevailing wage statutes provide that all workmen employed on a public works project must be paid the prevailing wage. That provision does not differentiate between partners (general or limited) and employees. (O.L. 1997.12.04)

37.3 Limited Partnerships. A limited partnership consists of one or more general partners who manage the business who are personally liable for partnership debts, and one or more "limited" partners who contribute capital and share in profits but who do not generally participate in the day-to-day management of the business. The limited partners do not incur liability with respect to partnership obligations beyond their capital investment. Corp. Code § 15611, et seq. The general partners are co-owners of the partnership assets. The limited partners have no direct ownership interest therein. The limited partners' sole rights are to a return of their capital and a share of the profits.

37.3.1 Except as otherwise provided by law or agreement, general partners of a limited partnership share the same liabilities as a partner in a general partnership. Corp. Code §§ 16306, 15643(b). Every general partner is an agent of the limited partnership and thus can bind the partnership. Limited partners are primarily passive investors, do not run the business, and not liable for partnership debts beyond their investment. However, a limited partner who participates in control of the business may be held personally liable to creditors who actually knew of such participation and who reasonably believed the limited partner was a general partner. Actions such as the limited partner acting as an employee for the limited partnership or general partner, consulting/advising a general partner, being an officer, director, shareholder of a corporate general partner, being a partnership creditor or debtor, voting, or acting to wind up the partnership after dissolution do not constitute "participation in the control" of the business. See Corp. § Code 15632(b).

37.3.2 Formalities: A limited partnership exists upon the filing of a certificate of limited partnership with the Secretary of State. Corp. Code § 15621. The certificate must contain the names and addresses of the general partners but the names of the limited partners and amounts of their investments need not be disclosed. Partners are not required to execute a written agreement to form a limited partnership. Corp. Code 15611(w), 15621(a).

37.3.3 Designation: Same as for general partnership except that the word "limited" is placed in front of the word "partnership" (instead of "general") and only general partners are named individually:

- A&B Enterprises, a limited partnership; John Smith and Joe Brown, each individually and as general partners of A& B Enterprises, a limited partnership

- B&C Enterprises, a limited partnership dba B&C Trucking; John Smith, an individual and general partner of B&C Enterprises, a limited partnership

37.4 Corporations. A corporation has all of the powers of a natural person in carrying out its business activities except when barred by its articles or other provisions of law. Witkin, Calif. Procedure, Pleading, 4th Ed., § 7; Corp. Code § 207. A corporation is a separate legal entity existing under authority granted by state law with its own identity separate and distinct from the persons who created it and from its shareholders. As a separate legal entity, a corporation is responsible for its own debts. Generally, shareholders, directors and officers of the corporation are not legally responsible for corporate liabilities. Exceptions may exist holding one personally liable for corporate obligations when an individual personally guaranteed the obligation or when "alter ego" liability (a drastic remedy) is imposed.

37.4.1 Employer, Defined: See Section 55.2 of this Manual for discussion.

37.4.2 Management and control is vested in the board of directors elected by the shareholders. The board makes policy and other major decisions. Dealings with third persons are generally conducted through the officers and employees. In smaller companies, the same persons may be stockholders, directors and officers. Shareholders elect the board of directors, but they do not directly control the board's activities or decisions. Although corporations have many constitutional protections, they are not "citizens" nor do they have the privilege against self-incrimination to prevent the disclosure of incriminating corporate records. (United States v. Kordel (1970) 397 U.S. 1, 7, 90 S.Ct. 763, 767, fn. 9) Nor may individuals assert such privilege to avoid producing corporate records in a representative capacity as officer/director of the corporation. (Braswell v. U.S. (1988) 487 U.S. 99 108-109, 108 S.Ct. 2284, 2290) Except in limited circumstances (small claims cases and administrative procedural filings), a corporation must be represented by an attorney in court proceedings. (Merco Const. Engineers, Inc. v. Municipal Court (1978) 21 Cal.3d 724)

37.4.3 Foreign corporations: A foreign corporation has the same capacity to be sued as a domestic corporation. The main issue for non-registered foreign corporations is whether it has subjected itself to the jurisdiction of the state. Conducting significant or regular business in the state will suffice. The capacity to be a defendant and to defend a suit is unaffected by failure to comply with the statutory requirements of filing with the secretary of state and appointment of an agent for service of process. Witkin, Calif. Procedure, Pleading, 4th Ed., § 76.

37.4.4 Suspended corporations: The powers of a domestic corporation may be suspended, and those of a foreign corporation forfeited, for failure to pay corporate franchise taxes. Revenue Code § 23301. The effect of suspension or forfeiture is drastic - the corporation may be sued but it cannot sue or defend suit and cannot appeal an adverse action.

37.4.5 Dissolved corporations: A corporation which is dissolved nevertheless continues to exist for the purposes of winding up its affairs, prosecuting or defending actions by or

against it but not for the purpose of continuing business except so far as for the winding up of its affairs. No action or proceeding to which a corporation is a party abates by the dissolution of the corporation or by reason of proceedings for winding up and dissolution thereof. Corp. Code § 2010. Summons or other process against a dissolved corporation may be served on an officer, director, or person having charge of its assets, or if no such person is found, to any agent upon whom process might be served at the time of dissolution. If none of such persons can be found, application can be made to the court for service upon the Secretary of State. Corp. Code § 2011(a)(4).

37.4.5.1 Causes of action against a dissolved corporation, whether arising before or after the dissolution may be enforced against (1) the corporation to the extent of its undistributed assets, including without limitation any insurance assets available to satisfy claims, (2) if any of the assets of the dissolved corporation have been distributed to shareholders, to the extent of their pro rata share of the claim or to the extent of the corporate assets distributed to them upon dissolution of the corporation, which ever is less -- but a shareholder's total liability may not exceed the total amount of assets of the dissolved corporation distributed to the shareholder upon dissolution of the corporation. Corp. Code § 2011(a)(1).

37.4.6 Formalities: A corporation must comply with the state's corporation law which requires filing of articles of incorporation containing certain essential provisions, payment of fees, and designation of officers including listing an agent for service of process.

37.4.7 Designation: ABC, Inc., a corporation

XYZ Co., a California corporation

AZ, a foreign corporation

L&M, Inc., a corporation dba Super Sam's Sandwiches

37.5 Limited Liability Companies (LLC). A hybrid between a partnership and a corporation combining the "pass through" treatment for taxes (partnership) with the limited liability accorded to corporate shareholders. Corp. Code § 17000 et seq. A business required to be licensed under the Business & Professions Code cannot operate as an LLC unless expressly authorized by statute. An LLC requires two or more "members" (owners) and is a recognized legal entity separate and apart from its members. See Corp. Code §§ 17003, 17101.

37.5.1 Subject to narrow exceptions, LLC members are not personally liable for the entity's obligations and liabilities and thus enjoy the same "limited liability" as corporate shareholders. Exceptions exist where the LLC member personally guaranteed the obligation (see Corp. Code § 17101(b) and/or may be personally liable for LLC obligations "under the same or similar circumstances and to the same extent as a shareholder"may be liable for a corporation's liabilities, i.e., "alter ego liability" may be imposed. Corp. Code § 17101(b).

37.5.2 LLC profits, losses, and distributions (of money or property) are distributed among its members as allocated under the operating agreement; otherwise, they are allocated in proportion to each members capital contributions. Corp. Code § 17202. Management of an LLC's business is vested with all its members unless the articles of organization provide otherwise. LLCs thus have an option as to whether it operates under centralized management. Corp. Code § 17150 et seq.:

37.5.2.1 Where articles of organization do not provide for managers, LLC members' operate the business more akin to general partners of a general partnership. Each member is deemed an agent of the LLC in dealings with third persons and can bind the LLC in the same way as a general partner can bind a partnership. Corp. Code § 17157.

37.5.2.2 Where articles provide for centralized management, the LLC may allow its business and affairs to be managed by or under the authority of one or more designated managers, much like a corporation. No member has the right to receive compensation for acting in the limited liability company's business except as provided in the operation agreement or other agreement among the members. Corp. Code § 17004(b).

37.5.2.3 Formalities: The existence of an LLC requires the filing of articles of organization with the Secretary of State on a form prescribed by the Secretary of State. Corp. Code § 17050. The persons who execute and file the articles need not be members. The articles must designate a qualified initial agent for service of process and a statement as to whether it will be managed by one manager, more than one manager, or the members. Corp. Code § 17051. The articles need not disclose the managers' names, the members' names or capital contributions. Additionally, the members must enter into an operating agreement either before or after the filing of the articles which may be in writing or oral. Corp. Code §§ 17001(b), 17050(a).

37.5.3 Designation: DEF, a limited liability company

XYZ, a limited liability company, dba Sams Subs

37.6 Unincorporated Associations. Covers any group whose members share a common purpose and who function under a common name, including churches, unions, political parties, professional and trade associations, social clubs, homeowners associations, etc. An unincorporated association has the capacity both to sue and be sued in the entity name, and to defend any action against it. CCP § 369.5. Like a corporation, it can only appear in court (except small claims court) through an attorney. Clean Air Transport Systems v. San Mateo Co. Transit Distr. (1988) 198 Cal.App.3d 576, 578-579.

37.6.1 Any member of the association may be joined and served as an individual defendant. § CCP 369.5(b). An association (as well as individuals and partnerships) who are doing business under a fictitious name which does not disclose the personal names of every member and which has not filed with the county clerk a certificate of fictitious business name lack the capacity to sue on transactions entered into under the fictitious name. B&P § 17918.

37.6.2 Designation: - ABC Association, an unincorporated association

- ABC Association, an unincorporated association; Jim Smith, an individual

37.7 Joint Ventures. A joint venture is an undertaking by two or more persons for the purpose of carrying out a single business enterprise for profit. It is normally formed for a particular time period or single transaction with limited duration and scope, e.g., construction projects. Much like a partnership, its members are co-owners who share profits and losses. Due to its similarity with partnerships, the rights and liabilities of joint ventures are largely controlled by the rules applicable to partnerships.

37.7.1 Designation: -Smith-Jones Enterprises, a joint venture; Smith Construction Co., Inc., a corporation; Jones Development Company, a corporation.

37.8 Other Miscellaneous (Less Common) Entities:

37.8.1 Professional Corporations. A corporation organized under the general corporation law that is engaged in rendering professional services in a single profession which, unless specifically exempted, conducts its business pursuant to a certificate of registration issued by a governmental agency regulating the profession and designates itself as a professional corporation (or other corporation as may be required by statute). Corp. Code § 13401(b). "Professional services" means any type of services that may be lawfully rendered only pursuant to a license, certification, or registration authorized by the Business and Professions Code or the Chiropractic Act. Corp. Code § 13401(a). A common example is a law office which operates with the designation of "a professional law corporation." In addition to the requirements of the general corporations law, such professional law corporation is subject to the requirements for "law corporations" in Bus. & Prof. Code § 6160 et seq.

37.8.1.1 A shareholder, officer, director, or professional employee of a professional corporation must be licensed, certified, or registered to render the professional services that the particular professional corporation renders. Corp. Code § 13401(d). The corporation may employ persons not so licensed so long as such persons do not render any professional services rendered by that professional corporation. (e.g., clerical staff, etc.) Corp. Code § 13405. The articles of incorporation must specifically state that the corporation is a professional corporation and no professional corporation can render professional services without a currently effective certificate of registration issued by the government agency regulating the profession. Corp. Code § 13404.

37.8.1.2 A professional corporation may adopt any name permitted by law expressly applicable to the profession in which such corporation is engaged or by a rule or regulation of the governmental agency regulating the profession. Corp. Code § 13409(a). The name cannot be substantially similar to another domestic corporation nor a foreign corporation qualified to render professional services in this state, nor use a name under reservation for another corporation. Corp. Code § 13409.

37.8.1.3 Designation: Sylvester & Holmes, a professional law corporation, or

Sylvester & Holmes, a professional corporation

Robertson's Dentistry, a professional corporation

37.9 Limited Liability Partnerships (LLP). A partnership, other than a limited partnership, formed and registered to provide professional limited liability partnership services in which each of the partners is a licensed person to engage in the practice of architecture, public accountancy, or the practice of law. Corp. Code § 16101(6)(A) & 16951.

37.9.1 An LLP must register with the Secretary of State indicating, among other things, an agent for service of process, a statement of the business in which it engages in, and its name which must contain the words "Registered Limited Liability Partnership," "Limited Liability Partnership," or one of the abbreviations "L.L.P.," LLP, "R.L.L.P.," or "RLLP" as the last words of its name. Corp. Code § 16953(a) & 16952.

37.9.2 An LLP must maintain security for acts, errors, or omissions arising out of the practice of the LLP in the form of insurance, bank or escrow accounts, and maintain a net worth for an amount depending on the type of professional practice. If the LLP fails to comply with the net worth requirement, each partner automatically guarantees payment of the difference between the maximum amount of security and the security otherwise provided. Corp. Code § 16956.

37.9.3 Designation: Witkin & Moore, LLP, a limited liability partnership, or

Witkin & Moore, L.L.P., a limited liability partnership, or

Money Manager Accountants, RLLP, a registered limited liability partnership

37.10 Business Trusts. A rare business entity, a business trust is formed pursuant to a trust document naming trustee(s), beneficiaries, and trust property. The trustee has full and complete control over trust property (business assets and operations) which is conveyed to them. The objective of a business trust is not to hold and conserve property (as in a regular trust), but is to provide a medium for the conduct of a business and sharing its gains. *Koenig v. Johnson* (1945) 71 Cal.App.2d 739.

37.10.1 Historically, the issue has often been whether a business is a bona fide business trust (an earlier form of a business trust was called a "Massachusetts Trust" common to that state) with more than one trustee or a partnership. If the principals are free from control of certificate holders (transferable certificates to which a beneficial interest is held and issued much like shares of stock) in the management of the property, a trust would exist; but if the certificate holders are associated together in control of the property as principals and the trustees are merely their managing agents, a partnership relation between the certificate holders would exist. *Bernesen v. Fish* (1933) 135 Cal.App. 588, 599-600.

37.10.2 Under general trust rules, unless otherwise provided in a contract, a trustee is not personally liable on a contract properly entered into in the trustee's fiduciary capacity

in the course of administration of the trust unless the trustee fails to reveal the trustee's representative capacity and identify the trust in the contract. Prob. Code 18000. A trustee is personally liable for obligations arising from ownership or control of trust property only if the trustee is personally at fault. However, a third person with claims against the trust or trustee can bring an action against the trustee in the trustee's representative capacity, whether or not the trustee is personally liable on the claim. Prob. Code 18004. The question of liability as between the trust estate and the trustee personally may be determined in a proceeding brought by the trustee or beneficiary concerning the trust (Prob. Code 18005) or may be settled internally amongst the trustees and beneficiaries. Witkin, Summary of Calif. Law, Vol. 11, Trusts, §265-266.

37.11 For purposes under the Labor Code, a "business trust" is a person (Labor Code 18), and an employer may be a "person" (IWC Orders, §2, Definitions). Accordingly, an action may appropriately be designated against both the business trust and the trustee(s).

37.11.1 Designation: Smith Development Trust, a business trust; John Day, individually and as trustee of Smith Development Trust (if it can be established that liability was through the fault of the trustee).

Vinters USA Trust, a trust; James Martin, trustee of Vinters USA Trust.

38 BANKRUPTCY.

38.1 DLSE Does Not Usually File Claims In Bankruptcy. There are exceptions to this general rule and deputies should consult with their supervisor regarding this issue. Assisting claimants with bankruptcy claims does fall within the expertise of the DLSE and personnel should be familiar with the procedures and terminology.

38.1.1 Information Should Be Made Available To Claimants. The information below is needed for filing claims and this information should be relayed to the wage claimant so that he/she may file his/her claim with the bankruptcy court. If the notice of bankruptcy is not received, the bankruptcy index clerk of the District Court where the petition was filed can furnish the information provided you have the name under which the petition was filed. The claimant should be advised to obtain the information needed in order to file the claim. The following summary is based on information gleaned from NORTON BANKRUPTCY LAW AND PRACTICE, 2d.

38.1.2 Bankruptcy Situations. Often employers have failed to pay wages because they are insolvent and sufficient funds are not available to the employers to meet their wage and other obligations. Bankruptcy is a remedy established by Congress to permit insolvent parties, whether individual, corporate or other, to discharge or in any way limit their obligations to creditors. A claimant who files a claim for wages against an employer, who has filed or subsequently files a bankruptcy action, becomes a creditor.

38.1.3 Pre-Petition Earnings. A priority is granted for certain "wages, salaries, or commissions" earned by an individual shortly before the filing of the bankruptcy. The amount entitled to priority is now set at $4,650.00*. The federal law expressly extends its coverage to include vacation, severance, and sick leave pay. This amount has been consistently increased in increments pursuant to the Bankruptcy Reform Act of 1994. The amount of $4,300 was effective April 1, 1998 until the present amount of $4,650.00 was set. The pre-petition priority is limited: The employee must earn the wages within 90 days before (1) the filing of the bankruptcy petition or (2) the cessation of the debtor's business whichever occurs first. As noted, the amount of the employee's pre-petition priority claim is now limited to $4,650.00. Amounts in excess of $4,650.00 or amounts earned prior to the 90-day period outlined above, are relegated to general nonpriority status.

38.1.4 The Underlying Policy of allowing a wage priority claim is to "enable employees displaced by bankruptcy to secure, with some promptness, the money directly due to them in back wages, and thus to alleviate in some degree the hardship that unemployment usually brings to workers and their families." Judge Learned Hand, in a case under the Bankruptcy Act, observed that "the statute was intended to favor those who could not be expected to know anything of the credit of their employer, but must

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*11 USC § 104(a) provides that the Judicial Conference is to propose a recommendation (which is usually adopted) for a uniform percentage adjustment of each dollar amount set out in the Bankruptcy Code. Currently, the amount of wages which may be protected as a priority claim of $4,650.00 represents the increase of $350.00 made in May, 2001.

accept a job as it was." Besides the goal of protecting unwary employees, the wage priority is designed to encourage employees not to abandon a failing business, thus enhancing the business' prospects for financial recovery.

38.1.5 Assignment. Individual employees may assign their wages and assignees "are entitled to the wage priority position of their assignors." A different rule would deprive individual employees of the full value of their claim by impairing its transferability.

38.2 What Pre-Petition Wages Are Eligible. Bankruptcy courts generally follow the rule that the employee earns wages within the meaning of the priority at the time the services are performed, rather than at the time the right to payment vests. Hence, if an event triggering a right to payment occurs post-petition (after the filing of the bankruptcy), the employee's claim for wages allocable to services rendered during the 90-day pre-petition (before the filing of the bankruptcy) period is not transformed into an administrative expense.

38.2.1 Vacation Pay Accrual. The above rule likewise applies to determining the time vacation pay accrues. Although the right to collect vacation pay may vest on the day the employee takes vacation, the employee continuously earned the vacation pay as the employment progressed. Thus, the pro rata amount of vacation pay earned during the 90 days of pre-petition employment qualifies as a priority claim. The majority of Bankruptcy courts hold that vacation pay is accrued on a daily basis. Hence, the claimant may receive administrative priority only for the amount of vacation pay that accrues during post-petition service. Unpaid vacation pay attributed to pre-petition service may be entitled to priority status. Claims for vacation pay earned before the 90-day period preceding the filing of the bankruptcy or the cessation of business are simply general unsecured claims.

38.2.2 Severance Pay Claims. The Bankruptcy courts also apply the above rule to severance pay, provided that the amount of earned severance pay relates to the employee's length of service. In such a situation, only the portion of severance pay earned during the 90-day pre-petition period is entitled to priority status. The fact that the right to severance pay "matures" upon termination within the priority period is irrelevant for priority allocation in length-of-service severance pay arrangements. However, if the employer offers the severance pay as a substitute for required notice of termination during the priority period, then the entire amount of severance pay is immediately earned upon termination. In this situation, the entire amount may qualify as a priority claim.

38.2.3 Severance Pay falls into one of two categories: First encompassing severance pay agreements that provide for severance pay solely as a substitute for notice. The courts agree that a claim for this type of severance pay is entitled to first priority treatment if the employee is terminated post-petition, on the ground that the claim is "earned" post-petition by the debtor's failure to give notice. The second category provides the employee with severance pay based on length of service. In this situation, the majority of courts view severance pay as accruing on a daily basis. Thus, as with vacation pay, the claimant is entitled to administrative priority only for the amount of severance pay

that may be apportioned to actual post-petition service. The mere fact that the right to payment arises due to the debtor's post-petition termination does not automatically entitle the employee to administrative priority for the full amount of the severance pay claim. A small number of courts view severance pay claims as "compensation for the hardship which all employees, regardless of their length of service, suffer when they are terminated and that it is therefore 'earned' when the employees are dismissed." Under this view, the employee earns the full amount of the severance pay when terminated. If the termination occurs post-petition, then the severance pay is a cost of doing business and should be treated as an administrative expense.

38.3 Post-Petition Wages. It is important to note that wages earned after the petition for bankruptcy was filed probably are not subject to the $4,650.00 limit. These post-petition wages generally fall into the category of administrative claims. Under the federal Bankruptcy Code wages, salaries, or commissions for services rendered after the commencement of the case (post-petition earnings) are an allowable administrative expense. Whether wages are earned pre-petition or post-petition depends on when the service for which the wages are paid was rendered, not when the right to payment matures or falls due. As will be discussed below, this timing issue has been especially critical in fringe benefits cases but also is important in many Chapter 11 cases where the business continues and the wages of the employees are a typical cost of doing business.

38.3.1 The necessity of affording first priority for post-petition wage claims is apparent: After the bankruptcy petition is filed, the trustee or debtor in possession may require the services of regular or new employees for either continued operation of the business or for winding up the estate. Those needed employees would of course be reticent to work if they did not have significant assurance of prompt payment. The types of services compensable as an administrative expense will of course vary, depending on the nature of the debtor's business.

38.3.1.1 The "wages, salaries, or commissions" associated with these post-petition services will receive administrative priority only if the services are necessary and beneficial to the estate. Wages are listed in the Code as an "included" type of actual, necessary cost and expense of preserving the estate. In Chapter 11 cases, where the debtor's business normally is continued, administrative allowance of wages will be fairly routine.

38.3.2 Restriction On Administrative Wage Claims. The court must find that the amount claimed as compensation for the services is reasonable. Unlike pre-petition wage claims, which are limited to $4,650.00 per claimant, the Bankruptcy Code does not impose a statutory maximum on administrative wage claims. Courts insure against excessive wage claims by demanding that the claim not be disproportionate to the value of the services rendered.

38.3.3 The Bankruptcy courts have interpreted the phrase "wages, salaries, or commissions" to include vacation and severance pay. These courts disagree, however, as to whether the claimant is entitled to administrative priority for the entire amount of vacation or severance pay if the right to payment matures during the administration of the estate,

or whether the claimant should receive administrative priority only for an amount apportioned to post-petition services. In general, the courts' decisions hinge on the nature of the vacation or severance pay as defined by an employment contract, a collective bargaining agreement, or general corporate policy.

38.4 Important: Automatic Stay. When a debtor files a petition for bankruptcy relief an automatic stay becomes effective. This stay prohibits creditors from proceeding on actions to collect any part of a debt except through the federal bankruptcy court. As a result, for debts owing at the time of the filing of the petition, employee wage claimants are barred from litigating actions or enforcing collection procedures against their employers to recover their wages and the Division of Labor Standards Enforcement is barred from adjudicating or taking collection action on the wage claim.

38.4.1 Please Note. In a Chapter 7 bankruptcy, any debts (cf., involuntary gap expenses) incurred after the filing of the petition can be adjudicated against the debtors without regard to the bankruptcy case. This is because the Bankruptcy laws do not anticipate protection of the debtor for debts incurred after the bankruptcy estate has been created. The stay, however, will preclude collection of the judgment pending close of the bankruptcy.

38.4.2 Referral To Legal Section. There are times when a referral to legal may be appropriate to protect legitimate state interest under our police powers. Some examples of this are non-payment of minimum wages, overtime, and to compel restitution of sums improperly withheld from employees. Filing of a bankruptcy petition will generally not affect the mere issuance of a citation by field personnel.

38.5 Contact DLSE Legal Section. In bankruptcy cases where these issues exist, you should consult the appropriate member of our legal staff for guidance.

38.6 Non-dischargeable Claims. Certain debts are not dischargeable. If a non-dischargeable debt is listed by the debtor, an objection to the dischargeability must be made based upon one or more of the grounds for objections specified in the Bankruptcy Code. In an individual's Chapter 7 or 11 bankruptcy, state fines, penalties or forfeitures, whether civil or criminal (except certain tax penalties), are non-dischargeable, as long as (a) they are payable to or for the benefit of a governmental unit and (b) they are not compensation for actual pecuniary loss. DLSE legal will be concerned with making this objection when a debtor lists a fine, penalty or forfeiture due to the State of California which is non-dischargeable. Should the deputy determine that the objections are significant, the case should be referred to legal following the standard Form 124 procedure. See the glossary and forms section for an example. Consult with your assigned Legal Section to ascertain whether an objection should even be filed.

38.7 Glossary Of Bankruptcy Terms.

38.7.1 Adjudication - The order or act of the court decreeing the debtor a bankrupt upon the petition.

38.7.2 Administrative Claim - See Post-Petition Claim, above.

38.7.3 Allowable Claim - One which the court permits to be paid, if and when funds are available, in the correct order of payment.

38.7.4 Bankrupt - Describes the entity after the adjudication.

38.7.5 Debtor - Describes the entity (individual, corporate, etc.) before the adjudication; or is the entity in the other types of proceedings.

38.7.6 Debtor In Possession - In Chapter 11 proceedings, the bankrupt entity which continues the business pending resolution of the bankruptcy.

38.7.7 Discharge - The step in the bankruptcy proceeding at which point, by the order of discharge, the bankrupt is released from legal liability for those obligations known as dischargeable debts.

38.7.8 Exempt Property - That property generally described by California Civil Procedure §§ 690 to 690.25, and Code of Civil Procedure §§ 704.10 to 704.995, homesteads belonging to the debtor or bankrupt.

38.7.9 General Claim - A claim with neither an order of priority nor a lien securing it.

38.7.10 Involuntary Gap Expenses - In an involuntary bankruptcy case (that is, a case where the debtor is forced into the bankruptcy by his creditors filing a petition), there will usually be a period of time between the filing of the creditors' petition and the date of the order for relief. It is sometimes referred to as the "involuntary gap." If these debts are incurred "in the ordinary course of the debtor's business or financial affairs," they are entitled to the involuntary gap priority.

38.7.11 Non-Dischargeable Claims - These debts are not discharged by the bankruptcy action. A few of these are: certain tax claims, debts not scheduled by the debtor in the bankruptcy case, a fine, penalty or forfeiture payable to a government unit for an event occurring within three years of the filing of the petition (this could include DLSE citation penalties), and for fraud while acting as a fiduciary, etc.

38.7.12 Objections - Reasons (or alleged reasons) why a claim should not be allowed, i.e., proof of claim alleging a non-existent priority status; or, proof of claim does not clearly prove the debt was one of the bankrupt's; or other reasons. The trustee has the duty to object to claims not entitled to proof or allowance. As a rule, substantial objections to wage claims may be overcome by the deputy's preparation and filing of a declaration and exhibits supporting the claim.

38.7.13 Petition - The form of pleading prescribed for filing with the court, the proposal that a debtor be adjudicated a bankrupt or that one of the types of debtor-proceedings be approved by the court. These are filed in the United States Bankruptcy Court having jurisdiction over the area or location.

38.7.14 Priority Claim - One that ranks ahead of others and must be paid before non-priority claims. The priority and sequence of priority are set by the Act. Wage claims (i.e., wages, salaries, commissions, vacation, severance, sick leave pay) may be the priority if earned within 90 days before the filing of the petition (or within 90 days of the business closing if that occurred before the petition was filed). Not more than $4,650.00 of the wage claim can be classified in this priority. However, wages earned post-petition are also entitled to a priority.

38.7.15 Pre-Petition Wage Claim - A priority claim which arises for services rendered before the bankruptcy petition is filed. There is a cap on the amount of wages and benefits which are subject to this priority claim. Note that the claim is based on the time the services are rendered, not on when the payment for the services becomes due.

38.7.16 Post-Petition Wage Claim - Sometimes an Administrative Claim. A claim which arises for services rendered after the bankruptcy petition has been filed. There is no cap on the amount of wages which may be claimed, but, in some instances, the court may limit the claim in Chapter 11 cases if it appears the services were not needed or the wage was inflated. The administrative claim is not to be confused with debts incurred (other than by a debtor-in-possession in a Chapter 11 case) after the filing of a bankruptcy.

38.7.17 Proof of Claim - Form of claim in which are recited the facts which establish the claim as being allowable. We use a variety of forms, according to the type of claim.

38.7.18 Provable Claim - Money debt due and owing at and prior to the petition date and for which no security is held.

38.7.19 Receiver - A person who is appointed by court order to conserve the estate during a period before a trustee is qualified.

38.7.20 Schedules - The detailed listings of the debts, assets, identity of creditors, claims of exemption and other information which is filed with the petition.

38.7.21 Secured Creditor - One who possessed a lien on some of the debtor's property perfected prior to the filing of the petition. The lien must be satisfied before any proceeds of the sale of that property become part of the "estate" and usable for dividend payments.

38.7.22 Trustee - A person who is elected by the creditors to administer the estate through liquidation to closing.

39 ASSIGNMENTS FOR BENEFIT OF CREDITORS, RECEIVERSHIPS, ETC.

39.1 Code of Civil Procedure Sections 1204, 1205, 1206. A general assignment for the benefit of creditors is a process available in the State of California which meets the requirements set out in Code of Civil Procedure 493.010, et seq. The procedure involves a conveyance by a debtor (usually a business entity) of substantially all property to a party (usually a credit management company or an attorney) in trust to collect all amounts owing to the debtor, to sell and convey the property transferred, distribute the proceeds of all the property and collection among creditors of the debtor and to return the surplus, if any, to the debtor.

39.1.1 The Assignment For Benefit Of Creditor Remedy is usually used by small businesses which find themselves in financial problems and do not wish to file bankruptcy; but instead agree with their creditors to pay off the indebtedness. The procedure, if used correctly, is usually more efficient than the bankruptcy court procedures in that money is available to the creditors sooner. Its also avoids the stigma sometimes attached to bankruptcy proceedings.

39.2 Contact DLSE Legal Section Regarding Exemptions. The assignment is subject to certain restrictions and exemptions which are found at Code of Civil Procedure § 1800, et seq. The Deputy should contact the assigned legal section for guidance in regard to questions which may arise as to restrictions and exemptions if that becomes necessary.

39.2.1 The Deputy's main concern should, of course, be the remedies available to wage earners who were employed by individuals or entities which file general assignments for the benefit of creditors. Bulk sale of intellectual property can also be of concern in this age of computers. (See Bulk Sale discussion at Section 40, infra)

39.2.2 The provisions of Code of Civil Procedure § 1204 enumerate the priorities allowed by law in all proceedings involving assignments for the benefit of creditors, receiverships, or like actions. The unsecured wages (those not reduced to judgment) earned within 90 days before the date of the making of the assignment or the taking of the property or the commencement of a court proceeding (in the case of a receivership) or the date of the cessation of the debtor's business have a priority over most other claims to the extent of $4,300.00 (Note: California has not yet conformed the amount to the latest bankruptcy maximum). Examples and exceptions are as follows:

1. Claims of the United States government for taxes are paramount to preferred lien claims under this section. United States v. Division of Labor Law Enforcement (9th Cir. 1953) 201 F.2d 857.
2. Preferred wage claims are paramount to the claim of the assignee for his fees and expenses. Division of Labor Law Enforcement v. Stanley Restaurant, Inc. (9th Cir. 1955) 228 F.2d 420.
3. Preferred wage claims are paramount to most state tax claims. (See Cal. Rev. & Taxation Code §§ 2191.5, 6756, 19253, 30321, 32386, 38531, 40157)

39.2.2.1 Corporate officials, such as the president, vice-president, and secretary, are not entitled to a preferential claim for salary due them for services rendered in these positions. (Carpenter v. Policy Holders Life Ins. Ass'n (1937) 9 Cal.2d 167.) However, the fact that an officer of the corporation is also employed by that corporation as a worker in some other capacity does not prevent him or her from participating in the benefits of the statute allowing preference to workers, but the preference is allowed only insofar as wages as a worker are concerned. (Clark v. Marjorie Michael, Inc. (1939) 34 Cal.App.2d Supp. 775). Also, of course, amounts due to a partner or a sole proprietor are not recoverable and such claims should not be taken.

39.2.3 Processing The Claim . The Labor Commissioner is authorized to file preferred or priority wage claims pursuant to the authority granted under Labor Code § 99. It should be noted that such claims are to be filed only after an investigation has been completed and the facts established to support the claim.

39.2.3.1 Wage claimants will not always know at the time of the filing of the claim that the employer is in an insolvency proceeding. Upon being notified of the pendency of the assignment for benefit of creditors or receivership proceedings, all wage claims against the same employer should be consolidated. As with bankruptcy claims, no further proceedings may be taken either by way of a hearing pursuant to Labor Code 98(a) or court action. The Deputy should have the claimant(s) complete declarations under penalty of perjury stating all the facts necessary to establish the right to the wages claimed.

39.2.3.2 The trustee, receiver or assignee has the right to demand such sworn statements and further has the right to refuse to pay any such claim in whole or in part if he has reasonable cause to believe that such claim is not valid. However, the trustee, receiver or assignee must pay any part of the claim that is not disputed without prejudice to the claimant's rights, as to the balance of his claim. The trustee must withhold sufficient money to cover the disputed balance until the claimant has had a reasonable opportunity to establish the validity of his claim by court action. In the event that the Deputy has established that the balance of the claim is valid and enforceable, the claims should be referred to the assigned Legal Section as soon as possible. The referral document (DLSE Form 124) should be marked so that it will be clear to the Legal Section that the matter is to be given priority handling. In addition, the Form 124 should set forth a complete history of the case and detail the facts found by the Deputy to support the unpaid claim balance.

39.2.3.3 Any claim for wages which does not meet the requirements set out in Code of Civil Procedure 1204(a)(1) and (2) should nonetheless be filed with the trustee, receiver or assignee as a general claim. For instance, all claims for wages which were earned outside of the 90-day period described in 1204(a)(1) and all wages in excess of $4,300.00 should be filed as general claims in the proceeding.

39.2.3.4 The claim filed in the proceedings should include vacation prorated for the 90-day period as a priority claim and any additional vacation accrual filed as a general claim.

39.2.3.5 Calculations for each claim should be attached to the individual's original claim form and should have explanatory notes which may be needed later in the event the claim is challenged.

39.2.3.6 A "Notice of Preferred Wage Claim" form is available; however, the claim need not be in any special form. A letter clearly setting forth each individual claimant's claim is sufficient. The notice form or letter should be sent certified mail, return receipt requested.

39.2.3.7 It should be noted that only wages (including vacation wages) may be filed as a priority claim. Do not attempt to file waiting time penalties, expenses or other sums which would not fit within the definition of wages found at Labor Code Section 200.

39.2.3.8 Receiverships occur infrequently, but the foregoing outline applies in most situations. However, since a receivership involves a court proceeding it is advised that the Deputy consult with the assigned Legal Section attorney regarding what action to take.

40 BULK SALE TRANSFERS, LIQUOR LICENSE TRANSFERS, ETC.

40.1 A priority wage lien is provided for at Code of Civil Procedure § 1205 and covers:

1. All wages earned within ninety (90)days;
2. Of the sale or transfer of:
   a) any business, or
   b) the stock in trade of any business
      1) in bulk or
      2) a substantial part of such stock in trade when the sale or transfer of the stock in trade is not in the ordinary and regular course of business.

40.1.1 Definition Of Terms. See Commercial Code § 6102 for a thorough discussion of the definitions; below are succinct definitions which may be useful to the Deputy:

40.1.1.1 Sales: A contract whereby property is transferred from one person to another for a consideration of value.

40.1.1.2 Transfer: An act of the parties by which the title to property is conveyed from one person to another.

40.1.1.3 Business: Any form of activity which is designed to bring a profit to the owner.

40.1.1.4 Stock In Trade: Inventory and the tools, goods, wares and raw materials used to produce inventory normally sold in the particular trade.

40.1.1.5 In Bulk; Substantial Part: The definitions found in the "Comments" following Commercial Code Section 6102 which deal with bulk sales would indicate that these terms would have to be defined on a case-by-case basis depending upon whether the transfer is of inventory of goods regularly held out for sale or inventory of machinery, etc. which are a part of the business but not regularly held out for sale. In the case of Myzer v. Emark Corp. (1996) 45 Cal.App.4th 884 the court noted that Section 1205 refers to "the sale or transfer of any business or the stock in trade, in bulk, or a substantial part thereof...." Section 1205 therefore encompasses, in addition to bulk transfers, transfers of "a substantial part" of a business or its stock in trade. The foreclosure proceedings and subsequent sale characterized as a sale of the business itself, amounts to a transfer of a substantial part of the business or stock in trade. Consult your assigned Legal Section if there are any questions regarding the scope of the sale.

40.1.1.6 Ordinary Or Regular Course Of Business: Marked by the normal according to the usage and customs of the trade.

40.1.1.7 Escrow: A deposit with a third person to be delivered on performance of a condition, and, on delivery by the third-party depository, the title passes. The sale or transfer may be through an escrow or by auction. The purpose of bulk sale laws such as Code of Civil Procedure Section 1205 are to protect the creditors of the business from the disposition of inventory outside the normal course of business. The seller of the

business is under an obligation to satisfy his creditors and the buyer does not take clear title unless the bulk sale transfer laws are complied with. (See California Uniform Commercial Code Section 6100 et seq.)

40.1.2 No Limit On Wage Preference. There is no monetary limit on the amount of wages for which a preference may be claimed under Section 1205, but the preference may only be claimed for wages earned within the 90-day period prior to the sale, transfer or opening of an escrow for the sale. For wages which were not earned within the 90 day period, the claim should be made, but preference may not be claimed. For guidance, see the description of general and priority wages and how to calculate them in the section on bankruptcy.

40.2 Processing A Claim. Again, it should be noted that the right of the Labor Commissioner to file a preferred lien or wage claim is contained at Labor Code 99 and the provisions of that statute regarding investigation and determination must be met before the claim may be filed.

40.2.1 The claim must be filed with the person listed in the bulk sale notice no later that the date set out in that notice.

40.2.2 The bulk sale notice must be contained in a newspaper of general circulation available within the judicial district where the property subject to the sale is located. Note that it is not necessary that the newspaper be delivered in the specific area where the property is located.

40.2.3 The claim should be made by certified mail, return receipt requested. The file should be pended for no longer than thirty days and a follow-up letter sent requesting status of the claim. In the event that the claim is either disputed or ignored, the matter should be discussed with the Legal Section without delay.

40.2.4 Additional Concerns. In this age of computer science, the sale of intellectual property has become a concern when so-called "dot-coms" are liquidated. Deputies are cautioned to be aware of sales of such properties the assets of which could be utilized to pay the wages of the workers.

40.2.4.1 Shifting Of Assets From One Firm To Another To Avoid Payment. While shifting assets between entities is not a new phenomena, it has become more common in recent years. Deputies should be aware of this practice and, if found after investigation, bring the facts to the attention of the Legal Section.

40.3 Liquor License Transfers: In the event of a sale of a restaurant or bar, the liquor license is transferred as a part of the transfer of the ownership of the business.

40.3.1 Business and Professions Code § 24073. Transfer of licenses; application; notice of intention; contents; filing.

No retail license limited in numbers, off-sale beer and wine license, on-sale beer and wine license, on-sale beer and wine public premises license, on-sale general license for seasonal business, shall be transferred unless before the filing of the transfer application with the department the licensee or the intended transferee records in the office of the

County Recorder of the county or counties in which the premises to which the license has been issued are situated a notice of the intended transfer, stating all of the following:

(a) The name and address of the licensee.

(b) The name and address of the intended transferee.

(c) The kind of license or licenses intended to be transferred.

(d) The address or addresses of the premises to which the license or licenses have been issued.

(e) An agreement between the parties to the transfer that the consideration for the transfer of the business and license or licenses, if any there be, is to be paid only after the transfer is approved by the department. (ABC)

(f) The place where the purchase price or consideration for the transfer of the business and license or licenses is to be paid, the amount of such purchase price or consideration, and a description of the entire consideration, including a designation of cash, checks, promissory notices, and tangible and intangible property, and the amount of each thereof.

(g) The name and address of the escrow holder referred to in Section 24074, or of the guarantor referred to in Section 24074.4, as the case may be.

A copy of the notice of intended transfer, certified by the county recorder, shall be filed with the department together with a transfer application.

40.3.2 Discretion. There are occasions when the license is only for beer and wine and the license is not worth transferring because a new license is relatively inexpensive and easy to procure. However, when the sale covers a location where a license to dispense hard liquor is involved, an escrow under Business and Professions Code Section 24074 is almost always opened.

40.3.3 The Deputy should check with the local office of the Department of Alcoholic Beverage Control (ABC) and ask if an escrow has been opened for the transfer of the license. It is necessary to have the address of the business locations for the ABC to be able to give you any information. ABC will be able to give you the name and address of the escrow holder and the probable date of the transfer of the license. ABC can also be of great assistance in providing information regarding ownership of the licensed establishment.

40.3.4 If the wage claim or claims have been investigated and the Deputy has established that the wages are due, demand should be made upon the employer and a copy of the demand sent by certified mail to the escrow holder.

40.3.5 The escrow holder may either pay the sum demanded including all wages earned and accruing prior to the sale, transfer or opening of the escrow (the demand should include any penalties found due but such penalties or other demands aside from wages should be listed separately because their priority for payment purposes from the escrow is not

the same as wages), or may notify the Deputy that the claim is denied, either in whole or in part.

40.3.6 In the event that the claim is denied by the escrow holder and the Deputy disagrees with the denial, an immediate referral to the Legal Section is necessary because the Legal Section has only twenty-five (25) days from the denial of the claim to file an action, secure an attachment, and serve it upon the escrow holder.

40.3.7 All of the information regarding the wages including the investigative notes and the reasons for the finding that the wages are due, must be submitted to the Legal Section at the time of the referral. The Deputy is to call the assigned Attorney (if the assigned Attorney cannot be reached within two days, the Senior Deputy should contact the Chief Counsel or Assistant Chief Counsel) and inform the Attorney of the fact that the referral is on the way or has been sent. The referral should be marked on the face of the DLSE Form 124 indicating that the matter is of a priority nature. The assigned Attorney must review the referral within three days after receipt in the Legal Section and either accept or reject the case within seven days of its receipt.

40.3.8 In the event the case is rejected by the Legal Section, the Deputy must notify the claimant(s) and advise them of their right (if they so desire) to bring an action in an appropriate court and secure an attachment pursuant to B&P Code Section 24074.

40.3.8.1 If There Are Any Questions Regarding The Filing Of Any Type Of Preferred Wage Liens, The Deputy Is Encouraged To Call The Assigned Attorney.

40.3.9 In Summary, after ascertaining that wages are owed, the Deputy is to follow these steps:

1. Ascertain name of escrow holder, account number, and date escrow opened. Note, the claimant may have this information, or the Deputy can contact the Department of Alcoholic Beverage Control, the County Recorder's office, or check local newspaper for published notice of liquor license transfer.
2. Send Notice of Claim letter to escrow holder.
3. If claim is disputed, prepare a DLSE Form 124 and send to Legal immediately.

41 TIME RECORD REQUIREMENTS.

41.1 Labor Code § 1174

Every person employing labor in this state shall:

(a) Furnish to the commission, at its request, reports or information which the commission requires to carry out this chapter. The reports and information shall be verified if required by the commission or any member thereof.

(b) Allow any member of the commission or the employees of the Division of Labor Standards Enforcement free access to the place of business or employment of the person to secure any information or make any investigation which they are authorized by this chapter to ascertain or make. The commission may inspect or make excerpts, relating to the employment of employees, from the books, reports, contracts, payrolls, documents, or papers of the person.

(c) Keep a record showing the names and addresses of all employees employed and the ages of all minors.

(d) Keep, at a central location in the state or at the plants or establishments at which employees are employed, payroll records showing the hours worked daily by and the wages paid to, and the number of piece-rate units earned by and any applicable piece rate paid to, employees employed at the respective plants or establishments. These records shall be kept in accordance with rules established for this purpose by the commission, but in any case shall be kept on file for not less than two years.

41.1.1 It is the employer's responsibility to keep accurate records of the time that employees work. If the employer fails to maintain accurate time records, the employee's credible testimony or other credible evidence concerning his hours worked is sufficient to prove a wage claim. The burden of proof is then on the employer to show that the hours claimed by the employee were <u>not</u> worked. Time records must be kept whether it is customary in the area or industry. (Anderson v. Mt. Clemens Pottery (1946) 328 U.S. 680; 90 L.Ed. 1515; 66 S.Ct. 1187 (rhg. den. 329 U.S. 822)) The leading California case on this issue is Hernandez v. Mendoza (1988) 199 Cal.App.3d 721; 245 Cal.Rptr. 36, which follows the rationale set out in the Anderson v. Mt. Clemens Pottery case.

41.1.2 Labor Code § 226 Requirements. As discussed in more detail at Section 14 of this Manual, Labor Code § 226 requires specific information be provided to employees on the wage statement which must be available with their periodic wage payment. Labor Code § 226 reads, in part, as follows:

(a) Every employer shall, semimonthly or at the time of each payment of wages, furnish each of his or her employees, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately when wages are paid by personal check or cash, an itemized statement in writing showing (1) gross wages earned, (2) total hours worked by the employee, except for any employee whose compensation is solely based on a salary and who is exempt from payment of overtime under subdivision (a) of Section 515 or any applicable order of the Industrial Welfare Commission, (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis, (4) all deductions, provided, that all deductions made on written orders of the employee may be aggregated and shown as one item, (5) net wages earned, (6) the inclusive dates of the period for which the employee is paid, (7) the name of the employee and his or her social security number, (8) the name and address of the legal entity that is the employer, and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.

41.2 More Stringent Requirements Contained in The IWC Orders at Section 7:

(A) Every employer shall keep accurate information with respect to each employee including the following:

(1) Full name, home address, occupation and social security number.

(2) Birthdate, if under 18 years, and designation as a minor.

(3) Time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall be recorded. Meal periods during which operations cease and authorized rest periods need not be recorded.

(4) Total wages paid each payroll period, including value of board, lodging, or other compensation actually furnished to the employee.

(5) Total hours worked in the payroll period and applicable rates of pay. This information shall be made readily available to the employee upon reasonable request.

(6) When a piece rate or incentive plan is in operation, piece rates or an explanation of the incentive plan formula shall be provided to employees. An accurate production record shall be maintained by the employer.

(B) Every employer shall semimonthly or at the time of each payment of wages furnish each employee, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately, an itemized statement in writing showing: (1) all deductions; (2) the inclusive dates of the period for which the employee is paid; (3) the name of the employee or the employee's social security number; and (4) the name of the employer, provided all deductions made on written orders of the employee may be aggregated and shown as one item.

(C) All required records shall be in the English language and in ink or other indelible form, properly dated, showing month, day and year, and shall be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California. An employee's records shall be available for inspection by the employee upon reasonable request.

(D) Clocks shall be provided in all major work areas or within reasonable distance thereto insofar as practicable.

41.2.1 Salaried Employees Who Are Non-Exempt And Paid Semi-Monthly. DLSE has opined that the confusion caused by an employer's use of semi-monthly instead of bi-weekly pay periods "cannot be ameliorated by non-compliance with the explicit requirements of Labor Code § 226." (O.L. 2002.05.17)

41.2.2 Piece Rate And Commission Plans. Labor Code § 226 requires that in the event the employee is paid by the piece rate basis, the employer must list the piece rate formula and the number of pieces completed. Section 7(A)(6) of the IWC Orders expands on this requirement and provides that in the event any "piece rate or incentive plan" is used in calculating the wages due, "an explanation of the incentive plan formula shall be provided to the employees." Section 7(A)(6) also provides that the employer must keep an accurate production record (including commission or piece rate calculation) and make that record available to the employee upon reasonable request.

41.2.3 Electronic Methods of Records Keeping. DLSE has taken the position that the use of electronic timecard systems, under certain circumstances, will meet the requirements of the California law (O.L. 1994.02.03-1 and 1995.07.20)

42 RIGHT TO INSPECT PERSONNEL FILE.

42.1 An employee's right to inspect the personnel records that an employer maintains may be found in Labor Code § 1198.5. Section 1198.5 was amended effective January 1, 2001 to include, with numerous limitations, all public employees in California.

42.2 An employee has the right, pursuant to Labor Code § 1198.5, to inspect his/her personnel records that the employer maintains relating to the employee's performance or to any grievance concerning the employee.

42.3 The employer must do one of the following in order to comply with the statute:

1. Keep a copy of each employee's personnel records at the place where the employee reports to work; or
2. Make the employee's personnel records available at the place where the employee reports to work within a reasonable period of time following an employee's request; or
3. Permit the employee to inspect his or her personnel records at the location where the employer stores the personnel records, with no loss of compensation to the employee.

42.4 The statute does not apply to (1) records relating to the investigation of a possible criminal offense, (2) letters of reference or (3) ratings, reports or records that were obtained prior to the employee's employment; obtained in connection with a promotional examination, or prepared by examination committee members who can be identified.

42.5 By reason of the exception for those agencies under the Information Practices Act, most employees of the State of California are not covered. Most public agency* employees are covered; but if a public agency has established an independent employee relations board or commission, the public agency employee must first seek relief through that body before pursuing relief before the Labor Commissioner or the courts.

42.6 The Division may use its subpoena process to compel the production of an employee's personnel files where the employer fails to provide them to an employee. (O.L. 1998.08.27)

42.7 Rights Of Ex-Employees Protected. The prior statute used slightly different language and from that language could be implied the fact that the protection was extended to ex-employees. The current language can no longer be read in that way. However, research by the DLSE concludes that it was not the intent of the Legislature to limit the protection only to current employees and DLSE will enforce the statute in favor of ex-employees.

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*"Local agency" is defined, for purposes of this statute, at Govt.Code § 53060.3(b) and includes cities, counties, cities and counties, special districts, authorities, community development agencies or other political subdivision of the state.

43 ENFORCEMENT OF WAGES, HOURS AND WORKING CONDITIONS REQUIRED BY THE INDUSTRIAL WELFARE COMMISSION ORDERS.

43.1 Minimum Wage And Overtime. Article XIV, Section I of the Constitution of the State of California states: "The Legislature may provide for minimum wages and for the general welfare of employees and for those purposes may confer on a commission legislative, executive, and judicial powers."

43.2 The Legislature has conferred on the Industrial Welfare Commission (IWC) the power to regulate minimum wages, maximum hours and working conditions for employees in "every industry, trade, and occupation" as specified in Labor Code sections 1171 through 1205.

43.3 Overtime Requirements Of IWC Orders Do Not Apply To Some Employees. The IWC's orders apply to employees in private industry, including those of non-profit organizations. Public employees are expressly excluded from most of the provisions of the Orders. (Note, however, that Order 14 contains no exclusion for public entities.) MW-2001, extends minimum wage coverage to most public employees. Labor Code section 1171 exempts outside salespersons (see Ramirez v. Yosemite Water Co (1999) 20 Cal.4th 785, for definition) and individuals participating in a national service program pursuant to 42 U.S.C. 12571 (also known as AmeriCorp). See Section 50, et seq. of this Manual for a further list of exempt employees.

43.4 Eight-Hour-Day Restoration And Workplace Flexibility Act Of 1999. The Legislature adopted AB 60 and made the following findings:

> "The Legislature hereby finds and declares all of the following: (a) The eight-hour workday is the mainstay of protection for California's working people, and has been for over 80 years. (b) In 1911, California enacted the first daily overtime law setting the eight-hour daily standard, long before the federal government enacted overtime protections for workers. (c) Ending daily overtime would result in a substantial pay cut for California workers who currently receive daily overtime. (d) Numerous studies have linked long work hours to increased rates of accident and injury. (e) Family life suffers when either or both parents are kept away from home for an extended period of time on a daily basis. (f) In 1998 the Industrial Welfare Commission issued wage orders that deleted the requirement to pay premium wages after eight hours of work a day in five wage orders regulating eight million workers. (g) Therefore, the Legislature affirms the importance of the eight-hour workday, declares that it should be protected, and reaffirms the state's unwavering commitment to upholding the eight-hour workday as a fundamental protection for working people. (1999, ch. 134)[*]

43.4.1 Any Exception From The 8-Hour Norm Must Be Clearly Provided. Adoption of this language evidences the Legislature's intent that the 8-hour day is to be

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[*]Note that there had been a number of changes made to some of the IWC Orders during the period 1990 through January 1, 1998; the most important change was in January, 1998, when the IWC did away with the daily overtime requirement in Orders 1, 4, 5, 7, and 9. In cases where the time frame of January 1, 1998 through January 1, 2000, is in issue, the reader's attention is directed to the DLSE Enforcement Policies and Interpretations Manual, October, 1998, pages 79 and 134-136.

considered the norm in California and any exception to that norm must, as with any exception to remedial legislation, be very narrowly construed.

43.5 The Federal Fair Labor Standards Act Does Not Pre-Empt The California Law. The Fair Labor Standards Act ("FLSA") provides minimum wage and overtime protection to workers throughout the United States. The FLSA contains many exceptions and, most importantly provides for an overtime premium for hours in excess of forty in a workweek but without providing for a daily overtime premium. However, the FLSA is designed as a floor, not a ceiling, and provides that where an employer is covered by both federal and state laws and the applicable minimum wage or working conditions are different, the higher standard prevails (29 U.S.C. Section 218(a); see also, Pacific Merchant Shipping v. Aubry 918 F.2d 1409, 1417 (9th Cir. 1990))

43.6 Coverage Or Applicability Of IWC Orders. In addition to those specific employee classifications and positions which are exempt (see Section 50 of this Manual) there are a number of employee classifications which have been determined to be exempt either by case law, federal pre-emption doctrines or policy.

43.6.1 Workers Employed Exclusively On Most Federal Military Reservations Or Ships Are Not Covered. The question of applicability of state law on federal enclaves is a difficult issue. Assistance from DLSE Legal Section should be sought. (O.L. 1994.08.04)

43.6.2 Determining Whether The Work Was Performed On A "Federal Enclave." Employees of a private employer who perform their work on military installations may or may not be subject to state wage and hour law (including the provisions of the Labor Code and any applicable IWC order), depending on the status of the property where the work is performed, and also, on the nature of the claim.

43.6.2.1 Definition Of Federal Enclave. The first question that must be asked is whether the military installation is a "federal enclave." A federal enclave is land over which the federal government exercises legislative jurisdiction under article I, section 8, clause 17 of the United States Constitution. An enclave is created when the federal government purchases land within a state with the state's consent. Not every federal facility is a federal enclave; the federal government's proprietary interest in a piece of land does not create a federal enclave. But the voluntary cession of land by a state to the federal government will result in an actual transfer of sovereignty, unless the purchase is conditioned on the retention of state jurisdiction consistent with the federal use. Also, the federal government can make an "express retrocession" of land that is federally owned so that the state obtains jurisdiction to enforce its laws.

43.6.2.2 Role Of California State Lands Commission. In order to determine whether certain land is a federal enclave, and if so, whether there has been a reservation or retrocession of state jurisdiction, and the date of the cession or retrocession, contact the State Lands Commission, located at 100 Howe Avenue, Ste. 100, Sacramento 95825 (telephone:916-574-1900).

43.6.2.3 **Determining Whether DLSE Has Jurisdiction Over The Claim If The Work Was Performed On A Federal Enclave.** If the land where the work was performed is not a federal enclave, or if state civil law jurisdiction has been reserved or retroceeded, then all state labor law (including the IWC orders) would apply. If the land is a federal enclave, and state jurisdiction hasn't been reserved or retroceeded, then federal law will apply, and also some state laws will apply while other laws will not. The following state law will apply: 1) State law that was in effect at the time of the cession, and which is not inconsistent with federal law, will continue to apply within the enclave unless it is abrogated by Congress, and 2) State law which did not exist at the time of cession will also extend to the enclave when the state regulation has been expressly permitted by Congress. All other state law will not apply. See *Taylor v. Lockheed Martin Corp.* (2000) 78 Cal.App.4th 472, 92 Cal.Rptr.2d 873 [holding that Labor Code § 6310 (which prohibits discrimination for complaining about occupational health and safety matters) covered employees working on a federal enclave (Vandenberg AFB) while the California Fair Employment and Housing Act (FEHA) does not.]

43.6.3 **Workers Employed by Indian Tribes or Businesses Owned by Tribes**. Indian tribes, and businesses owned by tribes, enjoy sovereign immunity which deprives DLSE and non-tribal courts of jurisdiction to enforce or adjudicate claimed violations of wage and hour laws, including claims for unpaid wages, against Indian tribes, business entities owned by tribes, and officers or agents of a tribe acting in their official capacity and within the scope of their authority for work performed on a federal enclave or where state civil law jurisdiction has been reserved or retroceeded.

43.6.3.1 **Geographic Location of the Employment Not Determinative**. The doctrine of tribal immunity extends beyond the geographic borders of a tribe's reservation and covers commercial activities with persons who are not members of a tribe. Tribal immunity applies unless specifically abrogated by Congress or waived by the tribe. Thus, even though substantive state law may apply to off-reservation tribal conduct, tribal immunity operates to deprive the state of the means to enforce such law, at least as to actions or claims for monetary damages. *Kiowa Tribe v. Manufacturing Technologies, Inc* (1998) 523 U.S. 751, 118 S.Ct. 1700.

43.6.3.2 **Limitations on Tribal Immunity**. Indian sovereign immunity does not preclude actions for declaratory or injunctive relief against tribal officials. *TTEA v. Ysleta Del Sur Pueblo* (5th Cir. 1999) 181 F.3d 676. A tribe waives immunity from suit by agreeing to an arbitration clause which provides for court enforcement of an arbitration award. *Smith v. Hopland Band of Pomo Indians* (2002) 95 Cal.App.4th 1, 115 Cal.Rptr.2d 455; *C&L Enterprises v. Potawatomi Indian* Tribe (2001) 532 U.S. 411, 121 S.Ct. 1589. Under the rationale set forth in these cases, DLSE could enforce wage and hour requirements prospectively, through actions for injunctive and declaratory relief. DLSE could process the wage claim of a person employed by a tribe or tribal entity if that person's employment is governed by an arbitration agreement. Of course, the tribe or tribal entity might seek to enforce the arbitration agreement, in which case DLSE's jurisdiction over the claim would case if a court ordered arbitration.

43.6.3.3 Tribal Immunity Extends to Certain Individuals. A tribal entity, including tribal owned businesses, are treated as the tribe for immunity purposes. This immunity extends to individual tribal officials and agents acting in their representative capacity and within the scope of their authority. Trudgeon v. Fantasy Springs Casino (1999) 71 Cal.App.4th, 84 Cal.Rptr.2d 65; Redding Rancheria v. Superior Court (2001) 88 Cal.App.4th 384; 105 Cal.Rptr.2d 773.

43.6.3.4 Tribal Immunity Does Not Extend Generally to Tribal Members. Congress, at 28 U.S.C. §1360, expressly conferred California with civil jurisdiction over Indian territory within the State's boundaries. But this jurisdiction only applies to individual Indians; not to tribes or tribal entities. Great Western Casinos, Inc. v. Morongo Band of Mission Indians (1999) 74 Cal.App.4th 1407, 88 Cal.Rptr.2d 828; Bryan v. Itasca County (1976) 426 U.S. 373, 96 S.Ct. 2102. Because tribal sovereign immunity does not protect individual tribal members, DLSE may enforce and adjudicate claims for unpaid wages against businesses owned by persons who are tribal members, as long as the business is not owned by the tribe or an entity created by the tribe.

43.6.3.5 No Jurisdiction to Enforce Civil Penalty Provisions in Labor Code Against Tribes or Tribal Business Entities. California can enforce "criminal/prohibitory" laws, but not "civil/regulatory" laws against tribes and tribal entities. Middletown Rancheria v. Workers Comp. Appeals Bd. (1998) 60 Cal.App.4th 1340, 71 Cal.Rptr.2d 105, held that despite a criminal sanction, workers compensation laws are "civil/regulatory", so the State lacks jurisdiction over the tribe for the purpose of enforcing California workers' compensation insurance laws. The same analysis would apply to other citable civil offenses. As with wage and hour claims, DLSE has jurisdiction to enforce these laws as to businesses owned not by the tribe but by tribal members.

43.6.3.6 Specific Laws Governing Indian Casinos. The governing federal statute, the Indian Gaming Regulatory Act of 1988 (25 U.S.C. §2701, et seq.) sets out a comprehensive scheme for regulating gaming on Indian lands, but also provides for the application of state law to a significant degree. The Act requires compacts between tribes and states to govern the scope and conduct of Indian casino gaming, and these compacts may further allocate jurisdiction between the tribe and the state. The Indian Gaming Compact adopted by California, under which Indian casino gambling is now regulated, is completely silent as to wage and hour issues. The Compact expressly allows tribes to maintain their own workers' compensation insurance systems, while requiring independent contractors doing business with a tribe to comply with state workers' insurance compensation laws.

43.6.3.7 Applicability of Federal Wage and Hour Law to Tribes and Tribal Entities. The issue of the applicability of the Fair Labor Standards Act to tribes and tribal entities remains unsettled. In Reich v. Great Lakes Indian Fish & Wildlife Comm. (7th Cir. 1993) 4 F.3d 490, the court held that law enforcement officers employed by an Indian agency were exempt from the overtime requirements of FLSA, finding that they should be treated in the same manner as other law enforcement officers who are subject to an

exemption under FLSA. The court did not reach any conclusion on the broader issue of FLSA's applicability to Indian tribes and tribal entities.

43.6.3.8 **Contractual Right to Wage Payment May Be Enforceable Even Though Work Performed On A "Federal Enclave."** Finally, we must note that another source of coverage could be the contractual agreement between the federal entity and the contractor If that agreement requires the contractor to comply with California wage and hour law, the employees would be entitled to enforce their rights under that contract as third party beneficiaries, or DLSE could bring an action on their behalf.

43.6.4 **Public Employees' Partial Exemption From IWC Orders**. Prior to January 1, 2001, public employees were expressly excluded from the Minimum Wage Order, and from Orders 1-13. Thus, those workers were not covered by minimum wage or overtime requirements. In the case of *Andrews v. Central California Irrigation District* (E.D. Cal. 1999), the federal district court, in an unpublished decision, ruled that because there is no provision excluding public employees from Order 14 coverage, an irrigation district's employees are covered by that wage order and its overtime requirements. The IWC, though made aware of this decision, declined to amend Order 14; consequently, public employees are treated the same as private employees under that Order.

43.6.4.1 **Public Employees Are Now Covered By State Minimum Wage Requirements**. With the enactment of MW-2001, on January 1, 2001, public employees ("employees directly employed by the State or any political subdivision thereof, including any city, county, or special district") are now expressly covered by minimum wage requirements. Also, Orders 1-13 were amended effective January 1, 2001 to specify that Sections 1 (Applicability), 2 (Definitions), 4 (Minimum Wage), 10 (Meal and Lodging credits) and 20 (Penalties for Underpayment) of these orders are applicable to public employees, while all other sections of these orders (e.g., overtime, meal and rest period requirements) are not. Order 16 contains similar provisions. Public employees are, therefore, entitled to payment of not less than the minimum wage for all "hours works" within the meaning of the applicable wage order. (O.L. 2002.01.29)

43.6.5 **Only Employees Are Covered**. The coverage of the IWC Orders extends only to employees. If the individual is not an "employee," there is no employment relationship with an employer and the wage orders do not apply. (O.L. 1988.10.27)

43.6.6 **Independent Contractors** are not employees. (See Section 28 of this Manual for a full discussion).

43.6.7 **Volunteers,** who intend to donate their services to religious, charitable, or similar non-profit corporations without contemplation of pay and for public service, religious, or humanitarian objectives, are not employees. (O.L. 1988. 10.27).

43.6.8 **Students** who perform work in the course of their studies, as part of the curriculum, are not employees if they receive no remuneration or credit toward school fees. (O.L. 1993.10.21, 1993.01.07-1).

43.6.9 Members of Religious Orders. In the past, DLSE has followed the rule that members of religious orders and clergy in general are not employees unless they work in commercial establishments which serve the general public. (For purposes of this proviso, DLSE followed the conclusions reached by the U.S. Supreme Court regarding enforcement of the FLSA in the case of Alamo Foundation v. Secretary of Labor (1984) 471 U.S. 290.) However, in view of the broad inclusion of the provisions of AB60 (Labor Code §§ 500, et seq.) this agency is reluctant to continue to take that view. There is no specific exemption for clergy in the California law. The federal rule, obviously, relies on the conclusion that the FLSA was adopted as part of Congress' commerce clause powers and, since churches are not engaged in commerce (except with some limited "employee" exceptions noted by the DOL in Opinion Letters) clergy are easily excluded from the FLSA coverage. It should be noted, however, that many clergy have advanced degrees in theology and would be exempt as a result of the "learned professional" exemption.

43.6.10 Applicants for Relief who exchange labor for aid or sustenance received from a charitable organization are not employees and, thus, not subject to the IWC orders. (Labor Code § 3352(b))

43.6.11 Territorial Scope of Wage Orders. In the absence of a conflict with federal law, California residents who are employed exclusively within the boundaries of California as that boundary is defined by state law, including residents employed on ocean waters located within such boundaries, are covered by the IWC Orders. (Tidewater Marine v. Bradshaw (1996) 14 Cal.4th 557) Federal law does not preempt the application of the IWC Orders to seamen, who are exempt from the provisions of the Fair Labor Standards Act. (Tidewater Marine, supra; Pacific Merchant Shipping v. Aubry 918 F.2d 1409 (9th Cir. 1990); see also O.L. 1987.09.08, 1987.06.13, 1993.02.02)

43.6.12 Absent a conflict with federal law, and subject to proper interpretation of the IWC Orders in light of the existence of territorial boundaries and potential conflicts with the laws of other jurisdictions, the IWC Orders presumptively cover individuals who are domiciled in California but who work partly or, under some circumstances, even principally, outside the state. (Tidewater Marine, supra; United Air Lines, Inc. v. Industrial Welfare Com. (1963) 211 Cal.App.2d 729)

43.6.13 Determining Classification of Employees: Industry or Occupation Order. To determine which IWC industry order applies to an employee or group of employees it is necessary to first determine whether the employer's business is covered by one of the industry orders of the Commission. In the event the employer's business is not covered by an industry order, the employee's occupation is used to determine coverage.

43.7 Industry Orders. Except as provided in the occupational orders, if the employer's business is covered by one of the industry orders, that industry order applies to all classifications of employees, regardless of the kind of work the employee performs, unless the employee is specifically exempted by the applicability section of the industry

order. Industry orders include Orders 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, and 13 as well as wage orders (i.e., MW-01) which provide only for the minimum wage requirement.

43.7.1.1 Examples: a clerical worker employed by a maker of toys works in the manufacturing company covered by Order 1; a driver who delivers supplies for a chain of beauty shops is employed in Order 2, the personal service industry, and a mechanic who works for a retail tire chain is covered by Order 7.

43.7.1.2 Determining Industry Order Coverage. A subsidiary of a large corporation may be covered by the order that the parent corporation is covered by if the parent corporation exercises control over the day-to-day operations of the subsidiary; but if the subsidiary is simply a part of a corporate ownership but not subject to the day-to-day control of the parent corporation as to the operations of the subsidiary, the business of the subsidiary will be the focus of the test to determine which Order applies.

43.7.1.3 Example. A large supermarket chain also owns a bakery. The supermarket chain does not exercise control over the day-to-day operations of the bakery. The bakery is in direct competition with other bakers in the area which are subject to Order 1 (manufacturing). Since the bakery is not subject to the day-to-day control of the parent corporation (which would be under Order 7, Mercantile) the employees of the subsidiary bakery would be covered by Order 1 (Manufacturing). (See also, O.L. 1993.11.03, 1994.10.03)

43.7.2 If the employer's business does not fall within the definition of any covered industry order, the employee's occupation must be examined to see which of the occupation orders to apply.

43.7.2.1 Examples: Employee is a nurse. The nurse may be employed by an employer in a particular industry (i.e., industrial nurse in a manufacturing plant – Order 1) or may be employed by a weight-control establishment under Order 2, or by a hospital under Order 5. If the nurse worked as a private duty nurse in a private home, she would come under Order 15, an occupational order; or if the nurse was employed by a large contractor on a job site, under Order 4, again an occupational order.

43.8 Occupation Orders of The IWC Include:

43.8.1 Order 4, Covering "Professional, Technical, Clerical, Mechanical, and Similar Occupations". This "catch-all" order covers all Professional, Technical, Mechanical and Similar Employees and, until the release of the 2001 Orders, contained the proviso that the provisions would cover "unless such occupation is performed in an industry covered by an industry order..."*

43.8.1.1 Most Employees Not Covered by Industry Orders. Several major types of businesses do not have industry-wide orders covering their operations and their

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*The quoted language was deleted with the 2001 Wage Order. However, DLSE will continue to read into the Applicability section of Order 4 the language "unless such occupation is performed in an industry covered by an industry order..." To do otherwise would lead to ludicrous results.

employees are treated on the whole as employed in Order 4. Some of the classes of occupations covered by Order 4 include all non-exempt employees in banks, utilities and insurance companies.

43.8.2 Order 14, Covering the "Agricultural Occupations". This order covers all work defined in the order as "agricultural", but does not apply to any employee working in the industries handling products after harvest.

43.8.3 Order 15, Covering the "Household Occupations". It is very important to note that Order 15 only applies to employees of a "private householder" and not to employees of firms contracting services to private households.

> "Household Occupations" means all services related to the care of persons or maintenance of a private household or its premises by an employee of a private householder. Said occupations shall include, but not be limited to, the following: butlers, chauffeurs, companions, cooks, day workers, gardeners, graduate nurses, grooms, housecleaners, housekeepers, maids, practical nurses, tutors, valets, and other similar occupations.

But, See Section 2(f) of Order 15 which provides that personal attendants may be employed by a private householder or by any third party employer recognized in the health care industry to work in a private household…"

43.8.4 Order 16, Covering Occupations in Onsite Construction, Mining, Drilling and Logging Operations. It had long been the enforcement position of the DLSE that Order 4 did not cover onsite construction, logging, drilling and mining operations, based on comments made by the IWC in various public meetings. Despite this interpretation, the DLSE took the position that certain tradespeople not employed on construction sites in maintenance or repair, were covered by Order 4. The IWC, in wording the applicability section of the new Order 16 as they did, quite clearly specifically intended to cover all employees in onsite construction and also move any tradespeople in the construction area who DLSE previously found had been covered by Order 4 to coverage under Order 16*.

43.8.4.1 Note: Employees who are not engaged in onsite construction, mining, drilling and logging operations but are employed by employers engaged in these types of work, would be covered by Order 4. (See Harris Feeding Co v. Department of Industrial Relations (1990) 224 Cal.App.3d 464)

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*The IWC obviously intended to cover all occupations in the four onsite areas described in Wage Order 16. As explained in more detail at Section 42.11.3.1, Order 16 states that it "supercedes the applicability of any wage order for those employees employed in occupations covered by this Order."

44 MINIMUM WAGE OBLIGATION.

44.1 Effective January 1, 2001, Minimum Wage In California Was $6.25 Per Hour; January 1, 2002 Minimum Wage Became $6.75 Per Hour.

> Every employer shall pay to each employee wages not less than six dollars and seventy-five cents ($6.75) per hour for all hours worked, and effective January 1, 2002, not less than six dollars and seventy-five cents ($6.75) per hour for all hours worked.

44.1.1 Order MW-2001 amends the minimum wage amounts in all pre-existing wage orders.

44.1.1.1 Minimum Wage Recent History: September 1, 1997: $5.15; March 1, 1998: $5.75; January 1, 2002: $6.25, and January 1, 2002: $6.75.

44.1.2 The minimum wage order states: "Exceptions and modifications to the minimum wage provided in the Industrial Welfare Commission's Orders may be used where any such valid Order is applicable to the employer."

44.1.3 Minimum Wage Now Covers Many Formerly Exempt Employees. In MW-2001, the IWC specifically included the following employees who previously had been subject to "non-statutory full and partial exemptions from the minimum wage":

1. state and local government employees;
2. full-time carnival ride operators;
3. professional actors;
4. personal attendants in private homes other than babysitters under the age of eighteen (18) employed as babysitters for a minor child of the employer in the employer's home;
5. student nurses, and
6. minors.

44.1.4 Learners. The IWC, in wage orders issued after January 1, 2001, amended the exceptions for "Learners" to include minors. Thus, learners (regardless of age) may be paid not less than 85% of the minimum wage rounded to the nearest nickel during their first one hundred sixty (160) hours of employment in occupations in which they have no previous similar or related experience.

44.1.5 Federal Minimum Wage Requirements Differ From California Requirements. Federal Courts, in construing the obligation of the employer under the FLSA, have consistently held that the obligation is met if an employee receives, for each pay period, an amount not less than the minimum wage for the total number of hours worked. Blankenship v Thurston Motor Lines (4th Cir. 1969) 415 F.2d 1193, 1198; United States v. Klinghoffer Bros. Realty Corp. (2nd Cir. 1960) 285 F.2d 487, 490; Dove v. Coupe (D.C. Cir. 1985) 759 F.2d 167, 171; Hershey v. MacMillan Bloedel Containers (8th Cir. 1986) 786 F.2d 353, 357.

44.2 In California, Employer With Obligation To Pay Contract Wage Amount Cannot Offset That Contract Amount With The Minimum Wage Obligation. California law differs dramatically from the FLSA in a crucial way -- the FLSA does not provide

a mechanism for the enforcement of non-overtime, contract based wages which exceed the minimum wage, while California law provides a statutory basis, under the Labor Code, for the enforcement of non-overtime contract based wage claims in excess of the minimum wage. (Labor Code § 1195.5) California law also explicitly prohibits employers from paying employees less than the wages required under any statute or less than the wages required under any contract or CBA.

44.2.1 Statutory Requirements. Labor Code §221 provides: "It shall be unlawful for any employer to collect or receive from an employee any part of the wages theretofore paid by said employer to said employee." Section 222 provides: "It shall be unlawful, in case of any wage agreement arrived at through collective bargaining, either wilfully or unlawfully with intent to defraud an employee, a competitor, or any other person, to withhold from said employee any part of the wage agreed upon." Finally, Section 223 provides: "Where any statute or contract requires an employer to maintain the designated wage scale, it shall be unlawful to secretly pay a lower wage while purporting to pay the wage designated by statute or contract."

44.2.2 All Hours Must Be Paid At Agreed Rate And No Part Of Agreed Rate May Be Used As Credit Against Minimum Wage Obligation. The above cited statutory scheme prevents an employer who operates under a contract that expressly pays employees less than the minimum wage for certain activities (e.g., washup time, recording time, etc.) that would constitute "hours worked" within the meaning of state law, from using any part of the wage payments that are required under that contract for activities that are compensated in an amount that equals or exceeds the minimum wage, as a credit toward satisfying minimum wage obligations for those activities that under the contract terms, are to be compensated at less than the minimum wage. Instead, all hours for which the employees are entitled to an amount equal or greater than the minimum wage pursuant to the provisions of the contract must be compensated precisely in accordance with the provisions of the contract; and all other hours (or parts of hours) which the contract explicitly states will be paid at less than the minimum wage, but which constitute "hours worked" under state law, must be compensated at the minimum wage. (O.L. 2002.01.29)

44.2.2.1 Federal Enforcement Provision Not Allowed In California. Averaging of all wages paid under a contract within a particular pay period in order to determine whether the employer complied with its minimum wage obligations is not permitted under the circumstances outlined above, for to do so would result in the employer paying the employees less than the contract rate for those activities which the contract requires payment of a specified amount equal to or greater than the minimum wage; such a payment scheme would violate Labor Code §§ 221-223.

45 WORKING CONDITIONS UNDER THE IWC ORDERS

45.1 **Reporting Time Pay. Section 5 of each of the Orders provides:**

(A) Each workday an employee is required to report for work and does report, but is not put to work or is furnished less than half said employee's usual or scheduled day's work, the employee shall be paid for half the usual or scheduled day's work, but in no event for less than two (2) hours nor more than four (4) hours, at the employee's regular rate of pay, which shall not be less than the minimum wage.

(B) If an employee is required to report for work a second time on any one workday and is furnished less than two (2) hours of work on the second reporting, said employee shall be paid for two (2) hours at the employee's regular rate of pay, which shall not be less than the minimum wage.

(C) The foregoing reporting time pay provisions are not applicable when:
- (1) Operations cannot commence or continue due to threats to employees or property; or when recommended by civil authorities; or
- (2) Public utilities fail to supply electricity, water, or gas, or there is a failure in the public utilities, or sewer system; or
- (3) The interruption of work is caused by an Act of God or other cause not within the employer's control

(D) This section shall not apply to an employee on paid standby who is called to perform assigned work at a time other than the employee's scheduled reporting time.

45.1.1 **Reporting Time Pay In Connection With Call Back**. If the employee is on a paid standby and is called to work, the reporting time pay provisions do not apply. In order to qualify as paid standby, the hourly wage for the standby time which has been agreed to or, absent a specific agreement, at the employee's regular rate of pay must be paid.

45.1.1.1 Reporting time pay constitutes wages. *(Murphy v. Kenneth Cole* (2007) 40 Cal. 4th 1094). Thus, failure to pay all reporting time pay due at the time of employment termination may be the basis for waiting time penalties pursuant to Labor Code § 203.

45.1.2 **Employee Reports To Work And Told To Return Later**. The DLSE has been asked what the reporting time pay requirements are when an employee is told to report at a specific time and is then told that there is no work available at that time but that he or she is to report again, say, two hours later. The language of the regulation clearly requires that the applicable premium be paid if, at the first reporting of the day, the employee is not put to work or is provided less than one-half the scheduled or usual number of hours; this would be the result despite the fact that the employee might, eventually, work more than the scheduled hours in the day in a subsequent reporting. At the second reporting of the day the same plain language of the regulation would require that in the event the employee is furnished with less than two hours of work, the employee is, nevertheless, entitled to recover two hours at the employee's regular rate of pay.

45.1.2.1 The reporting time premium requirement is designed to discourage employers from having employees report unless there is work available at the time of the reporting and is further designed to reimburse employees for expenses incurred in such situations.

45.1.2.2 If the employee was not simply told to report later, but the employee's activities were restricted by the employer pending the second reporting time, the time spent would be compensable as waiting time. (See also Section 45.1.6.1, below)

45.1.3 "Employee's Usual Or Scheduled Day's Work." If an employee has no regularly scheduled shift, then the usual shift worked by the employee (but in no event less than two or more than four hours) must be paid. However, if an employee has a regularly contracted "scheduled" relief shift* of less than two (2) hours the reporting time penalty is not applicable. However, in such a situation the employee must be paid for the regularly scheduled contracted amount.

45.1.3.1 Example: Assume a worker is scheduled to work four days of two hours each and one day of one hour. The regularly contracted relief shifts are not subject to the reporting time penalty. Note the emphasis on regularly contracted part-time relief (see AG Opinion in footnote). This exception would not apply unless the shift is regularly scheduled and is less than two (2) hours.

45.1.4 Required "Training" Or "Staff" Meeting Attendance. DLSE has been asked on a number of occasions how the Reporting Time provisions of the Orders affect a situation where the employer requires employees to attend a short training meeting, staff meeting or similar gathering under a variety of circumstances. Most common are:

1. Required meeting is scheduled for a day when the worker is not usually scheduled to work. The employer tells all of the workers that attendance at the meeting is mandatory and a one- or two-hour shift is "scheduled" for this meeting. For those workers not "regularly scheduled" to work, the employee must be paid at least one-half of that employee's usual or scheduled day's work.
2. Required meeting is scheduled on the day a worker is scheduled to work, but after the worker's scheduled shift ends.
   a. If there is an unpaid hiatus between the end of the shift and the meeting, the employee must be paid, pursuant to Section 5(B) (see above) at least two hours for reporting a second time in one day.
   b. If the meeting is scheduled to immediately follow the scheduled shift, there is no requirement for the payment of reporting time no matter how long the meeting continues.

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*There is an Attorney General Opinion (AG Opn. NS-5108, September 21, 1943, page 235-236) regarding the reporting time penalty as it appeared in 1943 ("each day an employee is required to report to work and does report for work but is not put to work or works 4 hours or less the employer shall pay the employee for not less than 4 hours at $.50 per hour"). In the opinion, the AG concluded: "where an employee is called to report and does report expecting to receive the usual day's work with the prescribed pay therefor she is denied the opportunity to earn a living wage if she is not compensated for at least a portion of the time she makes available to the proposed employer. This would not be true in connection with regularly contracted relief for part-time work...Should a woman be employed regularly to work a lunch hour to relieve the full-time clerk and reports to work expecting and knowing that she is to receive but one hour's employment per day and this is the regular part-time arrangement, we are of the opinion that is was not the intention of the mercantile order to apply to such an arrangement and that the employee may be paid the minimum wage at the hourly rate for the time actually employed." (Emphasis added)

45.1.5 Interruption Of Work. You will note that reporting time pay is not required when "the interruption of work [requiring the second reporting time] is caused by an Act of God or other cause not within the employer's control." DLSE has recently concluded that rain or other inclement weather that makes it impossible or unsafe to work falls into the category of "an Act of God or other cause not within the employer's control." This means that if workers are sent home (either immediately upon reporting to work or during the workday) because of rain or other inclement weather, there is no obligation to pay reporting time pay.

45.1.5.1 However, employees must be paid for all time they are restricted to the employer's premises, or worksite, while "waiting out" a delay caused by rain or other inclement weather, if they are not free to leave the premises or worksite during that time, even if the employees are relieved of all other duty during the period of time they are waiting for weather conditions to improve. The reason for this is that under the IWC orders, employees must be paid for all "hours worked," and the term "hours worked" includes both "all time the employee is suffered or permitted to work, whether or not required to do so," and all "time during which an employee is subject to the control of an employer." Restricting employees to the employer's premises, or worksite, means that the employee is subject to the employer's control so as to constitute "hours worked." See *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, and *Bono Enterprises v. Labor Commissioner* (1995) 32 Cal.App.4th 968. Under such circumstances, the employees must be paid their regular rate of compensation (which cannot be less than the minimum wage), or any overtime rate, if applicable. (O.L. 1998.12.28)

45.1.6 Restrictions Placed On Employee In Situations Involving Weather Delays. Even if the employee is given some limited freedom to leave the employer's premises or worksite while "waiting out" a delay caused by rain or inclement weather, there will still be an obligation to pay the employee for such time if the employee is so restricted geographically and/or temporally that the worker is deprived of effective use of his own time.

45.1.6.1 Example: If a worker is told that he can go across the street to a café during a rain delay, but that he must report back to work within five minutes of being notified that work is starting, the entire time that the worker is waiting in the café will constitute "controlled stand-by time", which is treated as "hours worked". (See generally, *Berry v. County of Sonoma* (9th Cir.1994) 30 F.3d 1174)

45.2 Meal Periods. Labor Code § 512(a) provides:

> An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

Section 11 of Wage Order 4-2001 provides:

> (A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work, the meal period may be waived by mutual consent of the employer and the employee. Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.
>
> (B) If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the meal period is not provided.
>
> (C) In all places of employment where employees are required to eat on the premises, a suitable place for that purpose shall be designated.
>
> (D) Notwithstanding any other provision of this order, employees in the health care industry who work shifts in excess of eight (8) total hours in a workday may voluntarily waive their right to one of their two meal periods. In order to be valid, any such waiver must be documented in a written agreement that is voluntarily signed by both the employee and the employer. The employee may revoke the waiver at any time by providing the employer at least one (1) day's written notice. The employee shall be fully compensated for all working time, including any on-the-job meal period, while such a waiver is in effect.

45.2.1 Employers Must Provide Meal Periods.

In *Brinker Restaurant Corporation v. Superior Court of San Diego* (2012) 53 Cal.4th 1004, the California Supreme Court interpreted the meal period provisions of Labor Code section 512(a) and Section 11 of Wage Order 5-2001 holding that in order to "provide" a meal period, employers must relieve employees of all duty. During that time, employees must be 'free to come and go as they please." If an employer has relieved an employee of all duty and if work does continue, the employer, although not liable for meal period premium pay, must pay for the time worked. In addition, the employer must relinquish control over their activities, permit them a reasonable opportunity to take an uninterrupted 30-minute meal period and not impede or discourage an employee from doing so. It is not enough just to make the meal period "available". Even if an employer has a formal policy of providing meal periods, it will be a violation if the employer creates incentives to forego, or otherwise encourages skipping of, meal periods.

45.2.1.1 Payment for Work Performed During Meal Period.

An employee who elects to work during a meal period must be paid for all hours worked and be compensated for all hours worked with payment of the appropriate overtime premium if work performed during a meal period results in accrual of daily or weekly overtime. An employer has the obligation to accurately record all hours worked, including those worked during a meal period, and must properly report all such time on wage statements, as required by Labor Code section 226(a).

45.2.2 **Note:** Labor Code § 512, requiring an employer to provide a meal period, does not exclude any class of employee. Consequently, it would appear that exempt employees are also entitled to meal periods in accordance with that section. However, the premium pay provided in Labor Code § 226.7 for failure to provide the meal period only applies if the meal period is required by the applicable IWC Order. The IWC Orders specifically excluded exempt employees from the coverage of the IWC meal (continued on page 45 – 5)

period requirement. Thus, no premium pay may be imposed on a employer who fails to provide a meal period to an exempt employee.

45.2.3.1 Limited Waiver Of Meal Period Requirement Allowed In Two Situations:

1. If a work period of not more than six hours will complete the day's work, the meal period may be waived entirely by mutual consent of the employer and employee. [1]
    a. Note, there is no requirement that the waiver be in writing in this situation.
    b. There is no requirement in this situation that the employee be able to eat while on duty as is the case with an "on-duty" meal period described below.
    c. An employer may not employ an employee for a work period of more than 10 hours in a workday without providing a second meal period. This second meal period may be waived if the total hours of work are no more than 12 hours *and* the first meal period has not been waived.
2. An on-duty meal period may be provided if the employee agrees in writing, *and* such on-duty meal is allowed "only when the nature of the work prevents an employee from being relieved of all duty."
    a. The test of whether the nature of the work prevents an employee from being "relieved of all duty" is an objective one. An employer and employee may not agree to an on-duty meal period unless, based on objective criteria, any employee would be prevented from being relieved of all duty based on the necessary job duties.
    b. The written agreement for an on-duty meal period *must* contain a provision that the employee may, in writing, revoke the agreement at any time.
    c. DLSE does not have the jurisdiction to exempt an employer from the meal period provisions in the Orders or those of Labor Code §§226.7, 512.

45.2.3.2 Collective Bargaining Exceptions.

Labor Code section 512 has been amended to except certain employees in specified industries and occupations from the meal period requirements of Section 512(a) where collective bargaining agreements meet certain requirements.

1. **Wholesale Baking Industry**. Section 512(c) provides that Section 512(a) does not apply to employees in the wholesale baking industry who are: (a) subject to an Industrial Welfare Commission Order and (b) covered by a valid collective bargaining agreement (CBA) that provides (i) for a 35-hour workweek consisting of five seven-hour days and (ii) payment of 1 and ½ the regular rate of pay for time worked in excess of seven hours per day and (iii) a rest period of not less than 10 minutes every two hours. This amendment was effective 1/1/2003.

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[1] Labor Code Section 512 which requires the meal periods, allows the IWC to adopt a working condition permitting a meal period to commence after six hours of work – however, the IWC has not done so. Consequently, the employer and employee must agree to the waiver under the conditions set out in the Orders.

2. **Motion Picture and Broadcasting Industries**. The meal period provisions of Section 512(a), Section 226.7, and IWC Wage Orders 11 and 12 do not apply to employees in the motion picture industry and the broadcasting industry that are covered by a valid collective bargaining agreement that: (i) provides for meal periods and (ii) includes a monetary remedy if the employee does not receive a meal period required by the agreement. This amendment was effective 1/1/2006.

3. **Construction Occupation, Commercial Drivers, certain Security Services Industry employees, and employees of certain Utilities.** The meal period provisions of Section 512(a) and (b) do not apply to a limited sector of employees that are covered by a valid collective bargaining agreement. This amendment was effective 1/1/2011.

The CBA exception provided by LC 512(e)&(f) applies only to employees in a construction occupation, commercial drivers, certain employees of security firms registered pursuant to Chapter 11.5 of the Business & Professions Code, and employees of electrical, gas, and publicly owned electric utilities.

The Section 512(e)&(f) exceptions to the Section 512(a)&(b) meal period requirement apply ***only if***: (1) The employee is covered by a valid collective bargaining agreement; (2) The valid collective bargaining agreement (i) expressly provides for the wages, hours of work, and working conditions of employees; (ii) expressly provides for meal periods for those employees; (iii) final and binding arbitration of disputes concerning application of its meal period provisions; (iv) premium wage rates for all overtime hours worked; and (v) a regular hourly rate of pay of not less than 30 percent more than the state minimum wage rate.

Other Collective Bargaining Agreements. There is no exception to the requirement for meal periods for employees on account of a CBA other than those provided above. Labor Code § 514 was amended effective January 1, 2002, to repeal the statutory exemption from the meal period requirement in the case of workers covered by a collective bargaining agreement. The Legislature adopted a statement that this amendment was declarative of existing law and shall not be deemed to alter, modify or otherwise affect any provision of any IWC Order. IWC Orders 1-15 and 17 do not provide, and never have provided, a CBA opt-out for meal period requirements. Presently, the only CBA opt-outs are those contained in Section 512 (1)(c-g). [Historical note: In 2006 the Court of Appeal declared the Order 16 opt-out provision to be unenforceable due to its having been adopted in violation of the express provisions of Labor Code § 516 which does not allow the IWC to adopt meal period requirements that are inconsistent with Labor Code § 512. Bearden v. Borax, 138 CA 4th 429 (2006). The enactment of AB 569, amending Labor Code section 512 effective January 1, 2011, created an opt-out which varies in substance from the provision in Wage Order 16. There are two additional requirements not provided for in Wage Order 16, making the opt-out contained in 512 more restrictive than the previous opt-out in wage Order 16 that was found to be unenforceable.]

45.2.4.1 **Order 1-2002 Amendment Allowing Parties To Collective Bargaining Agreements To Agree To A Meal Period After Six Hours Of Work**. Effective July 1, 2002, IWC Order 1-2002 allows a limited exception to the rule that no employer shall employ a worker for a period of more than five hours without a meal period to workers employed under the terms of a collective bargaining agreement. The IWC added a second sentence to Paragraph A that provides: "In case of employees covered by a valid collective bargaining agreement, the parties to the collective bargaining agreement may agree to a meal period that commences after no more than six (6) hours of work." Note that this CBA exception only applies to Order 1.

45.2.4.2 There is, of course, language in the Orders which allows an employee to waive the meal period by accepting an on-duty meal period if all of the required circumstances exist. California law has always allowed a union, as the collective bargaining representative, to act on behalf of its members where such waiver is allowed. (*Porter v. Quillin* (1981) 123 Cal.App.3d 869). However, as is the case where there is no CBA, it must be established by objective criteria that the conditions for the on-duty meal period are met before the waiver is allowed. The parties may not agree to the on-duty meal period because it is desired or helpful.

45.2.5 **"On-Duty Meal Period".** Even if all of the circumstances exist to allow an on-duty meal period, the employee must be provided with the opportunity to eat his or her meal while performing the duties required.

45.2.6 **Meal Time Training Or Client Meetings.** If an employee is required by the employer to attend a luncheon, dinner or other work related meal, or training accompanied by a meal, the employer must pay for the cost of the meal and the employee must be paid at the employee's regular rate of pay. As the time is work time, it must be counted as hours worked for overtime purposes. In addition, covered employees continue to be entitled to a duty free 30 minute meal period in accordance with the terms of the applicable Wage Order.

45.2.7 **Premium For Failure Of The Employer To Provide The Meal Period**. For each workday that the employer fails to provide the required meal period, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation. This premium pay is a "wage" under Labor Code § 200.

45.2.8 **Premium For Missed Meal Period Is Only Imposed Once Each Day**. No matter how many meal periods (rest period penalties are separate) are missed, only one meal period premium is imposed each day. Thus, if an employer employed an employee for twelve hours in one day without any meal period, the penalty would be only one hour at the employee's regular rate of pay.

45.2.9 **Premium Is Imposed For Failure To Provide Meal Period In Accordance With Applicable IWC Order**. No employer shall require any employee to work during any meal period mandated by an applicable order of the Industrial Welfare Commission. If an employer fails to provide an employee a meal period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal period is not provided. (Labor Code § 226.7)

45.2.9.1 **Relationship Between Record-Keeping Requirement And Meal Period.** The employer has an obligation under the record-keeping requirements set forth in the Wage Order to track meal periods unless "all work ceases."

45.2.10 **Wage Order 16-2001 Meal Period Requirements.** In addition to the requirements contained in the other Orders, Order 16-2001, Section 10(C), requires that the employer furnish "an adequate supply of potable water, soap, or other suitable agent and single use towels for hand washing."

45.2.10.1 Note: In Orders 4 and 5, the IWC has determined that hours of work of employees in the Health Care Industry are to be determined by the federal definition of hours worked. Thus, as discussed at Section 47.3.2, *et seq.* of this Manual, the employees in the Health Care Industry may be required to remain on the premises during their paid meal period.

45.3 **Rest Periods**. Section 12 of each of the Orders (except Order 16) provides:

> (A) Every employer shall 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 shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 ½) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.
> (B) In an employer fails to provide an employee a rest period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the rest period is not provided.

45.3.1 **"Major Fraction".** In *Brinker Restaurant Corporation v. Superior Court of San Diego County (Hohnbaum)* [1], the court interpreted the phrase "major fraction thereof" to mean the time period between three and one-half hours and four hours and does not mean that a rest period must be given every three and one-half hours. In so doing, the Court rejected as incorrect a 1999 interpretation by the Labor Commissioner that the term "major fraction thereof" means an employer must provide its employees with a 10-minute rest period when the employees work any time over the midpoint of each four hour block of time. The Court ruled that the rest periods must be given if an employee works between three and one-half hour and four hours, but if four or more hours are worked, it need be given only every four hours, not every three and one-half hours

45.3.2 **Rest Period Is Paid And Counted Toward Hours Worked**. The regulation requires that the rest period time shall be counted as hours worked for which there shall be no deduction from wages.

45.3.3 **The Rest Period Is A "Net" Ten Minutes**. The IWC has provided that the rest period is net – in other words, the rest period begins when the employee reaches an area away from the work station that is appropriate for rest. The employee is entitled to one rest period per work period. This means than an employer may not (except in the case of certain workers in extended care homes under Order 5) count periods of less than 10 minutes as rest periods meeting the requirements of Section 12 of the IWC Orders. (O.L. 2002.02.22; 1986.0l.03)

45.3.4 **Rest Period Is Not Limited To Toilet Breaks**. The intent of the Industrial Welfare Commission regarding rest periods is clear: the rest period is not to be confused with or limited to breaks taken by employees to use toilet facilities. The conclusion is required by a reading of the provisions of IWC Orders, Section 12, Rest Periods, in conjunction with the provisions of Section 13(B), Change Rooms and Resting Facilities which requires that "Suitable resting facilities shall be provided in an area separate from the toilet rooms and shall be available to employees during work hours."

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[1] **Significant Note**: On October 22, 2008, the California Supreme Court granted review of the California Court of Appeal decision in *Brinker Restaurant Corp. v. Superior Court of San Diego County (Hohnbaum).* The Supreme Court's grant of review supersedes the Court of Appeal's decision, and the Court of Appeal decision may not be cited or relied on by a court or a party in any other action. (California Rules of Court 8.1105(e) and 8.1115(a)). In its review of the *Brinker* matter, the California Supreme Court may clarify and confirm, among other things, the extent of an employer's obligation under the rest period requirements. Until there is further clarification from the courts and in the absence of other guidance, the DLSE will continue to follow the clear language of the law and consider any time in excess of two (2) hours to be a major fraction mentioned in the regulation. (O.L. 1999.02.16).

45.3.4.1 Allowing employees to use toilet facilities during working hours does not meet the employer's obligations to provide rest periods as required by the IWC Orders. This is not to say, of course, that employers do not have the right to reasonably limit the amount of time an employee may be absent from his or her work station; and, it does not indicate that an employee who chooses to use the toilet facilities while on an authorized break may extend the break time by doing so. DLSE policy simply prohibits an employer from requiring that employees count any separate use of toilet facilities as a rest period.

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45.3.5 Order 16, Exceptions. Order 16 covering the on-site occupations contains some exceptions which allow the employer to "stagger" the rest periods to avoid an interruption in the flow of work and maintain continuous operations. The DLSE has opined that an employer subject to Order 16 still may not schedule a rest period at the very beginning or very end of the workday. The very idea of a "rest period" is to provide the worker with needed rest time during the workday. (O.L. 2001.09.17)

45.3.6 Opt-Out Clause In CBA's. Under Order 16 only, the IWC Orders provide that parties to collective bargaining may chose to opt-out of the rest period provisions if the CBA provides "equivalent protection" for the workers.

45.3.6.1 Equivalent protection has been held to mean that the CBA must contain the same substantive requirements both as to the right to rest periods and the right to premium pay for rest period violations. (O.L. 2001.09.17)

45.3.6.2 In addition, if the CBA specifically provides final and binding arbitration for resolving disputes regarding the rest period provisions of a CBA, the collective bargaining agreement will prevail. The IWC announced in its Statement As To The Basis for Order 16-2001, that this language was intended to mean that the premium does not apply in the event that the CBA provides for final and binding arbitration of disputes involving the enforcement of the rest period provisions.

45.3.7 Premium For Failure To Provide Rest Periods is the same as that imposed for failure to provide meal periods. Note that only one hour for failure to provide a rest period may be imposed in each day regardless of the number of rest periods missed.

45.4 Meals and Lodging Costs.

45.4.1 The credit associated with meals and lodging contained at Section 10 of each of the Orders have been increased:

Credits	January 1, 2001	January 1, 2002
Lodging:		
Room occupied alone	$29.40 per wk.	$31.75 per wk.
Room shared	$24.25 per wk.	$26.20 per wk.
Apartment: two-thirds (b) of the ordinary rental value, and in no event more than:	$352.95 per mo.	$381.20 per mo.
Where a couple are both employed by the employer, two-thirds (b) of the ordinary rental value, and in no event more than:	$522.10 per mo.	$563.90 per mo.
Meals:	January 1, 2001	January 1, 2002
Breakfast	$2.25	$2.45
Lunch	$3.10	$3.35
Dinner	$4.15	$4.50

45.4.2 Only Actual Meal and Lodging Costs May Be Used As Credit Against The Employer's Minimum Wage Obligation. The actual costs of meals and lodging (in no event to exceed the amounts set out above) may be offset against the minimum wage obligation of the employer. If the actual cost of the meal or the lodging is less than the rate shown in the Orders, only the actual amount may be credited.

45.4.3 Meals must be "an adequate, well-balanced serving of a variety of wholesome, nutritious foods...consistent with the employee's work shift."

45.4.4 Lodging means "living accommodations available to the employee for full-time occupancy which are adequate, decent, and sanitary according to usual and customary standards. Employees shall not be required to share a bed."

45.4.5 Written Agreement Required For Credit Against Minimum Wage: Meals or lodging may not be credited against the minimum wage without a voluntary written agreement between the employer and the employee which explicitly references that such credits are being applied toward the minimum wage obligation of the employer. In addition, "Deductions shall not be made for meals not received nor lodging not used."

45.4.6 Employer May Not Force Purchase On The Employee. As the California courts have determined, deductions by employers which amount to coerced purchases from the employer are forbidden by the provisions of Labor Code § 450. (See California State Restaurant Assn. v. Whitlow (1976) 58 Cal.App.3d 340) Consequently, while the offer may be made by the employer, it may not be couched in terms of a requirement that the employee purchase the meal or the lodging.

45.4.6.1 Prior History. IWC Orders prior to 1976 had contained language which was silent on the question of the employer's right to credit meals toward the employer's minimum wage requirement. It had been the established practice in the restaurant industry up until 1976 to credit the minimum wage obligation if meals were "furnished or reasonably made available" to the employee. The Whitlow court noted that "In light of the prohibition against compelled purchases in section 450, the implied power of the commission to authorize in kind payments must be limited to situations in which such manner of payment is authorized by specific and prior voluntary employee consent. This limitation is consistent with the strong public policy favoring full payment of minimum wages, which the Legislature has effectuated by making payment of less than the minimum wage unlawful." (Id., at 58 Cal.App.3d p. 348)

45.4.7 Labor Code § 1182.8. Labor Code § 1182.8 permits employers of apartment managers to charge up to two-thirds of the fair market rental value of an apartment if:

1. there is a voluntary written agreement, and
2. no portion of the rental charge is used to meet the minimum wage obligation.

45.4.7.1 This means that the manager must be paid at least the minimum wage for all of the hours worked* and none of the apartment value may be credited toward that minimum wage obligation.

45.4.7.2 Calculating Overtime. In situations involving either charging two-thirds of the fair market value or use of the credits allowed in Section 10 of the Orders, if it becomes necessary to establish what the regular rate of pay is for purposes of overtime computation, the difference between the amount paid for rent or the amount taken as credit and the actual fair market value of the apartment must be figured into the calculation. (See discussion at Section 49.1.2.2 of this Manual)

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*Note that the "hours worked" definition for these types of employees is different under Order 5. (See Brewer v. Patel (1993) 20 Cal.App.4th 1017, 25 Cal.Rptr.2d 65)

45.5 Uniform And Tool Requirements.

45.5.1 The IWC Orders, Section 7, Section 9(A), provides, inter alia:

> When uniforms are required by the employer to be worn by the employee as a condition of employment, such uniforms shall be provided and maintained by the employer. The term "uniform" includes wearing apparel and accessories of distinctive design or color.

45.5.2 Color And/Or Design. The Division has historically taken the position, based upon notes of the Commission, that nurses can wear their white uniforms wherever they work, and the employer, consequently, need not pay for them. Other workers in occupations for which the particular white uniform is generally useable would fall into the same category. (See, generally, O.L. 1994.02.16-1)

45.5.3 If, instead of being professional nurses, the individuals were house-keepers or clerical employees, the rationale contained in the Statement of Basis would not be applicable since a uniform would not be "generally usable in the occupation". Consequently, any uniform (regardless of color) which is required to be worn by an individual in an occupation which would not generally wear that particular uniform, must be paid for by the employer. (See, generally, O.L. 1991.02.13)

45.5.4 If, for instance, given a choice of pastel or white uniforms, a pastel uniform were freely chosen by a nurse or other health care professional in an occupation which generally wears a white uniform, it is the opinion of the Division that it need not be paid for by the employer because the employer would not have been required to pay for the standard white uniform. The employee could not take advantage of the option and thereby create an obligation for the employer. Such would not be the case, of course, if the choice of wearing a standard white uniform were not available.

45.5.5 In the Statement of Basis for the Orders beginning in 1980, the IWC accepted DLSE enforcement policy:

> The definition and [DLSE] enforcement policy is sufficiently flexible to allow the employer to specify basic wardrobe items which are usual and generally usable in the occupation, such as white shirts, dark pants and black shoes and belts, all of unspecified design, without requiring the employer to furnish such items. If a required black or white uniform or accessory does not meet the test of being generally usable in the occupation the employee may not be required to pay for it.*

45.5.6 Clothing And Accessories Of A Distinctive Design. DLSE has taken the position that clothes of a particular design (e.g., tropical shirts) would be so distinctive as to require that the employer pay the cost of such clothes. (O.L. 1990.09.18) In the case of DIR v. UI Video (1997) 55 Cal.App.4th 1084, the dress code imposed by the employer which was found to be a uniform consisted of a blue shirt and tan or khaki pants.

45.5.7 Tools. When tools or equipment are required by the employer or are necessary to the performance of a job, such tools and equipment shall be provided and maintained by

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*This language appeared in the Statement As to The Basis for the 1980 and subsequent Orders and inasmuch as no substantive changes were made to the language dealing with uniforms, the basis for the language remains valid.

the employer, except that an employee whose wages are at least two (2) times the minimum wage provided herein may be required to provide and maintain hand tools and equipment customarily required by the trade or craft. This subsection (B) shall not apply to apprentices regularly indentured under the State Division of Apprenticeship Standards.

45.5.8 Remedy. Failure of an employee to receive two times the minimum wage while still obligated to purchase the tool would result in the employer being liable for the cost of the tool or equipment under Labor Code § 2802.

45.5.8.1 Definition Of "Hand Tools And Equipment". DLSE has opined that the term "hand tools and equipment" is to be given its literal meaning. Such hand held tools and hand held equipment do not include power driven tools or equipment. The IWC intended that the term be limited to hand held tools such as hammers or screw drivers. The word equipment is meant to encompass hand held measuring instruments or like apparatus. The IWC Statement As To The Basis of the 2000 Orders states: "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."

45.5.9 Deduction From Wages For Non-Return Of Uniforms Or Tools. The IWC, except in Order 16-2001, continues the language which ostensibly allows employers to deduct from an employee's final wages for the cost of uniforms or tools provided by the employer and not returned. The Orders require that the deduction be authorized by a prior written authorization by the employee.

45.5.10 Caveat: It is important that Deputies note that the DLSE must enforce the IWC Orders as written; however, employers should be warned that the deduction language is not in compliance with Labor Code Section 224, 300 and 400-410. Also, of course, the IWC Orders specifically prohibit deductions for normal wear and tear.

45.5.11 Even if there is a deduction made, the deduction may only represent the reasonable cost of the equipment or tool provided by the employer and not returned. The burden is on the employer to establish the reasonable cost.

46 HOURS WORKED.

46.1 Under the basic definition set out in all of the IWC Orders, "Hours Worked" means the time during which an employee is subject to the control of any employer, and includes all of the time the employee is suffered or permitted to work, whether or not required to do so. (e.g., Order 1-2000, § 2.(H).) Where it is determined that the employee's time is subject to the control of the employer, as in the contexts delineated below, the time constitutes "hours worked".

46.1.1 **The DLSE Interpretation Of Hours Worked** which provides that: "[U]nder California law it is only necessary that the worker be subject to the 'control of the employer' in order to be entitled to compensation" was found by the California Supreme Court to "be consistent with [the Court's] independent analysis of hours worked." *Morillion v. Royal Packing Co*. (2000) 22 Cal.4th 575, 583 [citing to DLSE O.L. 1993.03.31].

46.2 **Travel Time**: If an employee is required to report to the employer's business premises before proceeding to an off-premises work site, all of the time from the moment of reporting until the employee is released to proceed directly to his or her home is time subject to the control of the employer, and constitutes hours worked. (O.L. 1994.02.16; *Morillion v. Royal Packing Co*. (2000) 22 Cal.4th 575.

46.3 **Extended Travel Time**. The California rule requires wages to be paid for all hours the employee is engaged in travel. The state law definition of "hours worked" does not distinguish between hours worked during "normal" working hours or hours worked outside "normal" working hours, nor does it distinguish between hours worked in connection with an overnight out-of-town assignment or hours worked in connection with a one-day out-of-town assignment. These distinctions, and the treatment of some of this time as non-compensable, are purely creatures of the federal regulations, and are inconsistent with state law. (O.L. 2002.02.21).

46.3.1 Under state law, if an employer requires an employee to attend an out-of-town business meeting, training session, or any other event, the employer cannot disclaim an obligation to pay for the employee's time in getting to and from the location of that event. Time spent driving, or as a passenger on an airplane, train, bus, taxi cab or car, or other mode of transport, in traveling to and from this out-of-town event, and time spent waiting to purchase a ticket, check baggage, or get on board, is, under such circumstances, time spent carrying out the employer's directives, and thus, can only be characterized as time in which the employee is subject to the employer's control. Such compelled travel time therefore constitutes compensable "hours worked." On the other hand, time spent taking a break from travel in order to eat a meal, sleep, or engage in purely personal pursuits not connected with traveling or making necessary travel connections (such as, for example, spending an extra day in a city before the start or following the conclusion of a conference in order to sightsee), is not compensable. If the employee's travel from his home to the airport is the same or substantially the same as the distance (and time) between his home and usual place of reporting for work, the

travel time would not begin until the employee reached the airport. The employee must be paid for all hours spent between the time he arrives at the airport and the time he arrives at his hotel. No further "travel" hours are incurred after the employee reaches his hotel and is then free to choose the place where he will go. (O.L. 2002.02.21)

46.3.2 **Different Pay Rate For Travel Time Permissible**. The employer may establish a different pay scale for travel time (not less than minimum wage) as opposed to the regular work time rate. The employee must be informed of the different pay rate for travel before the travel beings. For purposes of determining the regular rate of pay for overtime work under the circumstances where a different rate is applied to travel time, the State of California adopts the "weighted average" method. (See Section 49.2.5 of this Manual; see also O.L. 2002.02.21).

46.4 **Uninterrupted Sleep Time**. DLSE enforcement policy has historically allowed eight hours to be deducted if an employee is scheduled for 24-hour work shifts and is required to remain on the employer's premises during the work shift and, in fact, receives eight hours of uninterrupted sleep. (But see specific exemption for ambulance drivers at Sections 47.3.1., 50.9.8 and 50.9.8.2 of this Manual). In addressing this issue, the Fourth District Court of Appeal in the case of *Aguilar v. Association of Retarded Citizens* (1991) 234 Cal.App.3d 21, upheld the DLSE policy:

> First, the IWC Wage Order clearly distinguishes between employees who work 24-hour shifts and those who work less than 24-hour shifts. The Wage Order expressly provides an exemption from compensation for sleep time only for employees who work 24-hour shifts. The record is clear the employees here do not work 24-hour shifts.
>
> Second, we do not find ARC's characterization of the shifts as being 24-hour shifts with the employees being 'temporar[ily] release[d]…to attend to personal interests' to be persuasive . ARC's characterization would abrogate the distinction between employees working 24-hour shifts and those working less than 24-hour shifts. Under ARC's analysis, all employees in the work force could be characterized as working 24-hour shifts, with the only variation being the length of the 'temporary release…to attend to personal interests.' An accountant who worked 8 hours a day could be viewed as working a 24-hour shift with a 16-hour temporary release period.
>
> ARC's interpretation requires a non-commonsense interpretation of the words; if IWC had intended the interpretation that ARC urges – that employers do not have to compensate employees working 17-hour shifts for sleep time – IWC easily could have so provided. They, however, did not. We conclude the employees here are entitled to compensation for all the hours worked; ARC is not entitled to deduct those hours when it allows the employees to sleep.

46.5 **Meal Periods**: Where an employee – although relieved of all duties – is not free to leave the work place during the time allotted to such employee for eating a meal, the meal period is on duty time subject to the control of the employer, and constitutes hours worked. *Bono Enterprises v. Labor Commissioner* (1995) 32 Cal.App.4th 968.

46.6 **Caveat**: Orders 4 and 5 contain a "Health Care Industry" exception which provides that "hours worked" is to be interpreted in accordance with the provisions of the Fair Labor Standards Act. This means that for *the employees engaged in* the "health care industry" the provisions of 29 CFR § 785.19(b) would apply and the *Bono Enterprises* case would have no applicability.

46.6.1 Note: The term used in the definitional language in Orders 4-2000 and 5-2000 states that "[W]ithin the health care industry*, the term 'hours worked'" is to be interpreted in accordance with the provisions of the Fair Labor Standards Act. However, the term "hours worked" in the definition is applied to employees, not employers. Consequently, it is the position of the DLSE that the IWC, in adopting this exemption to the narrow California definition of "hours worked", only intended that the broader definition contained in the federal law was to apply to those who are defined at subsection 2(H) of those Orders as "employees in the Health Care industry". Consequently, employees in hospitals, etc. who do not meet the criteria of "employees in the health care industry" as defined at IWC Order 5-2001, Section 2(G) will not be subject to the federal definition of "hours worked".

46.6.1.1 Meal Periods Under Federal Regulations. 29 CFR 785.19(B), the federal regulation which discusses meal periods, allows an employer to require workers to remain on the premises during an off-duty meal period. This federal regulation does require that the meal period be duty-free and specifically requires that the employee be allowed to leave his or her work station during the meal period. It was the original intention of the IWC when the "health care" exception in the "hours worked" definition was adopted, that hospitals be allowed to require employees to remain on the premises during meal periods.

46.6.2 IWC Order 5, Section 11(C) provides that under certain circumstances employees in group homes may be required to work "on duty" meal periods. If the employee under this provision is required to eat on premises, the meal period must be paid.

46.6.2.1 Note: A further discussion of the requirements of Meal Periods including the interpretation of "on-duty" meal periods and premiums for failure to provide meal periods can be found at Section 46.5 of this Manual. It must be noted at this point, however, that any premium imposed for failure to provide a meal period (or rest period) is not counted for purposes of calculating overtime.

46.6.3 Time Spent Waiting: The DLSE enforcement policy has consistently held that hours for which an employee has been hired to do nothing or merely to wait for something to happen are hours subject to the control of the employer, and constitute hours worked. (Armour & Co. v. Wantock (1944) 323 U.S. 126; Skidmore v. Swift (1944) 323 U.S. 134.) If, in the case of "standby" or "on call" status, the restrictions placed on the time of the employee are such that the employee is unable effectively to engage in private pursuits, the time is subject to the control of the employer and constitutes hours worked. (Madera Police Officers Association v. City of Madera (1984) 36 Cal.3d 403) (O.L. 1998.12.28)

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*The "Health Care industry" and "employees in the Health Care industry" have been defined for purposes of Orders 4 and 5 only. Those workers clearly within the definition will be exempt from the more stringent general California definition of "hours worked".

46.6.4 Changing Uniforms or Washing Up at Work. Time spent changing clothes or washing up on the employer's premises is compensable if it is compelled by the necessities of the employer's business. (O.L. 1994.02.03-3; 1998.12.23) It should be noted, however, that for enforcement purposes, the Division utilizes a de minimis test concerning certain activities of employees (See Lindow v. United States 738 F.2d 1057 (9th Cir.1984)) Under this test the Division will consider (1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time, and (3) the regularity of the additional activity. (O.L. 1988.05.16)

46.6.4.1 The only federal definition of the term "hours worked" is contained in the FLSA at 29 U.S.C. § 203(o) which simply excludes "any time spent in changing clothes or washing at the beginning or end of each work day." Federal case law, however, has limited this exception and has held that any actions which are an integral and indispensable part of the employee's principal activity task are compensable. (Steiner v. Mitchell, 350 U.S. 247 (1956) holding that time spent showering and changing at the beginning and end of each day in a battery plant is compensable.)

46.6.5 Training Programs, Lectures, Meetings. The Division utilizes the standards announced by the U.S. Department of Labor contained at 29 CFR §§ 785.27 through 785.31 in regard to lectures, meetings and training programs:

Time spent by employees attending training programs, lectures and meetings are not counted as hours worked if the attendance is voluntary on the part of the employee and all the following criteria are met:

1. Attendance is outside regular working hours;
2. Attendance is voluntary: attendance is not voluntary if the employee is led to believe that present working conditions or the continuation of employment would be adversely affected by nonattendance;
3. The course, lecture, or meeting <u>is</u> <u>not</u> <u>directly</u> <u>related</u> to the employee's job: training <u>is</u> directly related to an employee's job if it is designed to make the employee handle his job more effectively as distinguished from training him for another job or to a new or additional skill; and
4. The employee does not perform any productive work during such attendance.

46.6.6 Intern Programs. Historically, DLSE has required that in order to be exempt from the wage and hour requirements of the IWC Orders, the intern's training must be an essential part of an established course of an accredited school or of an institution approved by a public agency to provide training for licensure or to qualify for a skilled vocation or profession. The program may not be for the benefit of any one employer, a regular employee may not be displaced by the trainee, and the training must be supervised by the school or a disinterested agency. (O.L. 1996.12.30)

46.6.7 All Training Programs, Lectures, Meetings, Etcetera Which Do Not Meet The Above Criteria Are Hours Worked. If any one of the above listed criterion is not met, the time is to be considered "hours worked".

46.6.7.1 Independent Training. If an employee on his own initiative attends an independent school, college or independent trade school after hours, the time is not hours worked for his employer even if the course is related to his or her job.

46.6.8 Special Situations. If an employer were to establish a program of instruction for the benefit of his employees which corresponds to courses offered by independent, bona fide institutions of learning (e.g., English lessons, literacy training), voluntary attendance by an employee at such courses outside of working hours would not be hours worked even if they are directly related to his or her job or the course were paid for by the employer.

46.7 Try Out Time. There may arise situations where an employer may wish to have a prospective employee exhibit skills such as typing, shorthand, or operation of machinery, before employment. The DLSE will accept such "try out time" as non-compensable if:

1. This time is not, in fact, training as opposed to testing skills;
2. there is no productivity derived from the work performed by the prospective employee, and
3. the period of time is reasonable under the circumstances.

46.7.1 Each case must be reviewed on its facts. For instance, the period of time to test skills of a sewing machine operator will be much less than that needed to test the skills of a computer programmer. While no particular time frame can be given, the rate of pay for the occupation can usually be used as a guide to determine the amount of time necessary for a "try out".

46.7.2 Reporting Time Pay. The IWC Orders provide that if an employee is required to report for work and does report, but is not put to work or is furnished less than half the employee's usual or scheduled day's work, the employee shall be paid half of his or her regularly scheduled work, but in no event less than two hours nor more than four hours at the employee's regular rate of pay. (See discussion at Section 45 of this Manual)

46.7.3 Reporting time pay, split shift differential, meal period premium pay, and rest period premium pay, although paid to employees in hourly increments as required under Wage Orders, do not constitute "hours worked" for purposes of calculating whether overtime is owed.

46.7.3.1 "Act Of God". There are exceptions from the above requirements in the Orders one of which is in the event of an "act of God" or beyond the employer's control.

47 CALCULATING HOURS WORKED.

47.1 Rounding. The Division utilizes the practice of the U.S. Department of Labor of "rounding" employee's hours to the nearest five minutes, one-tenth or quarter hour for purposes of calculating the number of hours worked pursuant to certain restrictions. (29 CFR § 785.48(b))

47.2 "Rounding" Practices. As mentioned above, the federal regulations allow rounding of hours to five minute segments. There has been practice in industry for many years to follow this practice, recording the employees' starting time and stopping time to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour. Presumably, this arrangement averages out so that the employees are fully compensated for all the time they actually work. For enforcement purposes this practice of computing working time will be accepted by DLSE, provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked. (See also, 29 CFR § 785.48(b))

47.2.1 Recording Insignificant Time Periods. In recording working time, insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded. The courts have held that such trifles are de minimis. (Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946); Lindow v. United States 738 F.2d 1057 (9th Cir.1984)) This rule applies only where there are uncertain and indefinite periods of time involved of a few seconds or minutes duration, and where the failure to count such time is due to considerations justified by industrial realities.

47.2.1.1 An employer may not rely on this policy to arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time or practically ascertainable period of time he is regularly required to spend on duties assigned to him. See Glenn L. Martin Nebraska Co. v. Culkin, 197 F. 2d 981, 987 (C.A. 8, 1952), cert. denied, 344 U.S. 866 (1952), rehearing denied, 344 U.S. 888 (1952), holding that working time amounting to $1 of additional compensation a week is "not a trivial matter to a workingman," and was not de minimis; see also Addison v. Huron Stevedoring Corp., 204 F. 2d 88, 95 (C.A. 2, 1953), cert. denied 346 U.S. 877, holding that "[T]o disregard workweeks for which less than a dollar is due will produce capricious and unfair results;" and Hawkins v. E. I. du Pont de Nemours & Co., 12 W.H. Cases 448, 27 Labor Cases, para. 69,094 (E.D. Va., 1955), holding that 10 minutes a day is not de minimis.

47.2.2 Differences Between Clock Records And Actual Hours Worked. Time clocks are not required but in those cases where time clocks are used, employees who voluntarily come in before their regular starting time or remain after their closing time, do not have to be paid for such periods provided, of course, that they do not engage in any work.

47.2.2.1 Actual facts must be investigated, of course, however, unless the employee is either performing work during the period or has been directed by the employer to be on the premises, the early or late clock punching may be disregarded. Minor differences between the clock records and actual hours worked cannot ordinarily be avoided, but

major discrepancies should be investigated since they raise a doubt as to the accuracy of the records of the hours actually worked.

47.2.2.2 DLSE Enforcement Policy. When auditing payroll records, Division personnel will ascertain the facts regarding the time keeping requirements (i.e., the true work patterns of the workers and whether these patterns are accurately reflected by the time records). When, based on these facts, the above description results in an averaging out for both the employer and the employee, it is, in the long run, much more reasonable than an attempt at absolute accuracy by "counting minutes". This method also simplifies payroll computation and the average employer appreciates being permitted to use it.

47.3 Special IWC Provision For Hours Worked – Recess Periods: A special provision in Orders 3, 8, and 13 allows employers to exclude from "hours worked" recess periods occurring during the workday, provided the following conditions are met:

1. the recess must be at least 30 minutes long;
2. the employer must notify the employee of the time to report back to work;
3. the employee must be allowed to leave the premises;
4. no more than two work recesses can occur in a single shift; and
5. the duration of the recesses must not exceed two hours.

47.3.1 Sleep Time And Meal Periods On 24-hour Shifts: Currently, an employer and an employee working as an ambulance driver or attendant on a 24-hour shift may enter into an agreement to exclude up to three 1 hour duty-free meal periods and up to 8 hours of uninterrupted sleep time from "hours worked" provided adequate sleeping facilities are furnished by the employer. (Monzon v. Schaefer Ambulance Service (1990) 224 Cal.App.3d 16.)

47.3.2 Term "Hours Worked" Specially Defined For Employees In The Public Housekeeping Industry Required To Reside On Employment Premises: Except for employees employed in the "Health Care Industry", (as that term is defined) Orders 5-2002, contain a special definition for hours worked by employees in the Public Housekeeping Industry who are required to reside on the employment premises:

> "... in the case of an employee who is required to reside on the employment premises, that time spent carrying out assigned duties shall be counted as hours worked."

47.3.2.1 Under this definition, as applied, for instance, to a motel clerk who was required to reside on the motel grounds and to remain there 24 hours a day unless relieved, the California courts have held that only the time spent performing physical, mental or other specified tasks was counted as hours worked. (Brewer v. Patel (1994) 20 Cal.App.4th 1017.)

47.3.3 Hours Worked Specially Defined For Health Care Industry. Orders 4-2000 and 5-2000 specifically define "hours worked" for purposes of the health care industry as follows:

> "Within the health care industry, the term 'hours worked' means the time during which an employee is suffered or permitted to work for the employer, whether or not required to do so, as interpreted in accordance with the provisions of the Fair Labor Standards Act."

47.3.4 Under this federal definition, so long as the employee is relieved of all duties during the time allotted for a meal, the meal period does not constitute "hours worked" even if the employee is prohibited from leaving the employer's premises. (29 CFR §785.19(b); see discussion at Sections 46.6 and 46.6.1.1 of this Manual)

47.3.5 This creates an anomaly since employees in the Health Care Industry (as defined) are subject to the federal regulations concerning the definition of "hours worked" and federal law differs from California law as determined in Brewer v. Patel, supra.

47.3.5.1 The First District Court of Appeal in the case of Brewer v. Patel, supra, defined the IWC Order 5 language which requires that employees required to reside on the premises need only be paid for that time when they are performing assigned duties to allow employers to pay employees who are required to <u>remain</u> on the premises only for the actual time they are "performing physical, mental or other specified tasks."

47.3.5.2 Federal Regulations At Odds With California Case Law. The Patel court's definition is at odds with federal law which is to be applied to employees in the "Health Care Industry". The federal regulations require an employer to pay for all the hours the employee is required to be on the premises when such requirement is a condition of the employment. For the past fifty years, federal courts have interpreted the FLSA to require payment for time in which the employee is required to remain on the premises of the employer in order to respond to unscheduled contingencies. As the Court explained in Armour & Co. v. Wantock (1944) 323 U.S. 126, 133:

> "Of course an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a stand-by capacity...Readiness to serve may be hired, quite as much as service itself."

47.3.5.3 Thus, unlike the interpretation of the term by the Patel court, under federal rules, "hours worked are not limited to the time spent in active labor but include time given by the employee to the employer." Skidmore v. Swift & Co. (1944) 323 U.S. 134, 138. Instead, federal case law, and DLSE enforcement policy, have focused on how close an on-call employee must remain to the employer's premises to be considered entitled to compensation. This case law is summarized at 29 CFR § 785.17, which states, "An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while 'on call'."

47.3.5.4 For Enforcement Purposes, employees in the "Health Care Industry" under the Orders who are subject to federal regulations and are required to live on the employer's premises (residential care facilities, for instance) must be paid for all hours they are required to remain on the employer's premises pursuant to the federal regulations.

47.4 **Direction And Control Of The Employer**. The IWC Orders, unlike the federal Fair Labor Standards Act, provide a definition of the term "hours worked." (See Section 46.1, *et seq.* of this Manual).

47.4.1 **Federal Enforcement Policy**. For purposes of the FLSA, the Department of Labor for enforcement purposes, relies upon definitions first set out in the U.S. Supreme Court case of *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944) holding that employees must be paid for all time spent in "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer of his business." This definition was expanded later in the case of *Anderson v Mt. Clemens Pottery Co.* 328 U.S. 680 (1946) which held that the workweek includes "all the time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place." The federal regulations provide that "[a]s a general rule the term 'hours worked' will include: (a) All time during which an employee is required to be on duty or to be on the employer's premises or at a prescribed workplace and (b) all time during which an employee is suffered or permitted to work whether or not he is required to do so." (29 CFR §778.223)

47.4.2 **Difference In Enforcement Positions**. There is a substantial difference between the definition of hours worked adopted by the IWC and that used by the Department of Labor for enforcement of the FLSA. Under California law it is generally only necessary that the worker be subject to the "control of the employer" or "all the time the employee is suffered or permitted to work" in order to be entitled to pay. See *Morillion v. Royal Packing co.* (2000) 22 Cal.4th 575, 584 [citing to DLSE O.L. 1993.03.31. These two phrases operate independently of each other, so that if time falls into either category, it must be counted as hours worked. (O.L. 2002.01.29).

47.5 **Standby Or Waiting Time.** Generally, an employee who is required to remain at the employer's place of business and respond to emergency calls is working and must be paid for all hours – even if the employee is doing nothing more than waiting for something to happen. The U.S. Supreme Court long ago established the rule that:

> "An employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. Refraining from other activities often is a factor of instant readiness to serve, and idleness plays a part in all employments in a stand-by capacity. *Armour & Co. v. Wantock*, 323 U.S. 126 (1944)"

47.5.1.1 **May Be Subject To Different Rate Of Pay**. Generally, on-call or standby time at the work site are hours worked that must be paid for. It is possible, however, that the hourly rate of pay for the call time can be different from the regular rate paid for working time so long as the rate is set before the work is performed and the amount of the remuneration does not fall below the applicable minimum wage for any hour working standing alone. (O.L. 2002.02.21). For purposes of overtime computation, the weighted average of such rates is to be utilized in determining the regular rate of pay

47.5.2 Uncontrolled Standby. An employee who has the choice of being available or not available to respond to a request by the employer to return to work for an emergency may be on uncontrolled standby if the employee is completely unrestricted to use his or her time for their own purposes. Such "free" standby time is not under the control of the employer and, thus, need not be paid.

47.5.3 Stipend For Uncontrolled Standby. Under some circumstances, employers may pay an employee a stipend for being available in an uncontrolled standby situation to return to work if called. In these situations, the employee agrees to be available to return to work, but is otherwise free to pursue personal interests without restriction. The stipend paid for this uncontrolled standby agreement is included, for purposes of California law, in calculating the regular rate of pay for overtime purposes; but the hours for which the stipend is paid is not to be calculated on a weighted average basis. In other words, the stipend is simply added to the wage earned for actual hours worked and prorated among those hours.

47.5.3.1 Example: Employee is paid $10.00 per hour for all hours worked and is also paid a stipend of $20.00 per day for remaining available to return to work after hours. The employee works five days of eight hours each and is entitled to $400.00 plus $100.00 stipend for the uncontrolled standby. In the event the employee actually works 42 hours he is entitled to $525.00. The stipend is added to the regular rate ($400.00 + $100.00 = $500.00) and divided by the non-overtime hours worked (40) to reach the regular rate for overtime purposes ($12.50).

47.5.4 Controlled Standby. If the employee's time is so restricted that they cannot pursue personal activities and come and go as he pleases, the employer is considered to have direction and control of the employee. The DLSE has adopted the test which the California Supreme Court announced in the case of *Madera Police Officers Assn. v. City of Madera* (1984) 36 Cal.3d 403, and will apply that test to determine the extent of control.

47.5.4.1 The Madera court applied a two-part preliminary analysis to determine whether the time was compensable. The first part of the test measures whether the restrictions placed on the employee are primarily directed toward the fulfillment of the employer's requirements and policies? Second, is the employee substantially restricted so as to be unable to attend to private pursuits?

47.5.4.2 The Madera court also indicated that regarding the second prong of the test, the trier of fact must examine the restrictions cumulatively to assess their overall effect on the worker's uncompensated time. In other words, the net impact of the restrictions must be considered. Note that the court did not hold that no restrictions as to time and space could be placed on the employee; only that the restrictions could not be substantial enough to prevent the employee from attending to private pursuits.

47.5.5 Beepers. The simple requirement that the employee wear a beeper, standing alone, doesn't require the employee be paid for all the hours the beeper is on.

47.5.5.1 Federal Cases. While there are no reported California state cases directly on point, the federal case of *Berry v. County of Sonoma*, 30 F.3d 1174 (9th Cir.1994), discusses the

problems raised in determining, even under the broader FLSA standard, the proper application of the rule to the factual situation in each case. The *County of Sonoma* case set out the factors which must be considered in determining whether restrictions placed on employees during on-call hours were so extensive that such time should be deemed "hours worked" under the Fair Labor Standards Act (FLSA). According to the Court, those factors include: (1) whether there are excessive geographical restrictions on employees' movements; (2) whether the frequency of calls is unduly restrictive; (3) whether a required response time is unduly restrictive; (4) whether the on-call employee can easily trade his or her on-call responsibilities with another employee, and (6) the extent of personal activities engaged in during on-call time. (O.L. 1998.12.28)

47.5.5.2 Moreover, as with the test under the FLSA, the DLSE looks to "[w]hether time is spent predominantly for the employer's benefit or for the employee's'...This is a question 'dependent upon all the circumstances of the case.' Id. In other words, the facts may show that the employee was 'engaged to wait' or 'waited to be engaged.' This is a highly fact-driven test." (*Owens v. Local No. 169, Ass'n of W. Pulp and Paper Workers*, 971 F.2d 347, 354 (9th Cir.1992)

47.5.6 Except for employees in the "Health Care industry", while the Division cannot utilize the federal test in its entirety because of the obvious differences in the statute, the test applied under the California law is also "highly fact-driven." The difference is that the California test places no reliance on whether the individual is engaged in "work" and, thus, the existence of an "agreement" regarding the understanding of the parties is of no importance. The ultimate consideration in applying the California law is determining the extent of the "control" exercised.

47.5.6.1 The Division does not take the position that simply requiring the worker to respond to call backs is so inherently intrusive as to require a finding that the worker is under the control of the employer. Such factors as (1) geographical restrictions on employees' movements; (2) required response time; (3) the nature of the employment; and, (4) the extent the employer's policy would impact on personal activities during on-call time, must all be considered. The bottom-line consideration is the amount of "control" exercised by the employer over the activities of the worker. In some employments, the employer can be said to be exercising some limited control over his employee at all times. For instance, by statute the employee must give preference to the business of his employer if it is similar to the personal business he transacts. (Labor Code §2863). However, immediate control by the employer which is for the direct benefit of the employer must be compensated. (O.L. 1993.03.31, 1992.01.28)

47.6 Hours Worked — Unscheduled Overtime.

47.6.1 The California Industrial Welfare Commission Orders generally provide that "hours worked" means "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so."

47.6.2 Employer's Reasonable Duty to Ascertain. The courts have found that if employer had "constructive" knowledge of the fact that employees are working overtime, the wages must be paid. (Brennan v. GMAC (5th Cir.1973) 482 F.2d 825; see also, Burry v. National Trailer (6th Cir.1964) 338 F.2d 422; Kappler v. Republic Pictures (S.D. Iowa, 1945) 59 F.Supp. 112 [duty to inquire regarding overtime, employer may not escape duty by delegating].

47.6.3 Employee's Duty to Disclose. Forrester v. Roth, 646 F.2d 413 (9th Cir.1981). This case holds that "suffer or permit" means work the employer knew or should have known of. But, if employee deliberately prevents the employer from obtaining knowledge of overtime worked, the employee cannot later claim recovery. The employer must have the opportunity to obey the law. (See also, Ramirez v. Yosemite Water Co. (1999) 20 Cal.4th 785, 802, concerning requirement that exempt employee has duty to meet employer's "realistic expectations" concerning duties.)

47.6.4 It must be noted, as the IWC stated in the Statement As To The Basis of the Wage Orders, that the Supreme Court in Ramirez stated that in determining realistic expectations, consideration must be given to "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...performance, and whether these expressions were themselves realistic given the actual overall requirements of the job." In other words, an employer may not choose to ignore the fact that it would not be reasonable to expect an employee to perform the duties assigned without working overtime.

47.7 All Hours Must Be Compensated Regardless Of Method Used In Computation. DLSE has opined that employees must be paid at least the minimum wage for all hours they are employed. Consequently, if, as a result of the directions of the employer, the compensation received by piece rate or commissioned workers is reduced because they are precluded, by such directions of the employer, from earning either commissions or piece rate compensation during a period of time, the employee must be paid at least the minimum wage (or contract hourly rate if one exists) for the period of time the employee's opportunity to earn commissions or piece rate.

47.7.1 As an example, if piece rate workers are required to attend a meeting during which, of course, they would not be able to earn compensation at the piece rate, the employer would be required to pay those workers at least the minimum wage (or the contract hourly wage, if one exists) during such period. (For discussion of the legal rationale underlying this enforcement policy, see O.L. 2002.01.29)

48 BASIC OVERTIME INFORMATION.

48.1.1 Minors . Labor Code § 1391 provides that no minor (any person under the age of 18 years) shall be employed more than 8 hours in any workday. Minors 15 years or younger may not be employed more than 40 hours in any one week. However, Labor Code § 1391(a)(3) provides that a minor 16 or 17 years of age may work up to 48 hours in a workweek. Therefore, one and one-half times the minor's regular rate of pay shall be paid for all work over 40 hours in any workweek. Additionally, the wage orders provide that minors 15-17 years old who are not required by law to attend school may be employed for the same hours as an adult, and are subject to the same overtime pay requirements as adults. (See e.g., Order 4, Section 3)

48.1.2 Definition Of Workday. "Workday" is defined in the Industrial Welfare Commission Orders and Labor Code § 500 for the purpose of determining when daily overtime is due. A workday is a consecutive 24-hour period beginning at the same time each calendar day, but it may begin at any time of day. The beginning of an employee's workday need not coincide with the beginning of that employee's shift, and an employer may establish different workdays for different shifts. However, once a workday is established it may be changed only if the change is intended to be permanent and the change is not designed to evade overtime obligations. Daily overtime is due based on the hours worked in any given workday; and, of course, the averaging of hours over two or more workdays is not allowed. (O.L. 1993.12.09)

48.1.2.1 Example: 1. A factory worker whose usual shift is 7 a.m. to 3 p.m. has an established workday beginning at 7 a.m. On Tuesday night she is asked to work a special extra shift from 11 p.m. to 7 a.m. Wednesday. Since she has already worked eight hours on Tuesday, she is due time and a half beginning at 11 p.m. on Tuesday night until 3 a.m. and double time from 3 a.m. to 7 a.m. However, because her workday begins at 7 a.m. she may be paid straight time wages from 7 a.m. to 3 p.m. (her regular shift) on Wednesday regardless of the fact that the time worked is continuous.

48.1.3 Definition Of Workweek. "Workweek" is defined in the Industrial Welfare Commission Orders and Labor Code § 500 for the purpose of determining when weekly overtime is due. A workweek is any seven consecutive 24-hour periods, starting with the same calendar day each week, beginning at any hour on any day, so long as it is fixed and regularly recurring. An employer may establish different workweeks for different employees, but once an employee's workweek is established, it remains fixed regardless of his working schedule. An employee's workweek may be changed only if the change is intended to be permanent and the change is not designed to evade overtime obligations. (O.L. 1986.12.01)

48.1.3.1 Normally the workweek is the seven-day period used for payroll purposes. If it is not otherwise established in the record, for enforcement purposes DLSE will use the calendar week, from 12:01 a.m. Sunday to midnight Saturday, with each workday ending at midnight. Daily and weekly overtime is due based on the hours worked in the workday and workweek; the averaging of hours over two or more work weeks is not

allowed. The only exception to the rule concerning calculation on the workweek basis is the work period of 14 consecutive days available to employers engaged in the operation of licensed acute care or extended care facilities covered by Order 5. Note, however, that in the case of an employer using the 14-day calculation, daily overtime for all hours in excess of eight is required.

48.1.3.2 Example: If an employee's workweek begins on Monday morning, but she is not called in to work until Wednesday to work seven consecutive 8-hour days, until Tuesday, she is not due any overtime. His or her workweek ends Sunday night and she has only worked 40 hours with no daily overtime Wednesday through Sunday. Monday begins a new workweek, and she could work 8-hour days through Friday without any overtime due, thus having worked 10 consecutive days without overtime.

48.1.4 Fluctuating Workweek Compensation Arrangement Not Allowed. The Fourth District Court of Appeal held that the use of the fluctuating workweek method of calculating overtime is not permissible in California. (Skyline Homes, Inc., etc. et al v. Department of Industrial Relations, et al. (1985) 165 Cal.App.3rd 239, 166 Cal.App.3rd 232 (Hrg.den.May 26, 1985), 212 Cal.Rptr. 792.) The court in Skyline explained in detail and fully analyzed the issues concerning the use of the fluctuating workweek. The Skyline court concluded that the federal "fluctuating workweek" method of calculation (i.e., dividing salary wages by total hours) reduces the employee's regular hourly rate with each overtime hour worked, and is incompatible with the state law restrictions on uncompensated daily overtime imposed by the IWC wage orders*. (Skyline, 165 Cal.App.3d at 245-249.) One of the major differences between federal and state law in this area is the requirement in California that the premium pay for overtime is to be a penalty which creates a disincentive to employers to impose overtime on employees. (See Industrial Welfare Commission v. Superior Court (1980) 27 Cal.3d 690; Skyline, supra, see also O.L. 1991.01.07-1) Additionally, the enactment of Labor Code § 515(d) indicates that the California Legislature also concluded that the "fluctuating workweek" is not allowed.

48.1.5 The continuing validity of the Skyline decision has been reaffirmed by the California Supreme Court in Morillion v. Royal Packing Co. (2000) 22 Cal.4th 575.

48.1.5.1 Fluctuating Workweek Compensation Arrangement Defined. Under this method, an employee is compensated by a fixed weekly salary which by agreement between the employer and employee is designed to provide basic non-overtime compensation for all hours worked. The employee's regular rate of pay, for purposes of overtime compensation, is determined by dividing the number of hours actually worked in a

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*Recent research in IWC archives has disclosed that in 1963 "Findings", the Commission stated: "In defining its intent as to the regular rate of pay set forth in Section 3(a)(3)(A) and (B) to be used as a basis for overtime computation, the Commission indicated that it did not intend to follow the 'fluctuating work week' formula used in some computations under the Fair Labor Standards Act. It was the Commission's intent that in establishing the regular rate of pay for salaried employees the weekly remuneration is divided by the agreed or usual hours of work exclusive of daily hours over eight." Thus, the DLSE position (and the Skyline court) is correct.

particular workweek into the amount of the fixed weekly salary. The result of this method is that the more hours worked, the lower the regular rate and the greater the incentive to the employer to work employees overtime. In California, the law requires that there be a "penalty" for utilizing workers in overtime situations. (Industrial Welfare Commission v. Superior Court, supra 27 Cal.3d 690) No penalty is involved in a fluctuating workweek because the rate of pay actually decreases.

48.1.5.2 Example Of Illegal Fluctuating Workweek Computation. Fixed weekly salary of $500 for all hours worked. If the employee worked 50 hours in the week, the overtime, using the illegal fluctuating workweek method, would be computed as follows:

$500/week divided by 50 hours = $10 ("regular rate of pay")

50 hours minus 40 hours = 10 overtime hours

10 hours times $5 (½ regular rate of pay) = $50

$ 50 -	overtime compensation
+500 -	fixed weekly salary (straight time compensation for all hours worked)
$550 -	Total compensation for one week

48.1.5.3 Correct California Computation. Using the legal maximum regular hours – 40 – the overtime in this case would be computed as follows:

$500/week divided by 40 hours = $12.50 ("regular rate of pay")

50 hours minus 40 hours = 10 overtime hours

10 hours times $18.75 (1½ of regular rate of pay) = $187.50

$187.50 -	Overtime Compensation
+500.00 -	Fixed weekly salary
$687.50 -	Total compensation

48.1.5.4 Salary. In California, in a situation where a non-exempt employee is paid a salary, the regular hourly rate of pay for purposes of computing overtime must be determined by dividing the salary by not more than the legal maximum regular hours (in most cases 40 hours, but this may be less than 40 hours where daily overtime is being computed) to determine the regular hourly rate of pay. (See Labor Code § 515(d)) The contracted hours may be less than the legal maximum regular hours in one workweek, in which case the contracted hours must then be used as the divisor and the salary as the dividend to establish the regular hourly rate of pay. All hours over the legal maximum regular hours in any one workweek or in any one workday must be compensated at overtime rates.

48.1.6 Belo Contracts Illegal In California. "Belo" contracts do not meet the overtime requirements of the California Industrial Welfare Commission Orders or the provisions of Sections 515(d) of the Labor Code. (O.L. 2000.09.29; 1991.01.07-1)*

48.1.7 Belo Contract Defined. A Belo contract is one in which a specific hourly wage is set but the employer promises a weekly guarantee. In the case of the original Belo contract, the arrangement was for an hourly rate of 67 cents with a weekly guarantee of $40.00. Overtime at the regular hourly rate was not paid until the worker was employed 54½ hours in a workweek.

48.1.8 As stated above, DLSE has historically refused to accept Belo plans. That position is now reinforced by the adoption of Labor Code Section 515(d), discussed above. The concept flies in the face of the very reasons that the IWC adopted premium pay for overtime – premium pay was to provide a "penalty" to discourage employers from requiring overtime. (See Skyline Homes v. DIR (1985) 165 Cal.App.3d 239) Adopting a contract which provides for paying an individual on a regular basis to work overtime simply encourages the working of overtime. The system provides no penalty to the employer for employing the employee over eight hours in a day or forty hours in a week; in fact, the system encourages the employer to so employ the worker because the overtime has, according to the plan, already been paid for.

48.1.9 Overtime Compensation Is Not Due for Negligible Work: In Lindow vs. United States (9th Cir. 1984) 738 F.2d 1057, the Court held that under the "de minimis rule," employers are not required to compensate employees for negligible overtime work. DLSE utilizes this view for enforcement purposes. (See Section 46.6.4 of this Manual)

48.1.9.1 In the Lindow case, although the employer did not require its employees to report to work early, employees sometimes came to work before their shift to read the log book and exchange information. The appellate court ruled that the trial court improperly categorized the employees' pre-shift activities as preliminary since reading the log book and exchanging information were compensable activities. However, it determined that the trial court correctly applied the de minimis rule, finding that since the work time was

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*The "Belo" contract type of payment has been recognized by the United States Congress since 1949 for purposes of the FLSA. Congress adopted the language in 29 U.S.C. §207(f) with the express purpose of giving statutory validity, subject to prescribed limitations, to a judicial "gloss on the Act" by which an exception to the usual rule as to the actual "regular rate" had been recognized by a closely divided Supreme Court. (See 29 CFR §778.404, "Purposes of Exemption") As the Regulation states, "The provisions of section 7(f) set forth the conditions under which, in the view of Congress, [guaranteed wage plans may be adopted]. Plans which do not meet these conditions were not thought to provide sufficient advantage to the employee to justify Congress in relieving employers of the overtime liability [of] section 7(a)." No similar provision is found in California law.

The Supreme Court's ruling in the original case of Walling v. Belo, 316 U.S. 624 (1942) does not interpret the FLSA as it stands today. Congress felt that the interpretation of the Belo court was less than satisfactory and reluctantly felt compelled to change the FLSA in response to that interpretation so as to limit the so-called Belo Contract exception. The same is true as to the Regulations adopted by the Department of Labor. Those regulations are based on a specific exception in the FLSA (§207(f)) which, to repeat, does not exist in California law.

negligible, overlapped with time compensated and was therefore difficult to calculate, the time was not compensable under the Fair Labor Standards Act. In supporting its holding, the court noted that paying the employees for this negligible amount of compensable time would be administratively difficult for the employer, the aggregate amount of compensable time was insignificant, and that the additional work was not done on a regular basis. However, the court held, if the amount of time was significant or if the regularity of occurrence made the time significant, a different result would be had. Lindow v. U.S., supra, 738 F2d 1057. (See discussion of policy at O.L. 1994.02.03-3.)

48.2 "Makeup Work Time" Provisions Adopted By Legislature Are Now Part of IWC Orders Promulgated in 2000. The IWC incorporated the language of Labor Code § 513 into each of the orders except 14:

> If an employer approves a written request of an employee to make-up work time that is or would be lost as a result of a personal obligation of the employee, the hours of that make-up work time, if performed in the same workweek in which the work time was lost, may not be counted toward computing the total number of hours worked in a day for purposes of the overtime requirements, except for hours in excess of eleven (11) hours of work in one (1) day or forty (40) hours of work in one (1) workweek. If an employee knows in advance that he or she will be requesting make-up time for a personal obligation that will recur at a fixed time over a succession of weeks, the employee may request to make-up work time for up to four (4) weeks in advance; provided, however, that the make-up work must be performed in the same week that the work time was lost. An employee shall provide a signed written request for each occasion that the employee makes a request to make up a work time pursuant to this section. While an employer may inform an employee of this make-up time option, the employer is prohibited from encouraging or otherwise soliciting an employee to request the employer's approval to take personal time off and make-up the work hours within the same workweek pursuant to this section.

48.2.1 Makeup work exception requires:

1. Written request by the employee to make up time which would be lost by the employee due to a personal obligation
2. Makeup hours worked in one day may not exceed eleven (11) nor, of course, may the number of makeup hours worked in one workweek exceed forty (40).
3. Request may be made for makeup time for a recurring personal obligation which is "fixed in time over a succession of weeks" provided a written request is made every four (4) weeks.

48.2.1.1 Note: The employer is prohibited from soliciting or encouraging employees to make a request for makeup hours, but informing employee of this right is permitted.

48.2.1.2 Personal Obligation. As an enforcement policy DLSE will not review the reason for the make-up time, so as to allow any employee to determine whether the need to take time off constitutes a "personal obligation" within the meaning of the statute.

48.3 Work On Seventh Day In Workweek. Formerly the IWC orders had language permitting employment of 7 days in a workweek, "with no overtime pay required" provided the total of hours of employment do not exceed 30 in the week or 6 in any one day. In other words, such employees were exempt from the seventh day of rest requirement and the seventh day of work premium pay requirement if the 30 in the week or 6 in any

one day test was met. Such exemptions, unless repealed, remained valid despite the provisions of Labor Code § 510(a) by virtue of the language of Labor Code § 515(b)(2).

48.3.1 In all the new orders except 14 and 15, the IWC deleted the phrase "no overtime pay required" permitting employment of 7 days in a workweek provided that total hours for the week do not exceed 30 with no more than 6 hours worked in any one day but requires the payment of premium pay on the seventh day of work. Consequently, all employees (except those employed under Orders 14 and 15) meeting the hours criteria could be employed for seven days in a week if they were paid the applicable premium pay including for all of their hours worked on the seventh consecutive day of the workweek pursuant to Section 510(a).

49 COMPUTATION OF REGULAR RATE OF PAY AND OVERTIME.

49.1 Labor Code § 200 defines wages as "...all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis or other method of calculation."

49.1.1 In California, as with the federal FLSA, overtime is computed based on the regular rate of pay. The regular rate of pay includes many different kinds of remuneration, for example: hourly earnings, salary, piecework earnings, commissions, certain bonuses, and the value of meals and lodging.

49.1.2 Items of Compensation Included in Calculating Regular Rate of Pay. In not defining the term "regular rate of pay", the Industrial Welfare Commission has manifested its intent to adopt the definition of "regular rate of pay" set out in the Fair Labor Standards Act ("FLSA") 29 USC § 207(e):

> "...the 'regular rate' at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee..." (29 USC § 207(e)).

In determining what payments are to be included in or excluded from the calculation of the regular rate of pay, California law adheres to the standards adopted by the U.S. Department of Labor to the extent that those standards are consistent with California law.

49.1.2.1 Piece Rate, Production Bonus. The Department of Labor has interpreted § 207(e) of the FLSA to include piece rate and production bonuses in determining the regular rate of pay. (29 CFR §§ 778.110 ("production bonus") and 778.111 ("piece-rate"))

49.1.2.2 All Goods Or Facilities Received By Employee Are To Be Utilized In Determining Regular Hourly Rate For Overtime Computation. Following the long-established enforcement policy of the DLSE (which closely tracks the federal regulations in this regard) housing benefits, meals, etc., are added to the cash wage paid for purposes of determining the "regular rate" of pay. The federal courts have addressed this issue and the U.S. Supreme Court in the case of Walling v. Youngerman-Reynolds Hardwood Co (1945) 65 S.Ct. 1242, 1245 noted:

> "The regular rate by its very nature must reflect all payments which the parties have agreed shall be received regularly during the workweek, exclusive of overtime payments. It is not an arbitrary label chosen by the parties; it is an actual fact. Once the parties have decided upon the amount of wages and the mode of payment the determination of the regular rate becomes a matter of mathematical computation, the result of which is unaffected by any designation of a contrary 'regular rate' in the contracts." (See also, Walling v. Alaska Pacific Consolidated Mining Co. (9th Cir.1945) 152 F.2d 812, 815)

49.1.2.3 What Must Be Included In Calculating Regular Rate. Any sum paid for hours worked must, of course, be included in the calculation. Also, any payment for performing a duty must be included. For example, an employment contract may provide that employees who are assigned to be available for calls for specific periods will receive a payment of $25 for each 8-hour period during which they are "on call" in addition to pay at their regular (or overtime) rate for hours actually spent in making

calls. If the employees who a re thus "on call" are not confined to their homes or to any particular place, but may come and go as they please, provided that they leave word where they may b e reached, the hours spent "on call" are not considered as hours worked (See discussion at Section 46.6 .3, et seq. of this Manual). Although the payment received by employees for such "on call" time is, therefore, not allocable to any specific hours of work, it is clearly paid as compensation for performing a duty involved in the employee's job and, therefore, the payment must be included in the employee's regular rate in the same manner as any payment for services, such as an attendance bonus, which is not related to any specific hours of work.

49.1.2.4 Payments That Are To Be Excluded in Determining "Regular Rate":

(1) Sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency; (Discussed in 29 CFR § 778.212).

(2) Payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment; (Discussed in 29 CFR §§ 778.216 through 778.224).

(3) Sums paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Administrator set forth in appropriate regulations which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such talent fees are defined and delimited by regulations of the Administrator) paid to performers, including announcers, on radio and television programs; (Discussed in 29 CFR §§ 778.211 and 778.213).

(4) Contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees; (Discussed in 29 CFR §§ 778.214 and 778.215).

(5) Extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum work-week applicable to such employee under subsection (a) of this section or in excess of the employee's normal working hours or regular working hours, as the case may be; (Discussed in 29 CFR §§ 778.201 and 778.202).

(6) Extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days; (Discussed in 29 CFR §§ 778.203, 778.205 and 778.206).

(7) Extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a) of this section, [FN2] where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek; (Discussed in 29 CFR §§ 778.201 and 778.206).

(8) Any value or income derived from employer-provided grants or rights provided pursuant to a stock option, stock appreciation right, or bona fide employee stock purchase program which is not otherwise excludable under any of paragraphs (1) through (7) if—

(A) grants are made pursuant to a program, the terms and conditions of which are communicated to participating employees either at the beginning of the employee's participation in the program or at the time of the grant;

(B) in the case of stock options and stock appreciation rights, the grant or right cannot be exercisable for a period of at least 6 months after the time of grant (except that grants or rights may become exercisable because of an employee's death, disability, retirement, or a change in corporate ownership, or other circumstances permit-ted by regulation), and the exercise price is at least 85 percent of the fair market value of the stock at the time of grant;

(C) exercise of any grant or right is voluntary; and

(D) Any determinations regarding the award of, and the amount of, employer-provided grants or rights that are based on performance are—

(i) made based upon meeting previously established performance criteria (which may include hours of work, efficiency, or productivity) of any business unit consisting of at least 10 employees or of a facility, except that, any determinations may be based on length of service or minimum schedule of hours or days of work; or

(ii) made based upon the past performance (which may include any criteria) of one or more employees in a given period so long as the determination is in the sole discretion of the employer and not pursuant to any prior contract.

(9) Reporting time pay, extra hour for failure to provide meal period, extra hour for failure to provide break and split shift pay need not be included. In *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, the Court indicated that meal period pay, rest period pay, reporting time pay and split shift premium are all forms of pay similar to overtime premium. Because these payments are in the nature of premiums required by law, they are not included in computing the regular rate of pay on the same basis that overtime premium is not included in regular rate calculations. (See 29 CFR §§ 778.201, 778.202 and 778.224).

49.1.3 (section deleted – reformatted as 49.1.2.4, No. 9).

49.1.4 **Hours Used In Computation**. Ordinarily, the hours to be used in computing the regular rate of pay may not exceed the legal maximum regular hours which, in most cases is 8 hours per day, 40 hours per week. This maximum may also be affected by the number of days one works in a week. It is important to determine what maximum is legal in each case. **The** alternate method of scheduling and computer overtime in most Industrial Welfare Commission Orders, based on four 10-hour days or three 12-hour days does not affect the regular rate of pay, which in this case also would be computed on the basis of 40 hours per week. (*Skyline Homes v. Department of Industrial Relations* (1985) 165 Cal.App.3d 239, 245-50). [1]

49.1.5 **Salaried Non-Exempt – Explicit Written Agreement No Longer Allowed**. In the past, California law has been construed to allow the employer and the employee to enter into an explicit mutual wage agreement which, if it met certain conditions, would permit an employer to pay a salary to a non-exempt employee that provided compensation for hours in excess of 40 in a workweek. (*See, Ghory v. Al-Lahham* (1989) 209 Cal.App.3d 1487, 257 Cal.Rptr. 924). Such an agreement (backing in the regular rate) is no longer allowed as a result of the specific language adopted by the Legislature at Labor Code § 515(d). To determine the regular hour rate of pay for a non-exempt salaried employee, one must divide the weekly salary paid by no more than forty hours.

[1] It is important to note that the *Skyline Homes* case was not overturned by the Supreme Court in the case of *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, as some labor attorneys have suggested. What the Court said was that to the extent that the *Skyline* court had justified reliance on DLSE internal documents which were "underground regulations," the case was disapproved. The *Skyline* court had adopted the DLSE approach, but used an independent analysis to reach that decision. Thus, the rationale of the court concerning the fluctuating workweek method is valid. The case is still regularly cited by the Supreme Court in its decisions. (*See, Morillion v. Royal Packing Co*. (2000) 22 Cal.4th 575).

49.2 Methods Used in Computing Regular Rate of Pay:

49.2.1.1 **Salaried Workers:** Multiply the monthly remuneration by 12 (months) and divide by 52 (weeks) = weekly remuneration. Divide the weekly remuneration by the number of legal maximum regular hours worked = regular hourly rate. (See Labor Code § 515(d))

49.2.1.2 **Piece Workers, Production Bonus Workers or Commission Workers**: (See O.L. 1993.02.22-1, 1988.06.15, 1988.03.28, 1994.06.17-1; 1988.07.14, 1987.02.17). Either of the following two methods can be used to determine the regular rate for purposes of computing overtime compensation:

1. Compute the regular rate by dividing the total earnings for the week, including earnings during overtime hours, by the total hours worked during the week, including the overtime hours. For each overtime hour worked, the employee is entitled to an additional one-half the regular rate for hours requiring time and one-half and to an additional full rate for hours requiring double time. This is the most commonly used method of calculation.

2. Using the piece or commission rate as the regular rate and paying one and one-half times this rate for production during overtime hours. This method is rarely used.

49.2.1.3 It is recognized that the method outlined in alternative 1, above, resembles the computation used in the illegal fluctuating workweek plans. However, there is a distinct difference: Under that federal method the salaried employee is not given the opportunity to increase his or her basic rate; in fact, it is *always* the case that the longer the employee on a fluctuating workweek works, the lower the basic hourly rate of the salaried employee becomes. Under the DLSE method for piece workers, production bonus workers or commission workers, it is recognized that these employees are actually given additional time to make more pieces or earn more commission in the overtime hours so that the basic hourly rate may increase. Therefore, the *Skyline* analysis for computing the regular rate of pay is inapplicable to computing the regular rate for piece rate and commission employees. The *Skyline* court recognized this at 165 Cal.App.3d 239, 254.

49.2.1.4 As an alternative, (see 2 above) piece work performed during overtime periods may be paid by paying for each piece made during the overtime period at the appropriate rate, i.e., time and a half (1 ½) for 8 to 12 hours, or double time (2) over 12 hours.

49.2.1.5 **Example 1 Involving Piece Rates With Overtime Based On Time Period When Piece Was Made**

Piece work at $10.00 per piece	
Number of pieces during straight time hours	200
Number of pieces during 8-12 hours	50
Number of pieces over 12 hours	20
200 x $10.00	$2,000
50 x $15.00	$ 750
20 x $20.00	$ 400
Total earnings due:	$3,150

49.2.1.6 Example 2 Involving Piece Rates Calculated On Total Hours Worked:

	M	T	W	T	F	Total
Hours Worked	10	9	7	6	10	42

Total piecework earning for the 42 hours $420.00
Regular rate = $420 divided by 42 . . . . . $ 10.00
B Hours for which time and one-half is due = 5
Premium for overtime hours = $10.00 divided by 2 = $5.00 x 5 . . . . . $ 25.00
Total earnings due:
Straight time $420.00
Overtime . . . . . $ 25.00
Total $445.00

49.2.1.7 Example 3 Involving Piece Rate Calculated On Total Hours Worked At Time And One-Half And Double Time:

	M	T	W	T	F	S	Total
Hours Worked	6	9½	7	8	13	10	53½

Total piecework earnings for the 53½ hours $580.00
Regular rate - $580.00 divided by 53.5 . . . . . $ 10.84
B Hours for which time and one-half is due = 12.5
B Hours for double time hours is due = 1
Premium time and one-half hours = $10.84 ÷ 2 = $5.42 x 12.5 . . . . . $ 67.76
Premium for double time hours = $10.84 x 1 . . . . . $ 10.84
Total premium pay for overtime . . . . . $ 78.60
Total earnings due:
Straight time $580.00
Overtime . . . . . $ 78.60
Total $658.60

49.2.1.8 Example 4 Involving Piece Rate Calculated On Total Hours Worked Where Piece Rate Results in Less Than the Minimum Wage :

	M	T	W	T	F	S	Total
Hours worked	5	6	7	9	11	13	51

Total straight time earnings for the 51 hours $355.00
Minimum wage for the 51 hours ($6.75 plus overtime premium) $384.80
Since earnings are under the minimum wage, compute earnings for the week on minimum wage basis:
Total earnings due:
Straight time: 51 hours @ $6.75 . . . . . $270.00
Time and one-half: 10 hours @ $3.125 . . . . . $101.30
Double time: 1 hour @ $6.75 . . . . . $ 13.50
Total $384.80

49.2.2 Group Piece Work Rates: A group rate for piece workers is an acceptable method of computing pay. In this method the total number of pieces produced by the group is divided by the number of persons in the group and each is paid accordingly. The regular rate for each worker is determined by dividing the pay received by the number of hours worked. Again, of course, the regular rate cannot be less than the minimum wage.

49.2.3 Note: If notice is given to all workers before the performance of the work, the ratio among the various workers may differ (i.e., one may receive 7% while another receives only 5.5%). This is typical on some construction sites and fishing vessels where the experience of the workers is taken into consideration when calculating the shares.

49.2.4 Computing Regular Rate and Overtime on a Bonus. When a bonus is based on a percentage of production or some formula other than a flat amount and can be computed and paid with the wages for the pay period to which the bonus is applicable, overtime on the bonus must be paid at the same time as the other earnings for the week, or no later than the payday for the next regular payroll period. (See Labor Code § 204) Since the bonus was earned during straight time as well as overtime hours, the overtime "premium" on the bonus is half-time or full-time (for double time hours) on the regular bonus rate. The regular bonus rate is found by dividing the bonus by the total hours worked during the period to which the bonus applies. The total hours worked for this purpose will be all hours, including overtime hours. (See previous section)

49.2.4.1 Example Involving Overtime and Bonus: First, find the overtime due on the regular hourly rate, computing for salaried worker and piece workers as described in the sections above. Then, separately, compute overtime due on the bonus: find the regular bonus rate by dividing the bonus by the total hours worked throughout the period in which the bonus was earned. The employee will be entitled to an additional half of the regular bonus rate for each time and one-half hour worked and to an additional full amount of the bonus rate for each double time hour, if any.

Regular hourly rate of pay	$ 10.00
Total hours worked in workweek = 52	
Total overtime hours at time and one-half = 12	
Overtime due on regular hourly rate = 12 x $15.00	$180.00
Bonus attributable to the workweek	$138.00
Regular bonus rate = $138.00 ÷ 52 = $2.6538 ÷ 2 = $1.33 x 12 Overtime Hours	$ 15.92
Total earnings due for the workweek:	
Straight time: 40 hours @ $10.00	$400.00
Overtime: 12 hours @ $15.00	$180.00
Bonus	$138.00
Overtime on bonus	$ 15.92
Total	$733.92

49.2.4.2 If the bonus is a flat sum, such as $300 for continuing to the end of the season, or $5.00 for each day worked, the regular bonus rate is determined by dividing the bonus by the maximum legal regular hours worked during the period to which the bonus applies. This is so because the bonus is not designed to be an incentive for increased production for each hour of work; but, instead is designed to insure that the employee remain in the employ of the employer. To allow this bonus to be calculated by dividing by the total (instead of the straight time hours) would encourage, rather than discourage, the use of overtime. Thus, a premium based on bonus is required for each overtime hour during the period in order to comply with public policy.

49.2.4.3 Example: Involving Overtime, Double Time and Bonus. The bonus of $300.00 for remaining to the end of the season paid to a pieceworker who worked 640 regular hours, 116 time and one-half overtime hours and 12 double time hours:

Bonus	$300.00
Regular Bonus rate=$300.00 divided by 640	$ 0.469
1½ x regular bonus rate = 1½ x $0.469	$ 0.703
Double regular bonus rate = 2 x $0.469	$ 0.938
Overtime due on bonus for time and one-half hours = $0.703 x 116	$ 81.56
Overtime due on bonus for double time hours = $0.938 x 12	$ 11.25
Bonus	$300.00
Overtime on bonus	$ 92.81
Total due on bonus	$392.81

(Plus other properly computed earnings)

49.2.5 Weighted Average Method. Where two rates of pay are paid during a workweek, the California method for determining the regular rate of pay for calculating overtime in that workweek mirrors the federal method, based upon the weighted average of all hourly rates paid. (See 29 CFR §778.115) Initially, therefore, it must be predicated upon the finding that there are established hourly rates being paid. The rate will be established by adding all hours worked in the week and dividing that number into the total compensation for the week. This is consistent with the provisions of Skyline v. DIR (1985) 165 Cal.App.3d 239, since the hourly rates have already been established and what needs to be established now is the weighted average of those rates for purposes of overtime payment.

49.2.6 Exception to Weighted Average. In the situation where an employee is paid two rates during the course of the day and one of those rates is a statutorily-mandated rate (i.e., prevailing wage) the regular rate for calculating the overtime rate for work performed on the public works project must be based on the higher of either the weighted average or the prevailing wage rate in effect at the time that the work is performed*.

49.2.6.1 Example: If an employee is employed in a workweek for some hours on a private construction job at $14.00 per hour and then employed other hours on a public work project at $28.00, any overtime performed on the public work site must be compensated at the overtime rate required by the prevailing wage determination in effect on that project for the craft.

*It would be very unusual for the weighted average to be higher than the prevailing wage rate, but it is possible.

49.2.6.2 If the overtime is performed on the non-public work project, the weighted average of the public works rate of pay and the non-public works rate of pay is the regular rate to be used in the calculation of the overtime.

50 IWC ORDERS EXEMPTIONS.

50.1 The California Industrial Welfare Commission Orders apply to all employees in the State of California except those specifically exempted.

50.2 Employer Bears Burden Of Proof To Show Exemption. The employer bears the responsibility of proving this or any other exemption from the requirements of the IWC Orders. Walling v. General Industries Co., 330 U.S. 545, 67 S.Ct. 883 (1947)

50.3 Employees Exempted From Orders Generally:

1. Employees primarily "engaged in" administrative, executive, or professional capacities are exempt from Section 3 through 12 of the Orders. (IWC Orders, Section 1, Applicability of Order)

   a) In determining which activities constitute exempt work and for examples of exempt and non-exempt job duties, the IWC has chosen to utilize the provisions of certain specified federal regulations. These regulations are discussed below. It is very important to note that not all of the sections of the federal regulations are specified and, thus some are not applicable. Care must be taken to determine which federal regulations may be relied on.

2. Sheepherders were entirely exempt from the Orders until Wage Order 14-2001 became effective on July 1, 2001. After that date, Sections 3, 4(A)-(D), 5 6, 9,11, 12 and 13 do not apply to sheepherders. Note, however, that this exemption is <u>only</u> effective while the person is engaged <u>for the entire workweek</u> in sheepherding as that term is defined in the Order (Order 14-2001, Section 2(N)).

3. Outside salespersons (IWC Orders, Section 1(C)).

4. Effective January 1, 2001, any individual participating in a national service program, such as AmeriCorps, carried out using assistance provided under 42 U.S.C. § 12571, are entirely exempt from the Orders. (IWC Orders, Section 1(E) [generally]; see also, Labor Code § 1171)

5. Parent, spouse, child, or legally adopted child of the employer are entirely exempt from the Orders. (IWC Orders, Section 1(D)) Note that all other relatives of the employer would be covered by the IWC Orders.

6. Employees in computer software fields will be exempt from the overtime requirements* of the Orders if they:

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*The IWC Orders simply state that "employees in the computer software field...shall be exempt" if they meet the listed criteria. The provisions of Labor Code § 515.5 only exempt these employees from the overtime requirements if they meet that same criteria. It is the position of the DLSE, therefore, that the computer software exemption is limited only to the overtime exemption; but that they remain covered by the other protections in the Orders.

a. earn thirty-six dollars ($36.00) per hour for each hour worked, to be adjusted annually by the Division of Labor Statistics and Research (DLSR) on October 1 of each year to become effective January 1 of the following year by an amount equal to the percentage increase in the California Consumer Price Index for Urban Wage Earners and Clerical Workers. This adjustment will be posted on the DLSR website annually, and.
b. are primarily engaged in work that is intellectual or creative and requires the exercise of discretion and independent judgment, and
c. meet the duties test set out at Section 2(h)(ii) of the Orders, and
d. are highly skilled and proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, and software engineering within the meaning of Labor Code § 515.5 and exceptions thereto as defined in Labor Code § 515.5(b).

7. Physicians, like computer software workers, are exempt from overtime provisions of the Code and IWC Orders, if they:
   a. earn at least $55.00 per hour for each hour worked, and
   b. their primary duties require licensure pursuant to Business and Professions Code § 2000.
8. Generally, employees covered by a valid CBA that 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 30 percent more than the state minimum wage, are exempt from overtime requirements contained in Section 3 of the Orders (Hours and Days of Work) except for provisions concerning premium pay for minors.
   a. Order 4 limits the number of hours in a workweek to seventy-two and a CBA may not change that limit
   b. except for the provisions of Sections 4, 10, 11, 12 and 20, Order 9 exempts all employees covered by a CBA under the Railway Labor Act. This exception was contained in prior Orders and is extended as a result of the provisions of Labor Code § 515(b)(2).
   c. the CBA exception from overtime in Order 14 requires less protection in the CBA than that afforded in the other Orders.
9. Other exemptions from the overtime provisions of the Orders but not from the minimum wage and other provisions:
   a. truck drivers subject to 49 CFR §§ 395.1 to 395.13 or 13 C.C.R §§ 1200, *et seq.*; (Order 16 does not contain this exemption; see complete discussion, below)
   b. ambulance drivers and attendants scheduled for twenty-four (24) hour shifts of duty who have agreed in writing to exclude from daily time worked not more than three (3) meal periods of not more than one hour each and a regularly scheduled uninterrupted sleeping period of not more

than eight (8) hours (provided the employer provides adequate dormitory and kitchen facilities for employees on such a schedule);

c. Full-time carnival ride operators employed by traveling carnivals. Note this does not apply to pick-up or part-time operators, only to employees employed on a full-time basis by the traveling carnival and whose duties require that they spend their full time operating a carnival ride;

d. Professional actors;

e. Personal attendants in private homes (excluding babysitters under the age of 18 years employed to care for children of the householder), or personal attendants (See definition at IWC Order 5-2001, Section 2(N) which includes babysitters for purposes of that Order) who are employed by a non-profit organization* covered by Wage Order 5-2001.

f. Student nurses;

g. Employees directly employed by the State or any county, incorporated city or town or other municipal corporation (this exception does not appear in Order 14);

h. Organized camp counselors who are not employed more than 54 hours within six days in a week (provided they receive time and one-half premium for hours in excess of 54); note, however, that under Labor Code § 1182.4 a camp counselor paid a salary based on 85% of the minimum wage, is not subject to the IWC minimum wage or overtime provisions.

i. Until December 31, 2001, adults (or minors permitted to work as adults) who have direct responsibility for children under the age of eighteen receiving 24-hour care (had to be paid time and one-half premium for all hours in excess of 40); see discussion at Section 50.5 of this Manual regarding changes in IWC Order 5-2002.

j. Resident managers of homes for the aged having less than eight beds (must be paid time and one-half premium for all hours in excess of 40).

10. In addition, learners (defined as employees during their first one hundred and sixty (160) hours of employment in occupations in which they have no previous similar or related experience), may be paid not less than eighty-five percent (85%) of the minimum wage rounded to the nearest nickel. Note that this provision does not exempt learners from the overtime provisions of the Orders.

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*Non-profit organizations are listed with the Attorney General of the State of California.

50.4 Other Exemptions. While not totally exempting employees from either the overtime or minimum wage requirements, there are other exceptions to the 8-hour day overtime provisions contained in the Orders.

50.4.1 The "Alternative Workweek" arrangements which are Discussed in detail in Section 56 of this Manual, are, of course, also an exception to the 8-hour requirement.

50.4.2 Hospital And Rest Homes Exemption. Order 5-2002, Section 3(D) provides that in the operation of a hospital or an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises, the employer and employee may enter into an agreement or understanding, before the performance of the work, which provides a work period of fourteen (14) consecutive days in lieu of the workweek of seven consecutive days for the purposes of overtime computation and the employee receives compensation of time and one-half (1½) times the employee's regular rate of pay for all hours in excess of eighty (80) hours in the 14-day period.

50.4.3 Important Note. This provision, which has been part of the IWC Orders for many years, had, in past Orders, specifically required overtime after eight hours in any one day within the 80-hour extended workweek. That language is no longer required because the Labor Code now specifically requires premium pay after eight in any one day (Labor Code § 510) and any deviation from that norm would have to be specified in the regulation. Since there is no exemption from the eight-hour provision in the language of Section 3(D), the eight-hour requirement, together with the double time requirement after twelve hours, no longer need be mentioned but are applicable to said employees.

50.4.4 There Is No Longer An Overtime Exemption For Personal Attendants In For-Profit Care Homes. IWC Order 5, Section 2(N) provides an exemption for personal attendants as defined. That definition only applies to those employed by a non-profit organization.

50.5 Employees With Direct Responsibility For Children Under 18 Years Of Age Receiving 24-Hour Residential Care. Effective January 1, 2002 (See IWC Order 5-2002), employees with direct responsibility for children (1) under the age of 18, (2) who are not emancipated from the foster care system, and (3) are receiving 24-hour residential care, are exempt from the normal daily overtime requirements of the California law. Such employees must be paid as follows:

1. Time and one-half for all hours in excess of 40 in a workweek;
2. Double time for all hours in excess of 48 hours in the workweek;
3. Double time for all hours in excess of sixteen (16) in a workday.

50.5.1 The employees defined above may not be required to work more than 24 consecutive hours without an 8-hour period off. However, the IWC provided further that "time spent sleeping shall not be included as hours worked."

50.6 Commissioned Salespeople. Certain commissioned salespersons covered either by Order 4-2001 or 7-2001 are exempted from overtime requirements by Subsection 3(D) of those Orders (O.L. 1994.02.07):

> The provisions of subsections (A), (B) and (C) above shall not apply to any employee whose earnings exceed one and one-half (1½) times the minimum wage, if more than half (½) of that employee's compensation represents commissions.

50.6.1 It is important to note that certain requirements must be met in order to comply with California law and meet the exemption criteria:

1. In order to comply with the requirements of the exemption and of L.C. § 204, for each workweek in the pay period the earnings of the employee, whether actual commissions or a guaranteed draw for the workweek against commissions to be earned within such workweek, must exceed 1.5 times the minimum wage for each hour worked during the pay period.
2. As stated above, the payment of the earnings of more than 1.5 times the minimum wage for each hour worked must be made in each pay period. Therefore, it is not permissible to defer any part of the wages due for one period until payment of the wages due for a later period.
3. Compliance with the requirements of the exemption is determined on a workweek basis. The minimum compensation component of the exemption must be satisfied in each workweek and paid in each pay period.
4. The second component of the exemption, namely at least 50% of earnings from commissions, must also be satisfied in each workweek. However, the actual determination of compliance can be deferred until the reconciliation date following the end of the second pay period. Overtime will be due for any week in which the second component is not met. To test for whether the compensation arrangement is a bona fide commission plan, California law also uses a period of at least one month. Consistent commission earnings below, at, or near the draw are indicative of a commission plan that is not bona fide. If the commission plan is found to be invalid, overtime will be due for all weeks in which the exemption was claimed.

50.6.2 Use Of Federal Definitions. To the extent not inconsistent with California's overtime laws and policies, California in applying the provisions of Subsection 3(D) of Order 4-2001 and 7-2001, has adhered to the federal government's interpretation of the provisions of 29 U.S.C. § 207(i) (See also, Hermann v. Suwanee Swifty Stores, Inc. 19 F.Supp.2d 1365 (N.D. Ga.1998) However, the definition of commissions adopted by the U.S. Department of Labor and the definition of that term in California law differ. (See Keyes Motors v. DLSE (1987) 197 Cal.App.3d 557; 242 Cal.Rptr. 873) Thus, the provisions of 29 CFR § 779.413, et seq. to the extent that they discuss the definition of commissions and what constitutes commissions are not instructive for purposes of explaining DLSE enforcement policy in this area.

50.6.3 What Constitutes "Commissions" In California. In order to be a commissioned employee, the employee must be principally involved in selling a product or service and the amount of compensation received as commission must be based on a percentage of the sale price of the product or service. (Ramirez v. Yosemite Water Co., Inc. (1999) 20 Cal.4th 785, and Keyes Motors v. DLSE, supra.)

50.6.4 Advances, Draws, Guarantees. Many employment arrangements provide for the payment at a regular pay period of a fixed sum which bears a more or less fixed relationship to the commission earning which could be expected, on the basis of experience, for an average period of the same length. Such periodic payments are referred to as "advances," "draws," or "guarantees" and are keyed to a time base and must be paid under California law at time intervals of not less than twice a month. These advances, draws or guarantees are normally smaller in amount than the expected commission earnings for the period and if they prove to be greater, a deduction of the excess amount from commission earnings for a subsequent period is made when reconciliation is accomplished. In California, unless there is a specific agreement to repay advances other than out of future commissions, those advances are considered payment in lieu of salary and fix the employee's minimum compensation. (Agnew v. Cameron (1967) 247 Cal.App.2d 619; 55 Cal.Rptr. 733) This does not alter the fact that an advance or draw is intended to be linked to commissions and is recoverable during the employment from future commissions.

50.6.4.1 To satisfy the exemption, however, for each workweek the employee must be paid a guaranteed draw that exceeds 1.5 times the minimum wage and that can be recovered only from commissions earned in that workweek and not from commissions earned in future workweeks. This is so because every workweek must stand alone for purposes of minimum wage and overtime computation.

50.6.4.2 The stipulated sum may not be considered to be a draw against commissions if the circumstances show that it was simply paid as a salary; but if the draw actually functions as an integral part of a true commission basis of payment, then the actual commissions paid, even though less than the draw, will qualify as compensation which represents commissions on the sale of goods or services. Each case must be reviewed separately.

50.6.4.3 Representative Period. Whether compensation representing commissions constitutes most of an employee's pay so as to satisfy the exemption must be determined by testing the employee's compensation for a "representative period" of not less than 1 month. While there is no specific period and no bright-line test can be drawn, DLSE has determined that the federal FLSA is consistent with California law in this regard and utilizes the federal guideline. DLSE will accept a period "described generally as a period which typifies the total characteristics of an employee's earning pattern in his current employment situation, with respect to the fluctuations of the proportion of his commission earnings to his total compensation." (See 29 CFR § 779.417(a) and O.L. 1994.02.07)

50.6.4.4 Note: The representative period can <u>not</u> be less than one month.

50.6.4.5 Records. The employer bears the responsibility of proving this or any other exemption from the requirements of the IWC Orders. Walling v. General Industries Co., 330 U.S. 545, 67 S.Ct. 883 (1947) For this reason, adequate records must be kept which clearly indicate the amount paid and the nature of the payments made to the employee. A copy of the agreement between the employer and employee or, if not a written agreement, a summary of the agreement including the basis of compensation, the applicable representative period and the date the agreement was entered into and how long it remains in effect is required. (This is consistent with 29 CFR § 516.16)

50.6.4.6 Earnings Must Exceed One And One-Half Minimum Wage. The exception will not be met unless the employee receives earnings for each period (not exceeding a weekly period) of more than one and one-half times the applicable minimum wage. These earnings would include a guaranteed draw against commissions earned during the weekly period so long as that guaranteed draw was part of a bona fide commission plan.

50.7 Employees Covered By Collective Bargaining Agreements. The IWC Orders exempt employees from overtime if they are covered by a collective bargaining agreement which provides certain safeguards:

> Except as provided in subsections [dealing with hours of minors, days of rest and refusal to work more than 72 hours in any one workweek] this section shall 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 30 percent more than the state minimum wage.

50.7.1 This section is an opt-out provision which allows parties to collective bargaining agreements to provide any premium wage over the regular rate for any overtime work performed as long as the cash hourly rate of pay provided to the employee is at least thirty percent over the current minimum wage.

50.7.1.1 Overtime Hours Defined. For purposes of this section, DLSE interprets the term "overtime hours" to mean any hours which the collective bargaining agreement treats as overtime hours payable at a premium rate. It is not necessary, however, that the collective bargaining agreement provide the same premium rates (time and one-half or double time) as required by the California law. (See discussion at The Statement As To The Basis, page 16)

50.7.1.2 The provisions of the IWC Orders in this regard have been tested and found to be valid opt-out provisions not subject to pre-emption by the National Labor Relations Act. The case of NBC v. Bradshaw, 70 F.3d 69, 70-71 (9th Cir.1995) quoted the DLSE policy in the text of the case:

> On April 2, 1991, counsel for the then acting Labor Commissioner sent a letter to NBC that explained that the NABET-members' claims had been handled in accordance with the Commission's long-standing practice of waiting until the parties enter into a new agreement and then applying Wage Order 11-80's provisions to the interim period only if the overtime provisions

of the successor contract are not made retroactive to the date of the old contract's expiration. The letter stated in relevant part:

[T]he division has a long-established policy that provides that the mere expiration of a collective bargaining agreement will not operate to remove the worker from coverage by the collective bargaining agreement. Absent some other unilateral action by the parties to the expired CBA, the terms and conditions of the agreement (except for arbitration and union recognition) continue. In the vast majority of cases the parties reach agreement and retroactively implement the newly negotiated terms and conditions.

....

It is because of this history of collective bargaining that the Division has taken the position that mere expiration of the agreement will not suffice to trigger the requirement that the employer comply with the overtime obligations contained in the IWC Orders....[I]f the division were to measure the date the obligation of the employer arises to meet the overtime requirements simply from the date of expiration of the CBA, the state would be needlessly inserting itself into the collective bargaining process. It is for this reason that the Division measures the date the employer's obligation arises from the date of the expiration of the contract only if subsequent events indicate that such date did, actually, mark the cessation of the protections contained in that contract. Implementation of unilateral conditions by the employer without subsequent negotiations which result in contract terms which are retroactive to the date of the expiration would make the term 'agreement' meaningless for there would be no mutual assent.

50.7.1.3 The above statement remains the enforcement position of DLSE regarding the provisions of the CBA opt-out language in the IWC Orders. (O.L. 1991.04.02)

50.8 Certain Truck Drivers. The provisions of the some IWC Orders (not Order 16, see below) exempt certain drivers from the overtime requirements of the Orders. The exemption applies if the hours of service of the drivers are regulated either by the U.S. Department of Transportation or the regulations of the California Highway Patrol.

50.8.1 Overtime Exemption Under Section 3 Of The IWC Orders For Two-Axle Trucks Of 26,000 lbs. Or Less Which Are Regulated By The CHP, The PUC, Or The DOT. Most of the Industrial Welfare Commission Orders provide that the overtime provisions:

...are not applicable to employees whose hours of service are regulated by (1) the United States Department of Transportation Code of Federal Regulations, Title 49, Section 395.1 to 395.13, Hours of Service of Drivers, or (2) Title 13 of the California Code of Regulations, Subchapter 6.5, Section 1200 and following sections, regulating hours of drivers.

50.8.1.1 This section will address and attempt to clarify the exemption for drivers of two-axle trucks of not more than 26,000 lbs. gross vehicle weight*. (See O.L. 1996.07.10 for discussion and O.L. 1997.05.16 for clarification.)

50.8.2 U.S. Dept. Of Transportation Regulations: The IWC Order exempts those drivers whose hours of service are regulated by Code of Federal Regulations, Title 49, Section

*Three-axle trucks and two-axle trucks of over 26,000 lbs. are clearly regulated by the CHP and therefore exempt under Section 3 of the IWC Order. Therefore, the only grey area for purposes of applying the exemption are certain two-axle trucks of between 10,000 lbs. and 26,000 lbs., unless it is a for hire vehicle regulated by the PUC or transports hazardous material, then it may be exempt even if under 10,000 lbs.

395.1 to 395.13. Those regulations apply to vehicles of 10,000 lbs. gross vehicle weight rating* or more and who travel in interstate commerce. Both of these requirements, the weight of more than 10,000 lbs. and the interstate commerce requirement must be present.

50.8.3 The U.S. Department of Transportation defines interstate commerce as "[T]rade, traffic or transportation in the United States which is between a place in a State and a place outside of such State (including a place outside of the United States) or is between two places in a State through another State or a place outside of the United States." (49 CFR § 390.5.) The Department of Transportation has concisely explained how interstate commerce is to be defined for purposes of the Motor Carrier Act**:

> "A motor carrier is engaged in 'interstate commerce' when transporting goods either originating in transit from beyond the State or ultimately bound for destination beyond the State, even though the route of a particular carrier is wholly within one State. Merchants Fast Motor Lines, Inc. v. Interstate Commerce Commission, 528 F.2d 1042 (5th Cir. 1976). Traffic need not physically cross state lines to be in interstate commerce if the goods carried are in the course of through transit. 'Through Transit' is not to be confused with purely 'local' traffic not destined for points outside the state of origin. Id. For example, though the transportation by a carrier may be between points wholly in the same state, if the shipment originated outside of the state and was part of a continuous movement, then the in-state movement would be considered to be in interstate commerce." Shew v. Southland Corporation (Cabell's Dairy Division), 370 F.2d 376 (1966). See United States v. Western Pacific Railroad Co., 352 U.S. 59, 77 S.Ct. 161 (1956).

50.8.3.1 Thus, the first inquiry which should be addressed in determining whether the driver is exempt or non-exempt under the IWC Orders is whether the operation of the vehicle is subject to the United States Department of Transportation's regulations. The operative questions to ask are:

1. Is the truck weight between 10,000 and 26,000 lbs.?

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*"Manufacturer's gross vehicle weight rating" means the weight in pounds of the chassis of a truck or truck tractor with lubricants, radiator full of water, full fuel tank or tanks plus the weights of the cab or driver's compartment, body, special chassis and body equipment and pay load as authorized by the chassis manufacturer. In the event a vehicle is equipped with an identification plate or marker bearing the manufacturer's name and manufacturer's gross vehicle weight rating, the rating stated thereon shall be prima facie evidence of the manufacturer's gross vehicle weight rating." Vehicle Code § 390.

**It is important to note that the term "interstate commerce" is given different interpretations depending on the context within which the term is used. For instance, for purposes of the Fair Labor Standards Act, the term interstate commerce is measured very broadly and looks to the question of whether any of the goods being manufactured or sold impact on interstate commerce. Under the FLSA interpretation of the term, if the goods being manufactured are produced from goods coming from another state, interstate commerce is involved. This interpretation insures that the employment which may be subject to the Act covers more workers. Such is not the case when the Transportation Act is involved since the rationale for regulating transportation in interstate commerce is to insure the smooth flow of commerce between the states, not, as in the case of the FLSA, to insure that a remedial public policy (protecting the rights of workers engaged in the flow of interstate commerce) is being enforced.

a. If the truck is less than 10,000 lbs., the DOT does not regulate its activities and the inquiry regarding regulation may end except for the limited regulatory areas covered by state agencies explained below. If the truck weighs more than 10,000 but less than 26,000 the inquiry regarding DOT coverage must continue with numbered paragraphs 2 and 3, below.

b. As explained below, if the truck weighs more than 26,000 lbs. it is subject to regulation by state authorities in any event.

2. Does the carrier cross state lines?

3. If the carrier does not cross state lines, has the cargo crossed state lines? That is, are the goods in the course of through transit as opposed to purely local traffic not destined for points outside the state of origin?

   a. See the explanation of interstate commerce cited above.

50.8.4 If the truck does not cross state lines, and if the goods the truck is carrying do not constitute goods in interstate commerce as described above, the driver is not exempt under the federal regulations. However, the inquiry must continue to determine if any state regulation of hours of service of drivers is involved.

50.9 State of California: California Code of Regulations, Title 13 The scope of the regulations defined in §1200 of Title 13, C.C.R., indicates that the regulations in chapter 6.5 of those regulations regulate the hours of drivers of:

1) farm labor vehicles;
2) vehicles listed in Vehicle Code Sections 34500 and 34500.1, and
3) limited application to two-axle trucks of 26,000 lbs. or less transporting hazardous materials.

50.9.1 Two-axle trucks are regulated in four subsections of §34500 of the Vehicle Code. Those subsections include:

(f) two-axle trucks connected to a regulated trailer or semitrailer so that the combination exceeds 40 feet in length;

(g) two-axle trucks transporting any hazardous material or towing a trailer transporting hazardous material;

(j) two axle trucks regulated by the PUC, and

(k) two-axle trucks with a gross vehicle weight of 26,001 or more pounds, and any two-axle truck towing any regulated trailer/semitrailer with a gross vehicle weight rating of more than 10,000 pounds.

50.9.2 Overtime Premium Requirement Applicable To Some Truck Drivers. The Division may enforce the overtime provisions of the wage orders for workers employed as drivers of two-axle trucks that are not regulated by the United States Department of Transportation (trucks over 10,000 lbs. and not in interstate commerce) and two-axle trucks of less than 26,000 lbs. except for those two-axle trucks that:

1. Transport hazardous material;
2. Tow a regulated trailer or semitrailer with a combined length of 40 feet;
3. Tow a regulated trailer or semitrailer with a gross vehicle weight of 10,000 lbs; or

4. Any other "motortruck" within the meaning of the Vehicle Code, that is regulated by the PUC or the Interstate Commerce Commission (ICC)

50.9.2.1 The IWC exemption only applies to employees whose regular duty is that of a driver, not any other category of worker. The policy would cover employees regularly employed as relief drivers or as assistant drivers. However, any driver who does not drive or operate a truck for any period of time during an entire workday is entitled to overtime premium compensation for all overtime hours worked performing duties other than driving during that day. (*Crooker v. Sexton Motors, Inc.* (1972) 469 F.2d 206).

50.9.3 **"For Hire" Vehicles Under California Law**: An airport or hotel/motel shuttle is not a "motortruck" within the meaning of the Vehicle Code, and neither the PUC nor the ICC regulates the hours of service and logbooks of drivers of such shuttles. Therefore, such shuttle drivers are not exempt from IWC overtime regulation. (See O.L. 1997.05.16).

50.9.4 **Note**: It is important to point out that taxi drivers (not limousine drivers) are exempt from overtime (See Order 9, Section 3(M)).

50.9.5 **Order 16 And Truck Drivers**. Order 16 does not contain any exemption for truck drivers and, in addition, since the provisions of Order 16 supersedes any industry or occupational order for those employees employed in occupations covered by the Order (See Order 16, Section 1(F)), this can have a far reaching effect.

50.9.6 **Logging Truck Drivers**. Despite the provisions of Order 16 which are designed to seemingly cover any employee engaged in logging, truck drivers hauling logs who are employed by firms that engaged in the transportation of logs are under Order 9, and thus, typically exempt from the overtime provisions for the reasons cited in Section 50.9 of this Manual.

50.9.7 **Truck Drivers Who Are Employed In Any On-Site Occupation** set out in the Applicability section of Order 16, are covered by the overtime provisions contained in Order 16. In an e-mail opinion dated January 29, 2001, the DLSE opined:

> "A driver will be subject to Order 16 if he or she operates on or at or in conjunction with a construction, oil drilling, mining or logging site or delivers materials or personnel from such a site to a location off the site which is owned, operated or controlled by a contractor or other employer engaged in work at the construction, oil drilling, mining or logging site or delivers materials or personnel from a location off site which is owned or operated by such a contractor or employer to the construction, oil drilling, mining or logging site. A driver employed by a supplier or manufacturer who is engaged in supplying materials or personnel to a contractor or other employer on a construction, oil drilling, mining or logging site from an off-site location not owned, operated or controlled by a contractor or other employer engaged in work at the construction, oil drilling, mining or logging site will be covered by the IWC Order applicable to the industry in which he or she is employed."

50.9.8 **Exemption For Ambulance Drivers And Attendants On 24-Hour Duty**. Currently, this exception is only available under Orders 5 and 9. The exemption is available for ambulance drivers and attendants who have agreed in writing to *24-hour shift schedules* in which case, three one-hour meal periods and one eight-hour *uninterrupted* sleep period may be deducted from the total of 24-hour shift. This exemption does not

cover workers employed for less than 24 hours. (See Monzon v. Schaefer (1990) 224 Cal.App.3d 16; 273 Cal.Rptr 615 and O.L. 1994.02.03-4)

50.9.8.1 DLSE has historically enforced the exemption provision covering ambulance drivers and attendants as requiring, as the provision in the IWC Orders has always specifically stated, a written agreement before the exemption from the overtime requirements is effective. The Second District Court of Appeal, Division 6, in the majority opinion in Monzon v. Shaefer, supra, determined that the requirement by the IWC was not required.

50.9.8.2 The provision for ambulance drivers and attendants was adopted by the IWC many years ago based on provisions in the federal law. The federal proviso at 29 CFR § 785.22 provides, inter alia:

> (a) Where an employee is required to be on duty for 24 hours or more, the employer and the employee may agree to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period of not more than 8 hours from hours worked, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep. If sleeping period is of more than 8 hours, only 8 hours will be credited. Where no expressed or implied agreement to the contrary is present, the 8 hours of sleeping time and lunch periods constitute hours worked.
>
> (b) Interruptions of sleep. If the sleeping period is interrupted by a call to duty, the interruption must be counted as hours worked. If the period is interrupted to such an extent that the employee cannot get a reasonable night's sleep, the entire period must be counted. For enforcement purposes, the Divisions have adopted the rule that if the employee cannot get at least 5 hours' sleep during the scheduled period the entire time is working time."

50.9.8.3 Based on the above, the former DIW (Division of Industrial Welfare) and, subsequently, DLSE, have historically taken the position that if the employee does not get at least five consecutive hours of sleep during the eight hour period, the whole of the eight hour sleep period must be compensated.

50.10 Exemption For Motion Picture Projectionists. IWC Order 10 exempts workers whose exclusive duty is that of a motion picture projectionist if they are employed in the Amusement and Recreation Industry.

50.11 Announcers, News Editors And Chief Engineers are exempt if they are employed in the Broadcasting Industry and work in a radio or television station in a town which has a population of not more than 25,000 according to the most recent U.S. census. (Order 11-2001, § 3(K))

50.12 Irrigators In The Agricultural Occupations are exempt from overtime requirements in any week in which more than half of the employee's working time is devoted to performing the duties of an irrigator. (See Order 14, Section 3(C))

50.13 Special Rules For Extra Players In Motion Picture Industry. Order 12 exempts professional actors and actresses; but provides special overtime requirements for extra players at Section 3(D). Hours worked by extra players are computed in units of one-tenth (1/10) of an hour, and work time is defined in detail. The basic requirement for daily and weekly overtime is provided except that there is no provision for premium pay on the 7th day of work in the workweek for extra players.

50.13.1 Extras. In limited cases, persons who are not under the control of film makers and are used in large crowd scenes may not be considered employees of the film company. (O.L. 1997.05.27)

51 DETERMINING EXEMPTIONS.

51.1 There are a number of factors which go into determining whether an employee may be treated as exempt for purposes of the California Industrial Welfare Commission Orders. The exemption has far-reaching ramifications since that status deprives the employee not only of the right to overtime compensation, but also to most of the other protections afforded to non-exempt employees by the Wage Orders. Exempt status deprives the employee of the protections of the Orders:

Section 3, overtime premium;

Section 4, minimum wage;

Section 5, reporting time pay;

Section 7, requirement of records under IWC Orders (but not records required by the Labor Code;

Section 9, requirement that employer furnish uniform (however, Labor Code § 2802 would provide some protection for the exempt employee);

Section 10, requirement that meals and lodging amounts be limited;

Section 11, meal period requirement, and

Section 12, rest period requirement.

51.1.1 Determining The Exemption. Below are the criteria which must be met in order to apply the exemption to any employee.

51.2 Primarily Engaged In. Each of the exemptions – administrative, executive or professional – require that the employee be "primarily engaged in" the duties which meet the test for the exemption. The term "Primarily Engaged In" means that more than one-half (½) of the employee's work time must be spent engaged in exempt work and differs substantially from the federal test which simply requires that the "primary duty" of the employee fall within the exempt duties.

51.2.1 The IWC has noted in the Statement As To The Basis of the October 2000 IWC Orders that this "quantitative test" continues to be different from, and more protective of employees than, the federal "qualitative" or "primary duty" test.

51.3 Activities Constituting Exempt Work And Non-Exempt Work are to be construed in the same manner as such terms are construed in the listed sections of the Code of Federal Regulations under the Fair Labor Standards Act effective as of the date of the Order. (October 1, 2000 for all Orders except Order 16 which is effective January 1, 2001) A copy of the applicable federal regulations is found as an Addendum at the end of this Manual.

51.3.1 In each instance, the federal regulations listed are the same federal regulations utilized by the DLSE for at least the past twenty years to interpret and enforce the IWC Orders. The IWC has detailed the definitions to be used in determining the administrative, executive and professional exemptions by specifying the specific federal regulations which are to be relied upon. The IWC recognizes this fact when, in the "Statement As To The Basis" of the newly promulgated Orders, they state:

> "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."

51.4 Directly And Closely Related Activities. Among the activities which are to be considered as exempt include work that is "directly and closely related to exempt work and work which is properly viewed as a means for carrying out exempt functions."

51.4.1 The definitions of the term "directly and closely related to exempt work and work which is properly viewed as a means for carrying out exempt functions" differ from exemption to exemption. Specific examples for each of the exemptions are set out at 29 CFR § 541.108 (Managerial), § 541.208 (Administrative), and § 541.308 (Professional).

51.4.2 In assessing the duties of a putatively-exempt employee, it should be borne in mind that it is not the intent of the definitional language of "directly and closely related work and work which is properly viewed as a means for carrying out exempt functions" to expand the exemption, but simply to recognize that there are limited instances when production-type activities must be utilized to carry out the duties of the otherwise exempt employee.

51.4.2.1 Examples: Such activities as an attorney drafting a brief on a computer or typewriter; a manager preparing a personal memo to his or her staff on a computer; driving visiting management to the airport so further discussions regarding management activities can be carried on.

51.4.2.2 Occasional Tasks. In the Statement As To The Basis for the current Orders, The IWC states that the Commission "recognizes that 29 CFR § 541.110 also refers to 'occasional tasks' that are not 'directly and closely related'. The IWC does not intend for such tasks to be included in the calculation of exempt work." Thus, non-exempt work performed by an otherwise exempt manager on an occasional basis may not be counted toward the 50% time requirement. This reflects the long-established DLSE enforcement policy and any past enforcement policy statement which may have been interpreted by some to countenance non-exempt work by exempt employees – even on an occasional basis – is a misinterpretation of DLSE policy and clearly inapplicable to the current Orders.

51.5 Exercise Of Discretion And Independent Judgment. While the Legislature has stated in each of the exempt categories that as a condition of the exemption the employee must "customarily and regularly exercise[s] discretion and independent judgment in performing" the duties, the IWC Orders provide that the provisions of 29 CFR § 541.107 are to be used to determine the activities constituting exempt versus non-exempt work. That section, however, only addresses the term "discretionary powers" and does not address the exercise of discretion and independent judgment. The confusion arises from the fact that after the initial draft of the IWC Orders was produced, the California Legislature amended Labor Code § 515(a) to require, unlike the federal regulations, that in order to meet the criteria for exempt status, the

employee "customarily and regularly exercises discretion and independent judgment in performing" the duties. In the Statement As To The Basis, the IWC cited, inter alia, 29 CFR § 541.207 and specifically mentions that that section contains a "description of what is meant by the phrase 'discretion and independent judgment'."

51.5.1 Enforcement Note: For enforcement purposes, therefore, DLSE will disregard the language of 29 CFR § 541.107 and rely upon the language of 29 CFR § 541.207 to define the term "discretion and independent judgment" in each of the exempt classifications.

51.5.1.1 Additionally, the stated intent of the IWC that the "California 'quantitative test' continues to be different from and more protective of employees than, the federal 'qualitative' or 'primary duty' test" must be considered in applying the "directly and closely related" examples.

51.5.2 Realistic Expectations. The IWC Orders also provide that the work actually performed by the employee during the course of the work week must, first and foremost, be examined and the amount of time the employee spends on exempt work, together with the <u>employer's realistic expectations</u> and <u>the realistic requirements of the job</u>, shall be considered in determining whether the employee satisfies the requirements to be exempt.

51.5.3 Important Note: As more fully Discussed below, the IWC points out in the Statement As To The Basis of the Wage Orders that the Supreme Court in Ramirez stated that in determining realistic expectations, consideration must be given to "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." In other words, an employer may not choose to ignore the fact that it would not be reasonable to expect an employee to perform the duties assigned without performing work exceeding the duties test requirements.

51.5.3.1 As an example, when assessing a managerial exemption, a "straw boss" or working foreman has "duties" which are designed to be production duties and may, also, have some limited managerial duties as well. The production duties which the straw boss is assigned would not be counted toward the "directly and closely related" work because they are designed to fulfill the production aspect of the worker's assigned duties. The fact that he is performing those "production-type" duties is not an outgrowth of his limited supervisory role, but is simply a part of his production duties.

51.5.3.1.1 The IWC addressed this particular language in the Statement As To The Basis of the October 2000 Wage Orders. The IWC noted that:

> "...the last sentence of section A(5) comes from the California Supreme Court's decision in Ramirez v. Yosemite Water Co (1999) 20 Cal.4th 785, 801-802. Although that case involved the exemption for outside salepersons, 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."

51.5.3.2 The IWC quotes the above language from the Ramirez case in order to illustrate the requirement which has long been a part of the enforcement policy of the DLSE: An employer may not, through the use of "an idealized job description", thrust an employee into an exempt status when the duties imposed on that employee would not "realistically" allow the employee to perform exempt activities more than 50% of the time. By the same token, an employee in an otherwise exempt position may not surreptitiously perform non-exempt duties which are not within the realistic expectations of the employer in order to defeat the exemption.

51.5.3.3 Summary Of Test Of Whether Employee's Performance Did Not Meet Expectations: As the Supreme Court stated, the test of whether the employee has performed in such a substandard manner that he or she did not meet the "realistic expectations" of the employer involves an objective review of the following:

1. whether the employee's practice diverges from the employer's realistic expectations;
2. whether there was any concrete expression of employer displeasure over an employee's substandard performance, and,
3. whether these expressions were themselves realistic given the actual overall requirements of the job.

51.6 Salary Requirement. In order to meet the test for exempt status, an employee must, in addition to the above requirements, also earn a monthly salary equivalent to no less than two (2) times the state minimum wage for full-time employment. Full-time employment is defined in Labor Code § 515(c) as forty (40) hours per week*.

51.6.1 Neither the Legislature nor the IWC has set forth any criteria for determining the interpretations of the word "salary" for purposes of the IWC Orders. The fact that the Legislature provided that the monthly salary was to be "no less than" two times the state minimum wage indicates that they intended that the salary (as it is with the federal rule) was not to be subject to deduction unless the employee voluntarily absents himself for personal reasons. The monthly salary amount requirement of two times the minimum wage is a minimum standard which cannot be undercut by an action initiated by an employer (e.g., furlough, suspension). (O.L. 2002.05.06, see also Division Policy reflected in memo dated December 23, 1999, "Understanding AB 60" posted on DLSE website.)

51.6.2 Differences Between State And Federal Enforcement Required By Inconsistencies Of Federal Regulations With California Law. As the Commission has recognized in the Statement As To The Basis of the current Orders, the IWC "chose to adopt regulations for Wage Orders 1-13 and 15 that substantially conform to current guidelines in the enforcement of IWC orders, whereby certain Fair Labor Standards Act regulations (Title 29 CFR 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 DLSE has recognized these inconsistencies and tailored the federal enforcement policy to fit the California law.

51.6.3 The Required Salary May Not Be Prorated For Work Less Than Full-Time. Both the Legislature and the IWC clearly indicated that the salary requirement of two times the state minimum wage was the minimum which could be paid and that amount could not be prorated for part-time work. (Transcript of IWC Hearing, January 28, 2000, pgs. 65-67)

51.6.3.1 No Obligation To Pay Salary To Exempt Employee Who Has Performed No Work In The Workweek. Subject to the specified exceptions discussed in this Chapter, the employee must receive the full contract salary for any week in which any work is performed without regard to the number of days or hours worked, subject also to the general rule that an employee need not be paid the contract salary for any workweek in which no work is performed.

51.6.3.2 The federal courts have Discussed the requirements of the "salary" requirements under the Fair Labor Standards Act.

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*There is no requirement under the federal regulation to pay a salary to an exempt employee who has performed no work during the full workweek which is the measure of the obligation. As of March 1, 2002, the DLSE announced that it would adopt the weekly standard found in the federal regulations with some qualifications.

"The conclusion that an FLSA-exempt executive's pay may not vary as a function of the number of hours worked is also consistent with a common-sense understanding of salaried employment. Certainly a layman would understand that a salaried executive is a person paid an amount, on a weekly or less frequent basis, that bears no relationship to the number of hours worked in any particular week. The Ninth Circuit put this point as follows:

"A salaried employee is compensated not for the amount of time spent on the job, but rather for the general value of services performed. It is precisely because executives are thought not to punch a time clock that the salary test for "bona fide executives" requires that an employee's predetermined pay not be "subject to reduction because of variations in the...quantity of work performed"... Abshire v. County of Kern, 908 F.2d at 486. Similarly, the Third Circuit in Brock v. Claridge Hotel and Casino, 846 F.2d 180, 184 (3d Cir.), cert. denied sub nom. Claridge Hotel & Casino v. McLaughlin, 488 U.S. 925, 109 S.Ct. 307, 102 L.Ed.2d 326 (1988), explained that [s]alary is a mark of executive status because the salaried employee must decide for himself the number of hours to devote to a particular task. In other words, the salaried employee decides for himself how much a particular task is worth, measured in the number of hours he devotes to it. (Thomas v. County of Fairfax, 803 F.Supp. 1142, 1148 (E.D. Va.1992)

51.6.4 As the California Supreme Court stated in Morillion v. Royal Packing Co., (2000) 22 Cal.4th 575, 94 Cal.Rptr.2d 3, 995 P.2d 139, in determining how much weight to give federal authority in interpreting a California wage order, it is necessary first to make a comparative analysis of the two statutory schemes. (Id. at p. 588) In making this determination for purposes of the salary basis test, DLSE has concluded that, to the extent possible, the IWC intended that the enforcement of the "salary" requirement was to follow the federal guidelines so far as possible; but that certain of the federal guidelines may not be utilized in California because they conflict with California statutory law, case law, or public policy.

51.6.4.1 The important consideration which is shared by both the federal and the state law is that in order for an employer to be relieved of the obligation to pay the overtime premium required after eight hours in a workday or forty hours in a workweek, the employer is obligated, instead, to pay a pre-determined salary to the exempt employee.

51.6.5 Basic Differences Between Federal Law And Regulations And California Law. While the federal government's regulations regarding the salary test contained at Title 29 of the Code of Federal Regulations can be used as a guide, it is clear that there are a number of distinct differences between the requirements under the federal law and those set out in the California statute (Labor Code § 515(a)) and the IWC Orders.

51.6.5.1 California Salary Test Based On Multiple Of Current Minimum Wage . The first basic difference is that the salary found in the California law is based on the California minimum wage in effect at the time while the federal test continues to be the same fixed amount first utilized in 1973.

51.6.5.2 Effective January 1, 2001, the California minimum wage was $6.25 per hour, and effective January 1, 2002, that minimum wage rose to $6.75 per hour. For the year 2001, the monthly salary paid to an exempt employee must have equaled or exceeded $2166.67 and in the year 2002 that sum rose to $2340.00.

51.6.5.3 Federal Tests. The federal regulations currently require that in order to meet the "short test" for exemption the employee need only have a pre-determined salary of $250.00 per week (approximately $1083.33 per month); and in order to meet the so-called "long test", a salary of $155.00 per week (approximately $661.66 per month).

51.6.6 California Salary Basis Enforcement Policy. Second, the federal salary regulations require that an exempt employee be paid a full salary for any week in which he performs any work. Although the California statute and the IWC orders refer to a minimum "monthly" salary, the Division of Labor Standards Enforcement announced on March 1, 2002, that for enforcement purposes the DLSE will follow the federal regulations which require that the salary test be based on a weekly salary. Therefore, an employer may deduct a week's salary from the monthly salary where the employee performed no work that week. In contrast, the employer may not prorate the monthly salary for part-time employees. It must also be noted that deductions for vacation are treated differently under state and federal law. (O.L. 2002.03.01)

51.6.7 A Reduction In Salary Based Upon A Reduction Of Hours Is Not Permitted. DLSE has opined that its enforcement policy, in keeping with the stated intent of the Legislature and the California courts interpretation of the California law, will not permit a reduction in the salary of an exempt employee which is the result of a reduction in the number of hours in a workday or days in a workweek the employee is required to work. A complete discussion of this enforcement policy is found at O.L. 2002.03.12.

51.6.8 No Deductions May Be Made From An Exempt Employee's Salary Based On The Quantity Or Quality Of The Work Performed. An employee will be considered to be paid "on a salary basis" within the meaning of both the California statute and the IWC Orders, if under his employment agreement he receives on regularly scheduled paydays consistent with California law, a predetermined amount constituting all of part of his compensation, which totals at least two times the California minimum wage per <u>month</u>, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.

51.6.9 Pursuant to current DLSE policy and subject to the allowable deductions detailed below, in order to be eligible for the exemption, the employee must receive the pro rata share of his or her full monthly salary for any week in which he or she performs any work without regard to the number of days or hours worked in the workweek.

51.6.10 Pro Rata Deduction From Exempt Employee's Salary For Absences. DLSE has opined that its position regarding the proration of an exempt employee's salary as a result of absences will follow the announced position of the U.S. DOL. (See DOL Opinion Letter dated July 21, 1997) Pursuant to that position, DLSE has announced,

the proration may be made based upon the number of days in a workweek which the employee usually works; but may not be less than five nor more than six. Thus, if the employee usually works a five-day workweek the pro rata salary reduction may be one-fifth of the employee's salary. If the regular workweek is six days, each day of absence would equate to one-sixth of the weekly salary. In no event, however, may any one day of absence reduce the salary by more than one-fifth. (O.L. 2002.05.01)

51.6.11 It is the position of the DLSE that in determining the amount of the daily salary to be deducted for absences of a full day or more, the calculation must be based on the usual number of workdays scheduled to be worked by the exempt employee in a workweek divided into the pro rata monthly salary attributable to a week. The method* used is:

1. The pre-determined monthly salary is multiplied by 12 to find the yearly salary.
2. The product of that multiplication is divided by 52 (the number of weeks in a year) to find the weekly salary.
3. The usual number of days (regardless of the number of hours usually worked in any workday) the employee is scheduled to work in a workweek is divided into the weekly salary.

51.6.12 Work Performed Outside Work Site. As with the federal enforcement policy, DLSE takes the position that the work need not be performed at the usual job site of the employer in order to qualify as work performed. It is the position of the DLSE that a deduction cannot be made from the salary of an exempt employee in a situation where the employee spends time, for instance, reviewing files at home since the deduction is only allowed for an "absence of a day of more." (See also, Wage and Hour Opinion Letter, July 21, 1997, which agrees with this view.) (O.L. 2002.04.08)

51.6.13 Any Work By The Exempt Employee In The Day Precludes Reduction Of Salary. As pointed out in the section directly above, work off the site of the employer would still be compensable. If, for example, an employer required an exempt employee on vacation to be available on short notice to return to work, or expected the exempt employee to call the office or check e-mails while on vacation, or the employer calls the employee (or authorizes others to call the employee) that is work performed and a reduction in the salary of the employee would not be appropriate. The exempt employee's salary is not subject to the deduction if the employee did not have a reasonable expectation that he was free of all duties. However, the employee may not unilaterally absent himself and simply announce that he will be available. There must be some indication by the employer that the time is not expected to be completely duty-free.

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*See also, Wage and Hour Division, U.S. Department of Labor, Opinion Letter dated July 21, 1997. Note, however, that if the workweek actually worked exceeds the agreed workweek more than fifty percent of the time, the longer workweek will be used as the divisor in the formula.

51.6.14 **No Deduction From The Employee's Salary May Be Made For Absences Occasioned By The Employer Or By The Operating Requirements Of The Business**. If the employee is ready, willing and able to work, deductions may not be made for the time when work is not available. This rule, too, is subject to the general rule, under the current DLSE enforcement policy, that no salary need be paid to an exempt employee when no work is performed within the workweek.

51.6.14.1 *Example 1*: If an employer chooses to close his or her business for three days, exempt employees, in order to continue to be exempt, would have to be paid for the full week if they were ready, willing and able to work during that workweek but were prevented from doing so because of the employer's action closing the business.

51.6.14.2 *Example 2*: If an employer chooses to close his or her business for a full week, exempt employees would not be entitled to any salary for that week, providing, of course, that they performed no work for the employer.

51.6.14.3 **Absences Of One Full Day Or More For Personal Reasons**: If an otherwise exempt salaried employee absents himself or herself for a full day or more on personal business, such absence may be deducted on a pro rata basis from the salary owed. A deduction under these circumstances does not affect the salaried exempt worker's exempt status. For allowable proration amount see Section 51.6.9 of this Manual.

51.6.15 **Any Work Performed In The Time Period Will Preclude Reduction Of The Salary**. If an exempt employee performs any work during the work day, no deduction may be made from the salary of the employee as a result of what would otherwise be a "partial day absence." (See discussion at Section 51.6.8 of this Manual; also see O.L. 2002.04.08). However, on June 21, 2005 the First District Court of Appeal, Division 2, decided *Conley v. PG&E*. One of the issues decided was whether an employer can deduct for partial day absences of four hours or more from an employee's vacation pay bank, when the employee is salaried exempt. The court held that under the facts of PG&E's vacation pay policy, where the company only deducted for absences of 4 hours per day or more, there was nothing in California law which prohibits this practice. This enforcement policy is consistent with that of the U.S. Department of Labor. (See, Wage and Hour Division, U.S. Department of Labor, Opinion Letter dated July 21, 1997). The same rule would apply in a situation where an employer has chosen to close his or her business or otherwise failed to provide work for a full week, the exempt employee is entitled to recover wages for the full week if that employee is suffered or permitted to work anytime within that workweek.

51.6.15.1 **Example**: Assume an exempt employee is paid a monthly salary of $3000.00 and has an agreed schedule to work a five-day workweek. If an exempt employee's salary is subject to reduction for any of the absences discussed in this Chapter, each day's absence would result in a reduction of $138.46 ($3000.00 x 12 ÷ 52 = $692.31 being the pro rata weekly salary; $692.31 ÷ 5 = $138.45).

51.6.15.2 **Absences Occasioned By Sickness Or Accident**. No deduction may be made from the salary of an exempt employee for absences occasioned by sickness or accident unless the absence for sickness or accident exceeds the weekly period. Deductions may by made for absences in increments of full working day occasioned by sickness or disability (including industrial accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing full compensation for loss of salary occasioned by both sickness and disability and the employee has exhausted his or her leave under the policy.

51.6.15.3 **Federal Regulations.** The U.S. Department of Labor has interpreted its regulations to allow an employer with a bona fide sick leave plan to deduct accrued leave to pay the salary obligation for "partial day" absences for illness and injury; however, the federal interpretation does not allow a deduction from the salary for such partial day absences in the event the employee's eligibility for the leave has not yet vested or the employee has exhausted his or her leave.

51.6.15.4 **DLSE Enforcement Position.** The DLSE adopts the above interpretation by the DOL regarding partial day absences for time off due to sickness taken pursuant to a bona fide sick leave plan **unless** the accrual which the employer utilizes provides a vested right to wages. If a sick leave plan provides for a vested right to wages, as is the case with vacation and PTO plans, the holding in *Conley v. PG&E* (2005) 131 Cal.App.4th 260 is applicable and deductions from accrued sick leave may be made only for absences of at least 4 hours in duration. If a sick leave plan does not establish a vested right to wages, deductions from sick leave for increments of less than 4 hours continue to be permissible to the extent that such leave credits exist at the time of the partial day absence.*

51.6.16 **Explanation of Bona Fide Sickness Or Disability Plans, Policies or Practices**. It is only sickness or disability plans which continue the full amount of the salary of the sick or injured employee which will be recognized for these purposes. There may, however, be reasonable probationary periods which must be met before the sick leave becomes effective.

51.6.16.1 ***Caveat***: State required disability insurance benefits do not constitute a "bona fide" sick leave plan.

51.6.17 **Bona Fide Defined:** 1. Made or carried out in good faith; sincere: *a bona fide offer*. 2. Authentic; genuine: *a bona fide Rembrandt*. (AMERICAN HERITAGE DICTIONARY). There is no definition of the term "bona fide sickness or disability plans, policies or practices" contained in the federal regulations. In addition, research has disclosed that the U.S. Department of Labor has never defined or delimited the term in Opinion Letters or otherwise. DLSE will judge each sickness or disability plan on a case-by-case basis.

51.6.18 **Deductions From Other Amounts Owed The Exempt Employee.** Inasmuch as the salary obligation is owed to an employee except under the narrow exceptions listed in this Chapter, any salary payment to an employee from a source designed to pay some

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* The interpretation of the federal regulation which allows sick leave (paid leave time) to be utilized turns on the fact that the terms "amount" and "compensation" contained in the federal regulation refer to "cash" and not to other types of compensation – which the federal courts lump together as "paid leave time." (See *Barner v. City of Novato*, 17 F.3d 1256, 1261-62 (9th Cir. 1993). The Ninth Circuit did not directly address the question of what would be the result if what they referred to as a "benefit" was actually vested and could be drawn on as cash. The only logical legal conclusion would be that such vested "wages" which the employer was obligated to pay could not be forfeited for the purpose of meeting the employer's obligation to pay the salary for absences of at least four hours but less than one day. Nonetheless, if the sick leave is simply "paid leave time" and cannot vest as wages either at termination or during the employment, that sick leave accrual may be deduced for partial day absences due to illness.

benefit to the employee other than one devoted exclusively to payment for leave due to sickness or accident would not meet the limited exception allowed.*.

51.6.19 Penalties Imposed On Employees. Further, the federal regulations impliedly allow an employer to impose "penalties" for infractions of safety rules and specifically provide that imposition of such penalties would not affect the guaranteed salary required. (29 CFR § 541.118(a)(4)) There is no provision in California law which would allow an employer to deduct "penalties" from an employee's pay for safety violations. Thus, those federal provisions may not be utilized.

51.6.19.1 Caveat. Labor Code § 2928 which, while requiring that no deduction be made on account of an employee coming late to work except in the amount proportionate to the amount of work missed, does allow a deduction of one-half hour as a result of an employee's tardiness of less than half hour. However, that section would not apply to salaried exempt employees because, aside from the fact that there is no safety issue at stake, as explained below, no deduction may be made from an employee's salary based on the quantity of work (29 CFR § 541.118(a)) unless, with certain exceptions, the employee absents himself for personal reasons for a period of a working day or more.

51.6.20 Added Payments For Extra Work. On August 15, 1997, the Ninth Circuit held that the Department of Labor's interpretation of the Code of Federal Regulations at 29 CFR § 541.118(a) was correct. That Court held:

> "additional compensation besides the required minimum weekly salary guarantee may be paid to exempt employees for hours beyond their standard workweek without affecting the salary basis of pay. Thus, extra compensation may be paid for overtime to an exempt employee on any basis. The overtime payment need not be at time and one-half, but may be at straight time, or at one-half time, or flat sum, or on any other basis." Citing D.O.L. Wage & Hour Opinion Letter No. 1738 (April 5, 1995); see also D.O.L. Wage & Hour Division Opinion Letter No. 1737 (April 5, 1995). (Boykin, et al. v. Boeing Company, (9th Cir.1997)128 F.3d 1279, 1281)

51.6.20.1 The Boykin court noted that "the focus of the regulations is to prohibit employers from claiming that their employees are compensated on a salary basis when the employees are subject to deductions in pay...As the district court aptly noted: 'it is difficult to perceive the alleged injury to a salaried employee who receives some form of hourly overtime compensation without fear of having compensation docked on the same basis.'

51.6.20.2 Note: The <u>salary</u> paid to the exempt employee, however, must be fixed and certain.

51.6.20.3 It must be noted, that the DOL's interpretation, which the DLSE has adopted, only allows for an hourly rate for hours worked in excess of the standard. The DLSE will generally consider such an hourly rate to be valid if paid for more than eight hours in any one day or more than 40 hours in any one week. This does not mean that an employer is

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*So-called "Paid Time Off" (PTO) programs sometimes lump all time off together. In other words, the program may provide for a total of three weeks of "paid time off" but that time is used for all purposes including vacation, sick leave or other absences. As Discussed in detail at Section 15.1.12, leave time which is provided <u>without condition</u> is presumed to be vacation no matter what name is given to the leave by the employer.

required to pay the overtime for all hours in excess of eight or forty; but may, instead, choose any number of hours in a day in excess of eight or in a workweek in excess of forty after which the hourly "overtime" pay will be paid. If the employer can show that the industry practice is to work a lesser number of hours, DLSE will accept the payment to an otherwise exempt employee of an hourly rate in excess of that number of hours which is found to be the industry standard regarding number of hours in a workday or a workweek.

51.6.20.4 Federal Regulations vs. California Law. DLSE adopts the interpretation of the salary test made by the U.S. Department of Labor in Opinion Letters dated June 27, 1996, July 11, 1995, and November 8, 1985, with the exception that in California an employee will be considered to be paid on a salary basis within the meaning of the IWC Orders if under his or her employment agreement he or she receives, on regularly scheduled paydays which comply with Labor Code § 204, a monthly predetermined amount which is at least two times the effective California minimum wage as required by Labor Code § 515(a).

51.6.21 No Deduction For Jury Duty, Attendance As Witness Or For Temporary Military Leave. In order to insure that California law is at least as protective to the interests of employees as the federal law it is patterned on, DLSE will follow the provisions of the federal regulations concerning salary basis found at 29 CFR § 541.118(a)(4) insofar as those regulations are compatible with California law. Consequently, deductions may not be made from an exempt employee's monthly salary for absences caused by jury duty, attendance as a witness, or temporary military leave for periods of less than a full workweek.

51.6.21.1 Pursuant to the enforcement policy adopted by DLSE (See O.L. 2002.03.01) the rule that an employee must receive his or her full salary is, as with the federal regulation, subject to the caveat that an employee need not be paid for any week in which he or she performs no work during that entire week. Thus, any employee who performs no work within the week is not entitled to a continuation of his salary even if the time lost is due to jury duty, attendance as a witness, temporary military leave or any other reason.

51.6.22 Result Of Failure To Pay Salary. The effect of making a deduction not permitted by the California law, will depend upon the facts in a particular case.

51.6.22.1 Where deductions are willfully made in contravention of the salary requirements, such behavior indicates that there was no intention to pay the employee on a salary basis. In that case, the exemption would not be applicable to such employee and the overtime requirements of the Orders would apply.

51.6.22.2 On the other hand, where a deduction not permitted by these interpretations is inadvertent or made erroneously – but in good faith – the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions upon being made aware of the error and agrees, in writing, to comply in the future.

51.6.23 The Rules Regarding The Duty To Pay The Full Salary Do Not Address And Have No Impact On The Contractual Duties The Parties May Have Concerning Payment Of The Salary. The requirement that the employee must be paid a salary, without deduction, is simply a criteria which must be met in order that the employee be exempt from the overtime requirements of the Orders. The remedy for failure to pay a salary which meets these requirements is that the employee is not eligible for the exemption and, thus, must be paid the applicable premium pay for any overtime hours. However, the contract of employment would determine whether an employee had a right to recover salary which was not paid in full.

51.6.23.1 As pointed out, above, the courts have found that utilizing a common-sense understanding of salaried employment "...a layman would understand that a salaried executive is a person paid an amount, on a weekly or less frequent basis, that bears no relationship to the number of hours worked in any particular week." *Thomas v. County of Fairfax*, 803 F.Supp. 1142, 1148 (E.D. Va.1992) As the Ninth Circuit has stated: "A salaried employee is compensated not for the amount of time spent on the job, but rather for the general value of services performed. It is precisely because executives are thought not to punch a time clock that the salary test for "bona fide executives" requires that an employee's predetermined pay not be "subject to reduction because of variations in the...quantity of work performed"... *Abshire v. County of Kern*, 908 F.2d at 486.

51.6.23.2 Thus, absent an agreement by the parties as to the actual days the worker is to show up in return for the salary, there is no reason to read into an employment contract a requirement that the worker is to be on the job site or performing any certain number of days or hours per week.

52 ADMINISTRATIVE EXEMPTION.

52.1 Administrative Employee means any employee whose duties and responsibilities involve either:

1. The performance of office or non-manual work directly related to management policies or general business operations of his employer or his employer's customers, or

   The performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein; and

2. Who customarily and regularly exercises discretion and independent judgment; and

3. Who regularly and directly assists a proprietor, or another employee who is employed in a bona fide executive or administrative capacity (as such terms are defined for purposes of this section), or

   Who performs, under only general supervision, work along specialized or technical lines requiring special training, experience, or knowledge, or

   Who executes, under only general supervision, special assignments and tasks, and

4. Who is primarily engaged in duties which meet the test for the exemption.

52.2 The IWC Orders provide that for purposes of the Administrative exemption, activities constituting exempt work and non-exempt work shall be construed in the same manner as such terms are construed in the following regulations under the Fair Labor Standards Act effective as of the date of this order: 29 CFR §§ 541.201-205, 541.207-208, 541.210, 541.215. Exempt work shall include, for example, all work that is directly and closely related to exempt work and work which is properly viewed as a means for carrying out exempt functions. The work actually performed by the employee during the course of the work week must, first and foremost, be examined and the amount of time the employee spends on such work, together with the employer's realistic expectations and the realistic requirements of the job, shall be considered in determining whether the employee satisfies this requirement.

52.3 Types Of Administrative Employees: The following three types of administrative employees qualify for the exemption if, and only if, they meet the various other criteria Discussed above (See O.L. 1998.10.05):

1. Employees who regularly and directly assist a proprietor or exempt executive or administrator. They include those executive assistants and administrative assistants to whom executives or high level administrators have delegated part of their discretionary powers. Generally, such assistants are found in large establishments where the official assisted has duties of such scope and which

require so much attention that the work of personal scrutiny, correspondence and interviews must be delegated.

2. Employees who perform, only under general supervision, work along specialized or technical lines requiring special training, experience or knowledge. Such employees are often described as "staff employees", or functional, rather than department heads. They include employees who act as advisory specialists to the management, or to the employer's customers. Typical examples are tax experts, insurance experts, sales research experts, wage-rate analysts, foreign exchange consultants, and statisticians. Such experts may or may not be exempt, depending on the extent to which they exercise discretionary powers. Also included would be persons in charge of a functional department, which may even be a one-person department, such as credit managers, purchasing agents, buyers, personnel directors, safety directors, and labor relations directors.

3. Employees who perform special assignments under only general supervision. Often, such employees perform their work away from the employer's place of business. Typical titles of such persons are buyers, field representatives, and location managers for motion picture companies. This category also includes employees whose special assignments are performed entirely or mostly on the employer's premises, such as customers' brokers in stock exchange firms and so-called "account executives" in advertising firms. (29 CFR Section 541.201)

52.3.1 Job Titles Are Not Determinative: As with any of the exemptions, job titles reflecting administrative classifications alone may not reflect actual job duties, and therefore, are of no assistance in determining exempt or non-exempt status. The fact that an employee may have one of the job titles listed above is, in itself, of no consequence. The actual determination of exempt or non-exempt status must be based on an the nature of the actual work performed by the individual employee. (29 CFR Section 541.201(b))

52.3.2 Trainees. The administrative exemption does not include employees training for employment in an administrative capacity who are not actually performing the duties of an administrative employee. (29 CFR Section 541.210) As with any other administrative employee, a trainee is not exempt unless the trainee is "engaged in work" which is "primarily intellectual", and which involves the exercise of discretion and independent judgment, within the meaning of the IWC orders.

52.3.3 Office Or Non-Manual Work. This term, used in the federal regulations, is self-explanatory and restricts the work to "white collar" employees; but does not entirely preclude work on office machines which is directly related to the performance of the administrative duties. (See 29 CFR § 541.203 for further explanation).

52.3.3.1 Note that the administrative work may be performed either for the employer directly or for a customer of the employer. Examples are tax experts, labor relations consultants, etc. employed by tax firms, labor relations firms, etc., to perform services for customers.

52.3.4 Production Or Sales vs. Administrative. The federal interpretive regulations explicitly exclude "production" type work from the definition of "work directly related to management policies or general business operations." 29 CFR §541.205 subsections (a) and (b) provide as follows:

(a) The phrase "directly related to management policies or general business operations of his employer or his employer's customers" describes those types of activities relating to the administrative operations of a business as distinguished from "production" or, in a retailer or service establishment, "sales" work. In addition to describing the types of activities, the phrase limits the exemption to persons who perform work of substantial importance to the management or operation of the business of his employer or his employer's customers.

(b) The administrative operations of the business include the work performed by so-called white-collar employees engaged in "servicing" a business as, for example, advising the management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control. An employee performing such work is engaged in activities relating to the administrative operations of the business notwithstanding that he is employed as an administrative assistant to an executive in the production department of the business.

52.3.5 Numerous recent cases have confirmed that the "production" vs. "administration" dichotomy applies not only to manufacturing settings but also to settings in which the "product" consists of services. If the white-collar employees delivering such services are engaged in production-type work the employees are not exempt from the overtime requirements. More specifically, recent appellate decisions make it clear that the administrative exemption applies <u>only</u> to those employees whose primary duty is administering the business affairs of the enterprise rather than producing the goods and services that the enterprise exists to produce and market. In Dalheim v. KDFW-TV (5th Cir. 1990) 918 F.2d 1220 (cited as authority by the California Court of Appeal in Nordquist v. McGraw-Hill Broadcasting (1995) 32 Cal.App.4th 555) the court affirmed that news producers, directors, and assignment editors were not exempt as administrative employees. In so ruling, the Court held that:

> "The distinction §541.205(a) draws is between those employees whose primary duty is administering the business affairs of the enterprise from those whose primary duty is producing the commodity or commodities, whether goods or services, that the enterprise exists to produce and market." Id. at 1230.

The Court went on to further clarify the requisites for establishing the administrative exemption:

> "They [the non-exempt employees] are not responsible for setting business policy, planning the long- or short-term objectives of the news department, promoting the newscast, negotiating salary or benefits with other department personnel, or any of the other types of "administrative" tasks noted in §541.205(b)." Id. at 1231.

52.3.6 In the most recent case, the First District Court of Appeal addressed the administrative/production distinction and held that it is important "to determine whether [the employees] carry out [the employer's] day-to-day operations...or whether they administer the business affairs ... [of the company]." Bell v. Farmers Insurance Exchange (2001) 87 Cal.App.4th 805. On the facts presented in Bell, the court found the insurance adjustors non-exempt.

52.3.7 Federal Cases. The Ninth Circuit Court of Appeals, as well, has restricted the application of the administrative exemption to those employees who were involved in servicing the business, i.e., who had responsibility as to how the business should be run, rather than those employees who provided information which was used by customers in the course of its daily business activities. In Bratt v. County of LA (9th Cir. 1990) 912 F.2d 1066, 1070, the court articulated the following standard in determining that probation officers are not exempt administrators although they investigate and make recommendations to the courts regarding sentencing and detention matters:

> In addition, while the regulations provide that "servicing" a business may be administrative, Id., §541.205(b), "advising the management" as used in that subsection is directed at advice on matters that involve policy determinations, i.e., how a business should be run or run more efficiently, not merely providing information in the course of the customer's daily business operation. The services the Employees provide the courts do not relate to court policy or over-all operational management but to the courts' day-to-day production process. Thus, the Employees are not engaged in "servicing" a business within the meaning of §541.205(b).... Here, although probation officers provide recommendations to the courts, these recommendations do not involve advice on the proper way to conduct the business of the court, but merely provide information which the court uses in the course of its daily production activities.

52.3.7.1 Directly Related To Management Policies Or General Business Operations: The phrase "directly related to management policies or general business operations of the employer or the employer's customers" is limited to those types of activities that relate to the administrative operations of a business as distinguished from "production" or "sales" work. In addition to describing these activities, the phrase limits the exemption to persons who perform work of substantial importance to the management or operation of the business of the employer or the employer's customers. Such work is not limited, however, to participation in the formulation of management policies regarding the operation of the business as a whole. Employees whose work is "directly related" to management policies or to general business operations include those who are responsible for executing management policies, and those who perform assignments that have a substantial effect on the whole business, even though the assignments may only be directly related to a particular segment of the business. (29 CFR § 541.205)

52.3.7.2 Again, it must be noted that "directly and closely related" work is also to be included in determining the exemption. Examples of directly and closely related work as that term relates to the Administrative exemption, may be found at 29 CFR § 241.208.

52.3.8 Right To Exercise Discretion And Independent Judgment. As provided in 29 CFR § 541.207, means "the comparison and evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered."

52.3.8.1 The employee must have the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance.

52.3.8.2 The term "Discretion and Independent Judgment" has been most frequently misunderstood and misapplied by employers and employees in cases involving: 1) confusion

between the exercise of discretion and independent judgment, and the use of skill in applying techniques, procedures, or specific standards and 2) misapplication of the exempt status to employees making decisions relating to matters of little consequence.

52.3.8.3 "Consequence" Distinguished From Risk Of Loss: Exercising discretion and independent judgment with respect to matters of consequence must be distinguished from making decisions which can lead to serious loss due to the choice of wrong techniques, the improper application of skills, failure to follow instructions or procedures, or negligence. An employee who is entrusted with performing duties which, if not performed correctly, could lead to serious consequences for the employer would not, based solely on these facts, be an exempt employee. Some examples of situations which distinguish serious loss through neglect by an employee from exercise of decisions of significant matters are Discussed at 29 CFR § 541.207(f).

52.3.8.4 Customarily And Regularly Exercise Discretion And Independent Judgment. The work of an exempt administrative employee may require the exercise of discretion and independent judgment customarily and regularly. The phrase "customarily and regularly" signifies a frequency which must be greater than occasional but which may be less than constant. This requirement will be met by the employee who normally and recurrently is called upon to exercise and does exercise discretion and independent judgment in the day-to-day performance of his or her duties. (29 CFR § 541.207(g))

52.3.8.5 Use Of Skill Or Knowledge. The most frequent cause of misapplication of the term "discretion and independent judgment" is the failure to distinguish discretion and independent judgment from the use of skill in various respects. An employee who merely applies his or her knowledge in following prescribed procedures or determining which procedure to follow, or who determines whether specified standards is not exercising discretion and independent judgment.

52.3.8.5.1 The fact that there is some leeway in reaching a conclusion, (for example, when an acceptable standard includes a range or a tolerance above or below a specific standard) does not change the above outcome.

52.3.9 Skills. For instance, inspectors performing specialized work along standardized lines involving well-established techniques would not be exercising discretion and independent judgment. These inspectors are merely relying on techniques and skills acquired by special training or experience. They may have some leeway in the performance of their work but only within closely prescribed limits.

52.3.9.1 Employees of this type may make recommendations or decisions on the basis of the information they develop in the course of their inspections (as for example, to accept or reject an insurance risk or a product which was to have been manufactured to specifications), but these recommendations or decisions are based on the development of the facts as to whether there is conformity with the prescribed standards. In such cases a decision to depart from the prescribed standards or the permitted tolerance is typically made by the employee's superior. The employee is engaged in exercising skill

rather than discretion and independent judgment. For a further discussion of this point see 29 CFR § 541.207(c).

52.3.10 Knowledge And Experience. Often, after continued reference to the written standards, or through experience, the employee acquires sufficient knowledge so that reference to written standards is unnecessary. The substitution of the employee's memory for the manual of standards or the instructions under which he or she operate does not convert the character of the work performed to work requiring the exercise of discretion and independent judgment. The mere fact that the employee uses his knowledge and experience does not change his decision (i.e., that the product does or does not conform with the established standard) into a real decision in a significant matter.

52.3.11 Skill vs. Discretion And Independent Judgment. Skill rather than discretion and independent judgment is exercised in completing many tasks, but this does not necessarily mean, however, that all employees who are exercising skill are not also exercising discretion and independent judgment. Grading of commodities for which there are no recognized or established standards may require the exercise of discretion and independent judgment. For instance, in those situations in which an otherwise administratively exempt buyer does grading, the grading even though routine work, may be considered exempt if it is directly and closely related to the exempt buying.

52.3.11.1 Example: While a personnel manager who makes decisions to hire or fire or take other actions may be administratively exempt, an employee simply exercising skill in the application of techniques and procedures would not meet the criteria. As an example, the "screening" of applicants by a personnel clerk who interviews applicants and obtains from them data regarding their qualifications and fitness for employment would not meet the criteria. The data obtained by the personnel clerk is intended to reject all applicants who do not meet established standards for the particular job or for employment by the company. Standards are usually set by the employee's superior or other company officials, and the decision to hire from the group of applicants who do meet the standards is similarly made by other company officials. Such a personnel clerk does not exercise discretion and independent judgment as required by the Orders.

52.3.11.2 Further Example: On the other hand an exempt personnel manager will often perform similar functions; that is, he will interview applicants to obtain the necessary data and eliminate applicants who are not qualified. The personnel manager will then hire one of the qualified applicants. Thus, when the same interviewing and screening performed by the personnel clerk are performed by the personnel manager who does the hiring they constitute exempt work, even though routine, because this work is "directly and closely related" to the employee's exempt functions.

52.3.11.3 Titles Are Not Determinative. While based on the facts in certain cases insurance investigators, insurance estimators, comparison shoppers and similar employees have been found by the courts not to meet the requirements of the administrative exemption based on the fact that they do not exercise discretion and independent judgment

sufficient to place them in that category (e.g., Bell v. Farmers Insurance Exchange, supra, 87 Cal.App.4th 805) there may be employees with similar titles who could meet the requirements for exemption based on their duties.

52.3.12 Decisions In Significant Matters. The level or importance of the matters with respect to which the employee may make decisions is an important criteria. Obviously not all decisions independently made by employees constitute the exercise of discretion and independent judgment of the level contemplated here. The discretion and independent judgment exercised must be real and substantial, that is, they must be exercised with respect to matters of consequence. This interpretation has also been followed by federal courts in decisions involving the application of the federal regulations.

52.3.12.1 The term "decisions in significant matters" applies to the kinds of decisions normally made by persons who formulate or participate in the formulation of policy within their spheres of responsibility or who exercise authority within a wide range to commit their employer in substantial respects financially or otherwise. For a discussion of the meaning given the term see 29 CFR § 541.207(d).

52.3.13 Review Of Decisions. The term "discretion and independent judgment" does not necessarily imply that the decisions made by the employee must have a finality that goes with unlimited authority and a complete absence of review. The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action which is given particular weight rather than the actual taking of action. The fact that an employee's decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment. (See 29 CFR § 541.207(e) for a further discussion of this point)

53 EXECUTIVE EXEMPTION.

53.1 Executive (Managerial) Employee means any employee whose duties and responsibilities involve:

1. The management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof; and
2. Who customarily and regularly directs the work of at least two or more other employees therein; and
3. Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and
4. Who customarily and regularly exercises discretion and independent judgment; and
5. Who is primarily engaged in duties which meet the test of the exemption.

53.2 The IWC Orders provide that for purposes of the Executive exemption, activities constituting exempt work and non-exempt work shall be construed in the same manner as such terms are construed in the following regulations under the Fair Labor Standards Act effective as of the date of the Order: 29 CFR §§ 541.102, 541.104-111, 541.115-116. Exempt work shall include, for example, all work that is directly and closely related to exempt work and work which is properly viewed as a means for carrying out exempt functions. The work actually performed by the employee during the course of the work week must, first and foremost, be examined and the amount of time the employee spends on such work, together with the employer's realistic expectations and the realistic requirements of the job, shall be considered in determining whether the employee satisfies this requirement.

53.3 Management Duties Must Be Exercised Over The Entire Enterprise Or A Customarily Recognized Department Or Subdivision Thereof. The requirement that the exempt employee must exercise the managerial duties over either the entire enterprise in which he or she is employed or a customarily recognized department or subdivision of that entire enterprise is Discussed at 29 CFR § 541.104.

53.3.1 It is important to note that the term "customarily recognized department or subdivision" has a particular meaning. The phrase is intended to distinguish between "a mere collection of employees assigned from time to time to a specific job or series of jobs" and "a unit with permanent status and function." In other words, in order to meet the criteria of a managerial employee, one must be more than merely a supervisor of two or more employees. The managerial exempt employee must be in charge of the unit, not simply participate in the management of the unit.

53.3.2 An employee who is in charge of a unit or department with a continuing function will not lose the exemption simply because he or she draws the workers under his or her control from a pool. The important consideration is that the exempt employee is "in

charge" of the operation of the unit or department with a continuing function. (See discussion at 29 CFR § 541.104(e) and (f))

53.4 At Least Two Or More Subordinates Required. The IWC Orders and the federal regulations both require as a condition of exempt status, that the manager must supervise two or more employees or the equivalent in the department or unit which the manager is managing. (29 CFR § 541.106)

53.4.1 The "equivalent" of two employees, as the federal regulations provide, may be one full-time and two half-time employees. However, note that as the federal regulations concede, it has been the experience of the U.S. Wage and Hour enforcement unit that an employee with as few as two employees to supervise usually performs production work in excess of that allowed under the federal regulations. Experience of the DLSE has also shown that the fewer the employees which the putative exempt employee supervises, the more it is likely that the "manager" is actually a working foreman or straw boss performing non-exempt work more than 50% of the time.

53.5 The Manager Must Have The Authority To Hire Or Fire or that his or her suggestions and recommendations as to hiring or firing and as to advancement or promotion or any other change in the status of the supervised employees will be given particular weight. (See also the discussion of the exercise of discretion and independent judgment, below)

53.5.1 The right to take action involving the status of the employees under his or her supervision need not be direct nor must it be final. The manager's actions in this regard may be exercised through those who actually perform those functions; but the recommendation of the manager in such decisions must carry particular weight.

53.5.2 As a result of the amendment of Labor Code § 515(a), for enforcement purposes, DLSE will disregard the language of 29 CFR § 541.107 (see discussion at Section 51.5 of this Manual) and rely, instead, upon the language of 29 CFR § 541.207 to define the term "discretion and independent judgment" in each of the exempt classifications.

53.6 Right To Exercise Discretion And Independent Judgment. As provided in 29 CFR § 541.207, means "the comparison and evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered." The California Legislature (and, ultimately, the IWC) specifically added the requirement that in order to meet any of the tests for exemption an employee must "customarily and regularly exercise[s] discretion and independent judgment". This addition indicates that there is an intent to expand the meaning of the term "Discretionary Powers" used in the federal regulations for purposes of the managerial and professional exemptions. DLSE will continue to use the long-established meaning it had adopted for enforcement purposes.

53.6.1 The employee must have the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance.

53.6.2 As Discussed above in the section on administrative exemptions (Section 52.3.8, et seq. of this Manual), the term discretion and independent judgment has been most frequently misunderstood and misapplied by employers and employees in cases involving the following:

1. Confusion between the exercise of discretion and independent judgment, and the use of skill in applying techniques, procedures, or specific standards.
2. Misapplication of the term to employees making decisions relating to matters of little consequence.

53.6.2.1 For purposes of the managerial exemption, the experience of the DLSE has been that the most frequent cause of misapplication of the term "discretion and independent judgment" is the failure to distinguish discretion and independent judgment from the use of independent managerial skills. An employee who merely applies his or her memory in following prescribed procedures or determining which required procedure to follow is not exercising discretion and independent judgment.

53.6.2.2 The fact that there is some limited leeway which may be utilized in reaching a conclusion, (for example, when an acceptable standard includes a limited range or a tolerance above or below a specific standard) does not allow for the exercise of discretion and independent judgment.

53.6.2.2.1 Example: An example of this type of misapplication there are limited examples of the "manager" of a chain food operation whose duties are so circumscribed and routinized by the chain's operations manual which the manager must follow, that there is no opportunity to exercise discretion and independent judgment.

53.6.3 Knowledge, Skill And Experience. Often, after continued reference to the written standards, or through experience, the employee acquires sufficient knowledge so that reference to written standards is unnecessary. For instance, employees who have memorized the firm's operations manual which the firm insists the manager must conform to with little or no deviation would not be exercising discretion and independent judgment. These employees are merely relying on techniques and skills acquired by experience or rote. The substitution of the employee's memory for the manual of standards or the instructions under which he or she operate does not convert the character of the work performed to work requiring the exercise of discretion and independent judgment.

53.6.4 Directly And Closely Related. Examples of "directly and closely related" activities involving managerial duties would include use of a computer to type a memo to a subordinate; hands-on training of subordinates; record-keeping dealing with subordinate's activities, or other functions which directly aid in the supervision of subordinates or management of the facility. While it is possible that each of these activities could be assigned to non-exempt personnel, performance of these tasks by an otherwise exempt managerial employee would not affect the exemption.

53.6.4.1 On the other hand, the use of a computer by a worker to prepare the payroll, or, of course, performing sales or production work not connected with training of subordinates is not exempt activity since it has nothing to do with supervision or management. (See discussion below regarding "emergencies" or "occasional tasks")

53.6.5 Occasional Tasks. In the Statement As To The Basis for the current Orders, the IWC stated that the Commission "recognizes that 29 CFR § 541.110 also refers to 'occasional tasks' that are not 'directly and closely related'. The IWC has specifically stated that it "does not intend for such tasks to be included in the calculation of exempt work". Thus, non-exempt work performed by an otherwise exempt manager even on an occasional basis may not be counted toward the 50% time requirement. This clearly reflects the long-established enforcement policy of the DLSE. As the Commission has pointed out in the same Statement As To The Basis, the IWC "chose to adopt regulations for Wage Orders 1-13 and 15 that substantially conform to current guidelines in the enforcement of IWC orders, whereby certain Fair Labor Standards Act regulations (Title 29 CFR 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..."

53.6.5.1 Therefore, any past enforcement policy statement which may have been interpreted by some to countenance non-exempt work by exempt employees – even on an occasional basis – is an erroneous and inappropriate interpretation.

53.6.6 Emergencies. Under certain occasional emergency conditions, work which is normally performed by nonexempt employees and is nonexempt in nature will be directly and closely related to the performance of the exempt functions of management and supervision and will therefore be exempt work.

53.6.6.1 In effect, this means that a bona fide executive who performs work of a normally nonexempt nature on rare occasions because of the existence of a <u>real</u> <u>emergency</u> will not, because of the performance of such emergency work, lose the exemption.

53.6.6.1.1 Such activities as the safety of the employees under their supervision, the preservation and protection of the merchandise, machinery or other property of the department or subdivision in their charge from damage due to <u>unforeseen</u> <u>circumstances</u>, and the prevention of widespread breakdown in production, sales, or service operations fall within this category. For further discussion see 29 CFR § 541.109.

53.6.6.2 Note: The IWC has defined the term "emergency" to mean "an unpredictable or unavoidable occurrence at unscheduled intervals requiring immediate action". Thus, for instance, the fact that there are insufficient sales personnel on the floor to handle the number of customers is not to be considered an emergency. Such a contingency is neither unpredictable nor unavoidable.

53.6.7 Working Foremen. As the provisions of 29 CFR § 541.115 provide, working foremen or straw bosses are not exempt. Employees with dual job functions (i.e., those who, while not performing the same duties as those of their subordinates, perform routine, recurrent or repetitive tasks) are not exempt. See discussion at 29 CFR

§ 541.115(c). This situation often arises when a lead person with more experience is employed to perform more difficult tasks and is asked to supervise the crew with whom he or she works.

53.6.7.1 Note: 29 CFR § 541.115(b) discusses and, in fact, authorizes a finding that if a working foreman or lead person is engaged in non-exempt work more than 20% of the time, the employee would be non-exempt. This regulation is inconsistent with the provisions of Labor Code § 515 and with the definition of "primarily" in the IWC Orders. In addition, of course, the language refers to 29 CFR § 541.112, a section of the federal rules which was not adopted by the IWC and is the only reference to less than the "primarily engaged in" test of 50% found. For enforcement purposes the DLSE will disregard the language concerning 20% and, instead, require that, consistent with the California law, an employee who is engaged in exempt activities more than 50% of the time is exempt.

53.6.8 Trainees. The managerial exemption is not applicable to employees training to become executives (or any other exempt category) if they are not actually performing the duties required to meet the test or do not otherwise meet the criteria.

54 PROFESSIONAL EXEMPTION.

54.1 Professional Employee means any employee whose duties and responsibilities meet the following criteria:

1. Who is licensed or certified by the State of California and is primarily engaged in the practice of one of the following recognized professions: law, medicine, dentistry, optometry, architecture, engineering, teaching, or accounting; or

2. Who is primarily engaged in an occupation commonly recognized as a learned or artistic profession. For the purposes of this subsection, "learned or artistic profession" means an employee who is primarily engaged in the performance of:

   (i) Work requiring knowledge of an advanced type in a field or science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or work that is an essential part of or necessarily incident to any of the above work; or

   (ii) Work that is original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee or work that is an essential part of or necessarily incident to any of the above work; and

   (iii) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.

3. Who customarily and regularly exercises discretion and independent judgment in the performance of duties set forth above.

4. Who earns a monthly salary equivalent to no less than two times the state minimum wage for full-time employment.

54.2 Pharmacists And Most Nurses Are Not Exempt. Pharmacists employed to engage in the practice of pharmacy, and registered nurses employed to engage in the practice of nursing, are not considered exempt professional employees, and are not to be considered exempt unless they individually meet the criteria established for exemption as executive or administrative employees or fall into one of the three categories of "advanced practice" nurses listed in subsection (f) of the Applicability Section of the Orders. (See discussion below.)

54.3 Certain Nurse Categories Have Been Exempted. The following advanced practice nurses are to be included within the professional exemption:

(1) Certified nurse midwives who are primarily engaged in performing duties for which certification is required pursuant to Article 2.5 (commencing with Section 2746) of Chapter 6 of Division 2 of the Business and Professions Code.
(2) Certified nurse anesthetists who are primarily engaged in performing duties for which certification is required pursuant to Article 7 (commencing with Section 2825) of Chapter 6 of Division 2 of the Business and Professions Code.
(3) Certified nurse practitioners who are primarily engaged in performing duties for which certification is required pursuant to Article 8 (commencing with Section 2834) of Chapter 6 of Division 2 of the Business and Professions Code.

54.4 **Computer Software Workers.** Except as listed in the section directly below, an employee in the computer software field is exempt if all of the following apply:

1. The employee is primarily engaged in work that is intellectual or creative and that requires the exercise of discretion and independent judgment, and the employee is primarily engaged in duties that consist of one or more of the following:
   (i) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specification.
   (ii) The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to, user or system design specifications.
   (iii) The documentation, testing, creation, or modification of computer programs related to the design of software or hardware for computer operating systems.
2. The employee is highly skilled and is proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, and software engineering. A job title shall not be determinative of the applicability of this exemption.
3. The employee is currently compensated at the hourly rate of not less $37.94 or annual salary of not less than $79,050 for full-time employment, and paid not less than $6,587.50 per month. The Division of Labor Statistics and Research shall adjust this pay rate on October 1st of each year to be effective on January 1st of the following year by an amount equal to the percentage increase in the California Consumer Price Index for Urban Wage Earners and Clerical Workers. (Labor Code section 515.5(a)(4)).

54.5 The exemption for computer professionals does not apply to an employee if any of the following apply:

(1) The employee is a trainee or employee in an entry-level position who is learning to become proficient in the theoretical and practical application of highly

specialized information to computer systems analysis programming, and software engineering.
(2) The employee is in a computer-related occupation but has not attained the level of skill and expertise necessary to work independently and without close supervision.
(3) The employee is engaged in the operation of computers or in the manufacture, repair, or maintenance of computer hardware and related equipment.
(4) The employee is an engineer, drafter, machinist, or other professional whose work is highly dependent upon or facilitated by the use of computers and computer software programs and who is skilled in computer-aided design software, including CAD/CAM, but who is not in a computer systems analysis or programming occupation. (5) The employee is a writer engaged in writing material, including box labels, product descriptions, documentation, promotional material, setup and installation instructions, and other similar written information, either for print or for on screen media or who writes or provides content material intended to be read by customers, subscribers, or visitors to computer-related media such as the World Wide Web or CD-ROMs.
(6) The employee is engaged in creating imagery for effects used in the motion picture, television, or theatrical industry.

54.6 **Physicians**. As with computer specialists, physicians earning at least $69.13 per hour are exempt. (Labor Code § 515.6(a)). This figure, too, is to be reviewed and revised yearly by the DLS&R as with the computer worker exemption.

54.7 **Hourly Rate Required For Each Hour Worked.** It is important to remember that for both the computer software employee and the physician exemption to be effective, the employee must receive at least the required hourly rate for each hour they are employed by the employer. The burden is on the employer to prove the exemption and, thus, records of hours worked must be kept.

54.8 **Learned Or Artistic**. With the exception of the provisions of Orders 14-2001 and 16-2001, the definitions contained in the "learned or artistic" exemption are intended to be construed in accordance with the following provisions of federal law as they existed as of the date of the Wage Order: 29 CFR §§ 541.207, 541.301(a)-(d), 541.302, 541.306, 541.307, 541.308 and 541.310.

54.8.1 Particular notice should be given to the fact that the DLSE has consistently taken the position that in order to qualify for the "learned" exemption, the position must require one to have an "advanced degree." This is defined as a person who, in order to perform his or her job, has completed a prolonged course of intellectual instruction in a recognized field of learning resulting in the attainment of an advanced degree or certificate. Knowledge of an advanced type must be knowledge which cannot be attained at the high school level. (29 CFR § 541.301(b)) (See further discussion at Section 54.8.5 of this Manual). Of course, even with an advanced degree, the employee must also meet the other requirements discussed in Section 54.1 of this Manual.

54.8.2 **"Professional" Under Order 16-2001.** Note that among the many other differences, as discussed in detail below, the Order covering on-site construction, drilling, logging and mining does not refer to the federal regulations in regard to the definitions for activities of professional employees. The language used in Order 16 concerning the professional exemption is the same language as that contained in many of the IWC Orders first promulgated in 1989 under IWC Orders 1, 4, 5, 9, and 10, which include the "learned and artistic" exemption. The IWC provided in its "Statement As To The Basis" for Order 16 that the Commission "chose to adopt regulations that substantially conform to current guidelines in the enforcement of IWC orders…" Consequently, the DLSE will continue to interpret and enforce the "learned and artistic" language in the same way it has since the language was first used in 1989: that interpretation and enforcement policy will not, as pointed out above, be different from the enforcement policy dictated by the Commission in the current Orders.

54.8.3 **Order 14-2001.** There has been no change in the Applicability Section of Order 14. Under the Agricultural Occupations Order there continues to be no mention of the term "professional" in the applicability section. Order 14-2001 now provides:

> "No provision of this Order shall apply to any employee who is engaged in work which is primarily intellectual, managerial, or creative, and which requires exercise of discretion and independent judgment, and for which the remuneration is not less than two times the monthly State minimum wage for full-time employment."

54.8.4 **Discretion And Independent Judgment.** As with the managerial and administrative exemptions, the employee must "customarily and regularly" exercise "discretion and independent judgment in the performance of [the] duties." (See discussion of this requirement above.)

54.8.4.1 Note. The IWC has not specifically applied the "discretion and independent judgment" test to the advanced practice nurse classifications. However, in view of the statutory requirement (Labor Code § 515(a)) that in order to meet the test as an exempt employee one must "customarily and regularly exercise discretion and independent judgment," that requirement must be read into the Order.

54.8.5 **"Learned Professions"** are those requiring knowledge of an advanced type [which cannot be attained at the high school level] in a field of ***science*** or ***learning***, customarily acquired by a prolonged course of intellectual instruction and study as distinguished from a general academic education and from an apprenticeship and from training in the performance of ***routine*** mental, manual, or physical processes. (29 CFR § 541.301(a)-(d)) [Example: advanced degree in a specialized field, *i.e.*, B. S. in Chemistry.]

54.9 **"Artistic Professions"** are defined at 29 CFR § 541.302(a) as work that is "original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee." The term "recognized field of artistic endeavor" is defined at 29

CFR § 541.302(b) to include "such fields as music, writing, the theater, and the plastic and graphic arts."

54.10 **Artistic Professions; Duties.** Work of an artistic type must be original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee.

54.10.1 The work must be "in a recognized field of artistic endeavor." This includes such fields as music, writing, the theater, and the plastic and graphic arts. In considering these examples of such fields, it is important to evaluate each in connection with all media utilized in artistic endeavors. These media include not only those that have been traditionally utilized such as standard musical instruments [music] and clay, stone, charcoal, and paint [plastic and graphic arts], but also newer evolving media such as music synthesizers and computer graphic and art design programs.

54.10.2 The work must be original and creative in character, as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training.

54.10.3 For a detailed discussion of the "Artistic Professions" read 29 CFR § 541.30.

54.10.4 **Discretion And Independent Judgment.** Unlike the federal regulations which require that a learned or artistic professional "must perform work which requires the consistent exercise of discretion and judgment in its performance," 29 CFR § 541.305(a), California law dictated use of the criteria found at § 541.207, requiring that the employee "customarily and regularly exercise[s] discretion and independent judgment."

54.10.5 **Work That Is Predominantly Intellectual And Varied**. In order to meet the test for exemption as a Professional under California law, the employee must be "engaged in work predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work." 29 CFR § 541.306(a). This exemption therefore applies to individual employees, not to broad classes of professions. This is consistent with the IWC's intent, expressed in its Statement of Basis when it originally adopted the exemption in 1989, that "individual situations and actual duties" should be considered "when applying the exemption."

54.10.5.1 Examples (but not an exhaustive list) of the type of work which constitutes "predominantly intellectual and varied" are discussed at 29 CFR § 541.30

54.10.6 **Activities That Are An Essential Part Of And Necessarily Incident To Exempt Work.** work activities which are an essential part of and necessarily incident to the professional work is also included in the definition of exempt professional work. This provision recognizes the fact that there are professional employees whose work

necessarily involves some of the actual routine physical tasks also performed by obviously nonexempt employees. (29 CFR § 541.307(a))

54.10.6.1 However, it should be noted that unlike the incidental activities "directly and closely related to" the duties of an administrative or managerial employee which may be considered exempt under those categories, the professional exemption requires that such activities be "an essential part of and necessarily incident" to the exempt professional work. (29 CFR § 541.307(b))

54.10.6.2 As with the federal enforcement agency, it has been the experience of the DLSE that some employers erroneously believe that anyone employed in the field of accountancy, engineering, or other professional fields, will qualify for exemption as a professional employee by virtue of such employment. While there are many exempt employees in these fields, the exemption of individual depends upon his or her duties and the other listed criteria.

54.10.6.3 The professional exemption does not extend to and exempt all employees of professional employers, or all employees in industries having large numbers of professional members, or all employees in any particular occupation. Nor does it exempt those learning a profession. (29 CFR § 541.310) Moreover, it does not exempt persons with professional training, who are working in professional fields, but performing subprofessional or routine work. For a discussion of this point, see 29 CFR § 541.308(b).

54.10.7 Teachers. While the Applicability Section of the Orders exempts teachers as Professionals, the IWC's Statement As To The Basis points out that adoption of language based upon 29 CFR § 541.2 (a)-(c), was not to be construed to "affect the professional exemption as it relates to teachers, or to otherwise change existing law." This statement reflects the definition of "teaching" which remains unchanged in the current Orders. In order to be exempt under California law, the employee must be engaged in the "profession of teaching under a certificate from the Commission for Teacher Preparation and Licensing or teaching in an accredited college or university."

54.10.7.1 DLSE Enforcement Policy: Because of the unchanged definition of "Teacher", the DLSE enforcement policy will remain as it has been for the last twenty years. Provisions in the CFR notwithstanding, under California law a teacher will not qualify for the exemption unless he or she (1) is certified by the CTPL, or (2) teaches in an accredited college or university. The term "college or university" means a school of higher learning and academic studies, which grants the bachelor's degree (or higher degrees) in liberal arts and/or sciences and/or professions. Consequently, a high school or elementary school teacher who is not certified by the CTPL cannot be exempt. Likewise, a teacher in a trade school or technical school who is not certified by the CTPL cannot be exempt. (O.L. 1997.03.05)

54.10.8 Registered Nurses And Pharmacists. The special treatment for registered nurses and pharmacists is mandated by the express language of the IWC Orders which provides:

> "...pharmacists employed to engage in the practice of pharmacy, and registered nurses employed to engage in the practice of nursing, shall not be considered exempt professional employees, nor shall they be considered exempt from coverage for the purposes of this subsection unless they individually meet the criteria established for exemption as executive or administrative employees."

54.10.9 Thus, generally, provisions in the CFR notwithstanding, under California law registered nurses and pharmacists are ineligible for the "learned or artistic" professional exemption. (See also, Labor Code §§ 515(f)(1); 1186)

54.10.9.1 Advanced Practice Nurses. As mentioned above, however, three classifications of advanced practice nurses <u>may</u> now be exempt if they meet the test for professional exemption. The amendment of Labor Code § 515 had the effect of allowing certified nurse midwives, certified nurse anesthetists, and certified nurse practitioners who otherwise meet the requirements for the "learned professional" exemption, to be exempt. In order to meet the test for exemption, the three listed categories of nurses must be "primarily engaged in performing duties" which their particular certification allows, as well as meeting the other tests for the professional exemption. In other words, simply because a nurse is certified as a nurse midwife, a nurse anesthetist, or a nurse practitioner under the applicable Business and Professions Code Sections does not, automatically, exempt the nurse from overtime; he or she must also be primarily engaged in performing the duties of that exemption and meet the other requirements of the professional exemption such as the salary test.

55 IWC DEFINITIONS.

55.1 Section 2 Of The Orders. The IWC has retained the meaning of most of the well-known definitions from previous Orders. However, as outlined below, there have been some additions and amendments to the definitions.

55.2 Definition Of "Employer". The definition of employer for purposes of California's labor laws is set forth in the Wage Orders promulgated by the Industrial Welfare Commission; that definition, as set out in the Wage Orders, at Section 2, reads in relevant part as follows:

> "Employer" means any person . . . who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person. (E.g., 8 CCR §11090(2)(F))

55.2.1.1 Patterned On Federal Law Definition. The definition is patterned on the federal law definition of employer contained in the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §201 et seq., and therefore federal authorities are instructive on the meaning and scope of the state definition. (Nordquist v. McGraw-Hill Broadcasting (1995) 32 Cal.App.4th 555.) The federal definition provides that an "employer" includes "any person acting directly or indirectly in the interest of an employer in relation to an employee . . . ." (29 U.S.C. §203(d).) (O.L. 2002.06.18)

55.2.1.2 Court Interpretations. In light of the remedial purposes of the FLSA, federal courts have construed the term "employer" broadly, and have held that it encompasses "...corporate officers with a significant ownership interest who had operational control of significant aspects of the corporation's day to day functions . . . ." (Donovan v. Agnew (1st Cir. 1983) 712 F.2d 1509, 1514, Accord: Dole v. Elliott Travel & Tours, Inc. (6th Cir. 1991) 942 F.2d 962; Reich v. Circle C. Investments, Inc. (5th Cir. 1993) 998 F.2d 324 [consultant with no ownership interest who exercised measure of control over "work situation" was an employer].) (O.L. 2002.06.18)

55.2.1.2.1 Definition Under California Law. California's Industrial Welfare Commission Orders likewise constitute remedial legislation (Industrial Welfare Commission v. Superior Court (1980) 27 Cal.3d 690, 702) and is patterned on the federal definition; thus, it is evident that the state law definition of employer is likewise to be broadly construed. Even more compelling for the argument is the consistent finding by California courts that California law is designed to be at least as beneficial to the worker as federal law. The recent decision in Ramirez v. Yosemite Water Co., supra, 20 Cal.4th 785, 85 Cal.Rptr.2d 844, 978 P.2d 2, illustrates these principles. The court began by noting that "[t]he IWC's wage orders, although at times patterned after federal regulations...provide greater protection than is provided under federal law in the Fair Labor Standards Act (FLSA) and accompanying federal regulations." (Id. at p. 795, 85 Cal.Rptr.2d 844, 978 P.2d 2.) The state law cannot afford less protection. (O.L. 2002.06.18)

55.3 There Are Two Definitions Of "Personal Attendant":

IWC Order 5-2001 provides:

(N) "Personal attendant" includes baby sitters and means any person employed by a non-profit organization covered by this order to supervise, feed or dress a child or person who by reason of advanced age, physical disability or mental deficiency needs supervision. The status of "personal attendant" shall apply when no significant amount of work other than the foregoing is required.

While at IWC Order 15-2001 the term personal attendant is defined:

(J) "Personal attendant" includes baby sitters and means any person employed by a private householder or by any third party employer recognized in the health care industry to work in a private household, to supervise, feed, or dress a child or person who by reason of advanced age, physical disability, or mental deficiency needs supervision. The status of "personal attendant" shall apply when no significant amount of work other than the foregoing is required.

55.3.1 Note: Under Order 15, the definition of personal attendant is similar to that in Order 5 except that it covers "a person employed by a private householder or by any third party employer recognized in the health care industry to work in a private household" instead of "persons employed by non-profit organizations" as provided in Order 5.

55.3.2 Under Order 5, personal attendants are covered by most of the protections offered by the IWC Order, but are excluded from the overtime provisions. (See Section 3(E) of Order 5-2001)

55.3.3 Definition Of "Significant Amount Of Work". For purposes of defining the term "significant amount of work" as used in the definition of "personal attendants", DLSE uses the same quantitative test as the federal government (20%) but the language of the California definition concerning the qualitative (duties) test differs from that of the federal regulation. California law requires that performance of any significant amount of work other than supervising, feeding or dressing will defeat the exemption. In other words, any cooking, cleaning, laundering, shopping, etc., will be counted as other work. (O.L. 1994.10.03-2)

55.3.4 Under Order 15, personal attendants are not afforded most of the protections offered by the Order, except for minimum wage and "baby sitters" (defined as "any person under the age of eighteen who is employed as a baby sitter for a minor child of the employer in the employer's house") are not covered at all.

55.4 "Health Care Emergency". The IWC defines this term to mean an event which "consists of an unpredictable or unavoidable occurrence at unscheduled intervals relating to health care delivery, requiring immediate action."

55.5 "Health Care Industry". This term is defined as "hospitals, skilled nursing facilities, intermediate care and residential care facilities, convalescent care institutions, home health agencies, clinics operating twenty-four (24) hours per day, and clinics performing surgery, urgent care, radiology, anesthesiology, pathology, neurology or dialysis."

55.5.1 Note that the term "clinics" is actually defined in two different ways. The term includes facilities "operating twenty-four (24) hours per day" and facilities "performing surgery, urgent care, radiology, anesthesiology, pathology, neurology or dialysis." If either one of the definitions apply, the clinic would be considered part of the "Health Care industry".

55.5.1.1 Under the recently adopted definition of "Health Care Industry" the term "clinic" does not apply to a physician's office unless that office meets the requirements of a "clinic" under either of the definitions listed.

55.6 "Employees In The Health Care Industry." To meet the definition of an employee in the Health Care Industry, one must (1) provide patient care; or (2) work in a clinical or medical department (including pharmacists dispensing prescriptions in any practice setting), or (3) work primarily or regularly as a member of a patient care delivery team. The term also includes "licensed veterinarians, registered veterinary technicians and unregistered animal health technicians providing patient care."

55.7 Hours Worked. The definition of "hours worked" has ramifications not only in dealing with the question of whether the employee is eligible to be employed on a 12-hour alternative workweek applicable only to workers in the Health Care Industry, but also impacts on the definition of the term "hours worked" which is to be applied to an employee in the Health Care Industry in Orders 4-2000 and 5-2000. Inasmuch as the definition of "hours worked" under the less-stringent federal definition is an exception to the common definition of that term in California, and since exceptions to remedial legislation are to be narrowly construed, the federal definition of "hours worked" will only be applied to "employees in the Health Care Industry" as that term is defined by the IWC. (See Section 46 of this Manual for detailed discussion of "Hours Worked".)

55.8 "Workday" And "Workweek". The terms "workday" and "workweek" have been altered; but the changes are not substantive. A workday is still a 24-hour period beginning at the same time each calendar day; and a workweek is still a "fixed and regularly recurring period of 168 hours, seven consecutive 24-hour periods."

55.9 "Outside Salesperson". The IWC concluded that under most of the Orders, there was no reason to amend the definition of the term "outside salesperson". However, for purposes of Order 16-2000 only, the IWC 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.

55.10 The IWC noted in its Statement As To The Basis of Order 16, that it intended 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 other provisions of the Labor Code.

55.11 Order 4-2001 Applicability. The IWC deleted the language in the Applicability Section of Order 4 which provided that the provisions of that order apply to the occupations covered "unless such occupation is performed in an industry covered by an industry order of this Commission..." No reason was given for the revision of the language and DLSE takes the position that it was simply an oversight by the Commission since that long established position is the essence of the occupation orders and had the Commission intended that the provisions of Order 4 apply to those named occupations when the employee is engaged in work covered by an industry order, they would have so stated (e.g., Order 16-2001, Applicability, Section 1(F)).

56 ALTERNATIVE WORKWEEK ARRANGEMENTS

56.1 **Both The Labor Code And The IWC Orders Provide For Alternative Workweek Arrangements**. Labor Code § 511 and most of the current IWC Orders provide for alternative workweek schedules similar to, but not exactly the same as, those provided in the past wage orders. Note, however, there are differences within the Orders and among the industries covered by the specific Orders both in the schedules which may be adopted and in the Election Procedures which are to be utilized. Consequently, a very careful review of the provisions of both the IWC Orders and the Labor Code sections must be made in order to understand the alternative workweek rules.

56.2 **Not All IWC Orders Provide For Alternative Workweek Arrangements.** Alternative workweeks are provided for in Orders 1-13, 16 and 17. Note, however, that there are different rules to be applied depending upon which Order is applicable to the employee(s).

56.2.1 **Orders 14-2001 and 15-2001**. Alternative workweek arrangements are not provided for under Orders 14 (Agricultural Occupations) and 15 (Household Occupations).

56.2.1.1. **Order 14.** Order 14 never contained an alternative workweek provision. The employers are already allowed to work employees up to 10 hours per day without incurring premium overtime liability. In addition, the provisions of Labor Code § 511 which allow alternative workweek arrangements do not apply to workers employed under Order 14. Labor Code § 554 provides that none of the provisions of the Chapter, except Labor Code § 558, shall apply to agricultural employees.

56.2.1.2. **Order 15 Employees**, on the other hand, are subject to the general provisions contained in Labor Code § 511. In addition, Order 15-2001 does define the term "alternative workweek schedule" as "any regularly scheduled workweek requiring an employee to work more than eight (8) hours in a 24-hour period"; the Order does not provide any of the procedures for implementing such an alternative nor does the Order further delimit the term. It should be noted that Order 15 never provided an alternative workweek option; however, since Labor Code § 511 now provides that employers may propose alternative workweek schedules and since Labor Code § 511 does not in any way limit the schedules to any group of employees (except as noted above, agricultural employees who, as provided in Labor Code § 554, are not covered by AB 60) it would be permissible to propose an alternative workweek per Labor Code § 511 for employees covered by Order 15-2001.

56.3 All Wage Orders except 14 and 15 specifically allow regularly scheduled alternative workweek schedules.

56.3.1 **12-Hour Day Limit.** The alternative workweek arrangements, generally, may comprise of workdays not exceeding twelve (12) hours. However, any work time more than ten (10) hours per day is subject to overtime premium pay. *Mitchell v. Yoplait* (2004) 122 Cal.Ap.4th Supp 8.

56.3.2 **Employees In The Health Care Industry: Up To 12-Hour Days.** Orders 4 and 5 allow employees in the Health Care Industry (as that term is defined at Section 2(G) of Orders 4- and 5-2001) to agree to an alternative workweek of up to 12-hour days without the requirement to pay overtime premium pay for any hours up to 12. (See Section 55.5 of this Manual for a discussion of the definition of Health Care Industry.)

56.3.3 **Except Under Order 16-2001, Workdays Within Alternative Workweek Must Be At Least Four Hours.** The alternative schedule (except under Order 16-2001 which does not contain a minimum number of hours) must provide at least four hours of work in any scheduled work day in the alternative workweek.

56.4 **Requirement That Alternative Workweek Schedule Provide For Two Consecutive Days Off Retained In Most Orders**. The IWC retained the requirement contained in previous Orders that alternative workweek schedules must provide for two (2) consecutive days off in Orders 1, 2, 3, 6, 7, 8, 11, 12, and 13.

56.5 **No Requirement For Two Consecutive Days Off For Employees Working An Alternative Workweek In Orders 4, 5, 9, 10, 15, and 16.** These Orders do not contain the requirement that the alternative workweek schedules provide for two (2) consecutive days off.

56.6 **Some Workers Employed In Occupations Covered By Order 16-2001.** Employees working in offshore oil and gas production, drilling, and servicing occupations, as well as employees working in onshore oil and gas separation occupations directly servicing offshore operations may adopt an alternative workweek schedule of up to twelve (12) hours per day. (Order 16-2001, Section 3(B) (1) (h)).

56.7 **Election Procedures.** The IWC has adopted detailed procedures to be followed for the adoption and repeal of alternative workweek schedules. (IWC Orders, Section 3(C)). There are slight variations in the election procedures required under Order 16-2001 and those variations are discussed starting at Section 56.8.4, below.

56.7.1 **Alternative Workweek Written Agreement Must Be Proposed By Employer**. A proposal for an alternative workweek must be in the form of a written agreement which is submitted to the employees by the employer.

56.7.2. **Proposal Must Designate A Regularly Scheduled Alternative Workweek Of A Specified Number Of Regularly Recurring Work Days**. The employer's proposal for an alternative workweek schedule must designate the number of days in the workweek and the number of hours in the work shift. (IWC Statement of Basis) Section 3(C)(1) of the Orders allows the employer to propose a menu of options which will suit the employer s business needs so long as the proposal clearly provides a <u>specified</u> <u>number</u> of regularly recurring work days and the <u>number</u> <u>of</u> <u>hours</u> in the work shift. The IWC Orders do not require a proposal to designate the starting and ending time of the shifts which will be available during the alternative workweek. Two examples of acceptable regularly scheduled alternative workweeks:

a) a 3/12 and 1/4 workweek;
b) a 4/10 workweek.

56.7.2.1 **Choice From Menu Of Options.** The IWC recognized that employers with a large number of employees and multiple shifts have the freedom to propose a workweek schedule to be voted on which provides a menu of options outlining the number of days and the hours in the work shift in the proposed alternative workweek "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 two-thirds vote of the work unit." (Statement As To The Basis)

56.7.2.2 **Note:** The menu options cannot offer a regular 8-hour day since that is not an alternative workweek. (Labor Code § 500(c)). However, accommodation of any employee who is unable to work the alternative schedule is an option after the vote.

56.7.2.3 ***Example Of Menu Option:*** An employer proposes a 4/10 workweek with shifts to cover an around-the-clock operation. Employees would have the right to choose which shift they wish to work, "subject to reasonable nondiscriminatory conditions, such as a seniority-based system or a system based on random selection…" (Statement As To The Basis)

56.7.2.3.1 **Note.** Unless the employees are allowed to freely choose the shift they will work, they would have to be advised of the fact that each shift is limited as to the number who may choose that shift and, further, be made aware of the "nondiscriminatory" method to be utilized in assigning the employees to a particular shift.

56.7.2.4 **An Alternative To A Menu Of Work Schedule Options.** If it is impractical to allow the employees to choose among work schedule options even with the use of reasonable nondiscriminatory conditions, the employer may 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.

56.7.2.5 **Example Of A Proposed Alternative Workweek Without Menu Options:** An employer employing workers seven days a week, may, for instance, propose a number of 10-hour, four-day work schedules by dividing the employees into separate work units. "This method would inform each employee of exactly which schedule would be adopted by the election." (Statement As To The Basis).

56.7.2.6 (Eliminated 1/30/07)

56.7.2.7 **Regular Schedule.** The schedule of work options language of Labor Code section 511(a) does not allow a situation where the employee may opt to work an alternative workweek or a normal workweek on an irregular basis for that would not meet the criteria of " regularly scheduled."

56.7.3 **Regular Alternative Schedules Need Not Always Be Four 10-Hour Days.** An alternative workweek schedule may be any combination of hours up to twelve (12) hours per day within a workweek as long as the overtime premium is paid for all hours over ten (10) in a day and over forty (40) in a workweek. *Mitchell v. Yoplait* (2004) 122 Cal.Ap.4th Supp 8. For instance, a workweek of four days of nine (9) hours and one day of four (4) hours would be valid. Also valid would be a workweek of three (3) days of twelve (12) hours and one day of six (6) hours as long as the employer paid time and one-half overtime premium pay for six (6) hours each week. The schedules must be consistent; but may differ from one workweek to the next if the schedule is a regularly recurring one. For instance, an alternative workweek schedule which provides that in the first week the employer works Monday through Thursday and in the second week works Tuesday through Friday would be valid so long as the schedule is regular and recurring.

56.7.3.1 **Nine/Eighty Schedule.** A common alternative workweek schedule involves a workweek which runs from Friday at noon to the following Friday at noon (a total of 168 hours) with the daily schedule 8 a.m. to 5:30 p.m. (with a half-hour meal period at noon). The employee is scheduled for nine (9) hours per day on Monday through Thursday and eight (8) hours on every other Friday (8:00 a.m. to 4:30 p.m. with a half-hour meal period at noon). This schedule will result in four nine (9) hour days and one four (4) hour day each week. (O.L. 1991.06.19)

56.7.3.1.1 **Note:** The 9/80 schedule will not work if any day scheduled is less than four hours. However, that should not present a problem since, as discussed below, each of the Orders except 16-2001 require a four-hour minimum be scheduled for any day within an alternative workweek.

56.7.4 **Overview Of Alternative Workweek Requirements.**

ORDER NUMBER

	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
Alternative Workweek Procedures Provided in Order	x	x	x	x	x	x	x	x	x	x	x	x	x			x	x
12-Hour Day Limit (Health Care Workers, Offshore Oil and Gas Workers				x	x											x	
Four-Hour Minimum Day Requirement	x	x	x	x	x	x	x	x	x	x	x	x	x				x
Two Consecutive Days Off Required in Workweek	x	x	x			x	x	x			x	x	x				
Special Rules for Pre-Existing Alternative Workweek Arrangements				x	x												x
Special Definition of Unit				x	x											x	
Special Rules on Repeal																x	

56.7.4.1 Deputies are strongly advised to use the above table as a guide only. A thorough reading of the Alternative Workweek Arrangement language in each of the Orders and utilization of the detailed explanations in this Manual are required in order to understand and enforce the provisions.

56.8 **Alternative Workweek Elections Must Meet Criteria Set Out In IWC Orders In Order To Be Valid**. It is very important to note that the IWC Orders state that:

> "[I]n order to be valid, the proposed alternative workweek schedule must be adopted in a secret ballot election, before the performance of work, by at least a two-thirds (2/3) vote of the affected employees in the work unit. The election shall be held during regular working hours at the employees' work site."

56.8.1 **Two-Thirds Of Affected Employees Must Vote In Favor Of Adoption Of The Alternative Workweek**. The election is limited to the employees in the affected work unit and at least two-thirds of those must vote in favor of the alternative workweek.

56.8.2 **Affected Employees.** "For purposes of this subsection, 'affected employees in the work unit' may include all employees in a readily identifiable work unit, such as a division, a department, a job classification, a shift, a separate physical location, or a recognized subdivision of any such work unit. A work unit may consist of an individual employee as long as the criteria for an identifiable work unit in this subsection are met." (IWC Orders, Section 3(C)(2)).

56.8.3 **Note Regarding Vote:** The language of both the statute and the Orders clearly requires that the number of votes in favor of adoption must be two-thirds of the affected workers. Thus, it is not two-thirds of the affected workers who voted that will determine the result. *A worker not voting in effect votes no.*

56.8.4 Order 16-2001. The scope of the term "affected employees" is narrowed for workers employed in occupations covered by Order 16-2001. The definition of the term "work unit" (Order 16-2001, Section 2(U)) for Order 16 purposes only, means affected employees will only include "all nonexempt employees of a single employer within a given craft who share a common work site." Thus, not all carpenters employed by a single employer may be eligible to vote on an alternative workweek arrangement. The workers must not only share a craft, but also a work site. Order 16 further provides that "A work unit may consist of an individual employee as long as the criteria for an identifiable work unit in this subsection is met."

56.8.5 Order 16-2001 Affected Employees Eligible To Vote Includes Workers Not On The Job Site On Election Day. Those workers employed in occupations covered by Order 16-2001 who are otherwise eligible and who are not on the job site on the day of the election must be notified and allowed to vote in any election for an alternative workweek if such worker has been employed in the affected work unit within 30 calendar days immediately preceding the election.

56.8.5.1 Specific Language Regarding Elections Under Order 16-2001. DLSE is aware of the language used by the IWC in Order 16-2001 regarding balloting. (IWC Order 16-2001, Section 3(C)(2)) The language appears to require that ballots must be mailed to the last known address of any employee who meets the criteria of that section who is not present on the work site on the day of the election. Literal enforcement of the language as written would, of course, preclude the election from being final on the day set for the vote. In addition, the language does not set a date after the ballots have been mailed out to those workers who were not present for the return of the completed mailed ballots. The IWC does not explain this seeming inconsistency in the Statement As To The Basis for Order 16-2001.

56.8.5.2 IWC Intended To Address Fluctuating "Manning" Situations In Order 16-2001. DLSE understands that the Wage Board which negotiated the language in Order 16 was concerned that employers might "man-up" or "man-down" (i.e., hire more help or lay off help) in order to affect an election for an alternative workweek. (Transcript of Wage Board meeting of August 17, 2000, pages 7-17) Significant fluctuations in the number of employees on these job site are not uncommon (IWC meeting of January 28, 2000, pages 242-243, comments of Commissioner Barry Broad in making the charge to the On-Site Wage Board) and it would be difficult to differentiate between manning (or staffing) based on business needs and manning fluctuations designed to affect an election.

56.8.5.3 DLSE Finding Regarding Order 16 Requirements. DLSE finds that interpreting the provisions of Order 16 to require that the employer must wait until the date of the election to determine who did not vote before sending out notice to all affected employees would not further any of the objectives the IWC intended. In addition, DLSE finds that reading IWC Order 16-2001, Section 3(C)(3) along with the provisions of Section 3(C)(2) leads to the conclusion that the IWC did not intend that the

employer must wait until the date of the election to determine which employees would not vote.

56.8.5.4 Enforcement Policy Concerning Election Under Order 16-2001. For purposes of enforcing the provisions providing for an election for alternative workweeks under Order 16-2001, the DLSE will require that the employer must, in good faith and at least 14 days prior to the scheduled election, notify (at their last known address) all workers who would be eligible to vote under the criteria set out in the Order (i.e., employed on the job site by the employer within 30 calendar days immediately preceding the election) of the date, time and place of the election and furnish all such employees with a ballot to be brought to the election site on the date and at the time set for the election. The employer shall bear the burden of proof that good faith efforts have been utilized to effect the notice and the delivery of ballots. Failure to show that good faith efforts have been utilized in informing all eligible workers will void the election.

56.9 Election Must Be Held During Working Hours And At The Employees' Work Site. The IWC Orders provide that "[t]he election shall be held during regular working hours at the employees' work site." Recognizing that some employees of a single employer in the on-site occupations covered by Order 16 may be eligible to vote on one particular job site while currently assigned to another job site, DLSE concludes that this language requires and it was the intent of the IWC that each employee currently employed by the employer and eligible to vote must have the opportunity to vote without loss of pay. If necessary, the employer must provide any current employee of the employer transportation to the work site where the election is held and must pay for the time reasonably lost by the employee in voting during working hours.

56.10 Written And Oral Disclosure Of Effects Of Alternative Workweek. The employer must advise the employees, at a meeting held at least fourteen (14) days prior to the voting, of the effects on the wages, hours, and benefits adoption of the alternative workweek will have upon the affected employees. In addition, the employer must provide that disclosure in a written form in both English and, if more than five per cent of the affected employees primarily speak a language(s) other than English then in that/those language(s) as well. The employer must mail the written disclosure to affected employees who do not attend the meeting referred to above.

56.10.1 Failure Of Employer To Meet The Disclosure Requirements Set Out In The IWC Orders Will Make The Election Null And Void. Any failure to comply with the disclosure requirements set out in the IWC Orders will result in the election being null and void. (IWC Orders, Section 3(C)(3)) If the election is null and void any alternative workweek established based on that election is void ab initio and the employer must pay the premium overtime for any hours after eight (8) hours in any workday.

56.11 Employer May Not Reduce An Employee's Regular Hourly Rate Of Pay As A Result Of Adoption, Repeal Or Nullification Of An Alternative Workweek Arrangement. An employer may not reduce an employee's regular rate of hourly pay

As a result of the adoption, repeal or nullification of an alternative workweek schedule. (IWC Orders generally, Section 3(B)(4); IWC Orders 4-2000 and 5-2000, Section 3(B)(3); IWWC Order 16-2001, Section 3(B)(1)(d)) (O.L. 2002.01.21 and 2002.05.22)

56.11.1 **Unilaterally Imposed Alternative Workweek Schedules**. DLSE has been asked to respond to a number of questions regarding the validity of plans unilaterally instituted by employers which require employees to work regular schedules of more than eight hours in a day. In these situations, no proposed alternative workweek was presented by the employer for adoption by the employees; instead, the employer simply instituted a "regularly scheduled workweek requiring an employee to work more than eight hours in a 24-hour period." (See Labor Code § 500(c) defining "alternative workweek schedule.") The DLSE has opined that while there is no prohibition placed on an employer who would require employees to work extended hours in a workday or workweek so long as the premium is paid on the employee's regular rate of pay for all overtime hours, an employer mandated "alternative workweek" which requires more than eight hours in a workday and reduces the regular hourly pay of the worker in order to escape the obligation of paying a premium for those extra hours is against public policy as announced by the California Legislature. (O.L. 2002.1.21 and 2002.05.22).

56.12 **Employer Must Bear The Cost Of Conducting Any Election In Connection With An Alternative Workweek.** The employer is obligated to bear all of the costs of conducting any election called for in connection with an alternative workweek arrangement. This includes not only the original election proposed by the employer, but any election allowed by Labor Code § 511 or the Orders to decertify or repeal the alternative workweek.

56.13 **Employers Are Prohibited From Intimidating Or Coercing Employees Regarding Elections**. Employers may not intimidate or coerce employees to vote either in support of or in opposition to a proposed alternative workweek. Any discrimination against any employee for expressing opinions or for opposing or supporting the adoption or repeal of an alternative workweek is illegal. Any violation of these rights is subject to Labor Code § 98 *et seq* (IWC Orders generally, Section 3(C)(8)).

56.13.1 Investigation of allegations involving intimidation, coercion or any other irregularity in the election process are handled pursuant to the procedures set out in Labor Code § 98.7 (See also, Section 56.22 of this Manual).

56.13.2 **Note**: The employer is not prohibited from exercising his or her free speech in connection with the alternative workweek election. So long as the employer does not engage in coercion or intimidation, he/she is not prohibited from expressing an opinion on the alternative workweek.

56.14 **Existing Alternative Workweek Arrangements Adopted Prior To 1998**. Labor Code § 511 provides, *inter alia*, that under certain circumstances Alternative Workweek Arrangements adopted prior to the effective date of the statute will remain valid while others are declared invalid. The IWC adopted these special rules to apply to any Alternative Workweek Arrangement adopted:

1. In a secret ballot election held pursuant to Orders 1-13 only, and;
2. If the election was held prior to 1998 or conducted since 1998 if the election was held under the rules in effect prior to 1998, and;
3. The election was held before the performance of any work

Alternative Workweek Arrangements meeting these requirements shall remain valid after July 1, 2000, provided that the results of the election are reported by the employer to the Division of Labor Statistics and Research by January 1, 2001, in accordance with the requirements of Section 3(C)(6) of the Orders (Election Procedures). New arrangements must be entered into pursuant to the provisions of Section (C) of the Orders.

56.14.1 Note: Alternative workweek arrangements adopted between January 1, 2000 (when AB 60 became effective) and October 1, 2000 (when the new wage orders pursuant to Labor Code § 517 became effective) must have complied with the procedures for adoption of alternative workweek schedules in effect in pre-1998 wage orders. DLSE's position in this matter is based on the language used by the IWC in the Statement As To The Basis included in the Interim Order which states that the Order is consistent with previously published enforcement policies. In addition, the legislative intent which was contained in AB 60 and published in the Labor Code which states, inter alia, "Sec. 21. Wage Orders number 1-98, 4-98, 5-98, 7-98, and 9-98 adopted by the Industrial Welfare Commission are null and void, and Wage Orders 1-89, 4-89 as amended in 1993, 5-89 as amended in 1993, 7-80, and 9-90 are reinstated until the effective date of wage orders issued pursuant to Section 517."

56.15 Special Rules Covering Alternative Workweek Arrangements Under Orders 4- and 5-2001. Labor Code § 511(g) allowed 12-hour alternative workweeks in the Health Care Industry which had been adopted pursuant to Orders 4 and 5 prior to 1998 or under the rules contained in Orders 4 and 5 effective prior to 1998, to remain in effect until July 1, 2000. The IWC allows these 12-hour Alternative Workweek Arrangements in the Health Care Industry to continue (see IWC Orders 4- and 5-2000, Sections 3(C)(8)). However, the agreement must meet the following criteria:

1. The 12-hour Alternative Workweek was adopted in a secret ballot election held pursuant to the rules in Orders 4 or 5, and;
2. If the election was held prior to 1998 or conducted since 1998 if the election was held under the rules in effect prior to 1998, and;
3. The election was held before the performance of any work, and;
4. The employer makes a reasonable effort to find another work assignment for any employee who participated in the valid election prior to 1998 and who is now unable to work the alternative workweek schedule, and,
5. If, since October 1, 1999, an employer implemented a reduced pay rate for employees choosing to work 12-hour shifts, the employer must pay a base rate to each affected employee in the work unit that is no less than that employee's base rate in 1999 immediately prior to the date of the rate reduction.

56.16 Serious Violation Of Election Procedures, Order 16. Under the provisions of Order 16-2001, the Labor Commissioner is specifically granted authority to declare the election null and void in the event of a "serious violation" involving intimidation, coercion or discrimination connected with alternative workweek elections. (IWC Order 16-2001, Section 3(C)(7))

56.17 Employee Petition To Repeal An Alternative Workweek Arrangement. Any type of alternative workweek schedule that is authorized by the Labor Code may be repealed by the affected employees upon a petition signed by one-third (a) of the affected employees and presented to the employer.

56.17.1 Note: The requirement that only one-third (a) of the affected employees need petition in order to require an election to repeal the alternative workweek is different from that required in most of the old Orders (IWC Orders 2, 3, 6, 7, 8, 11, 12 and 13 first promulgated in 1980 required a two-thirds (b) majority) The one-third requirement is now applicable to all Orders.

56.17.2 New Secret Ballot Election Upon The Question Of Repeal. In the event that the requisite one-third (a) of the affected employees sign the petition the employer must schedule an election to be held within thirty (30) days of the date the petition is presented to the employer. Again, the same procedures apply to the election to repeal the alternative workweek as apply to the original alternative workweek election.

56.17.3 Two-Thirds Majority Needed To Repeal Alternative Workweek. As with the original election, a two-thirds (b) vote of the affected employees is required to reverse the alternative workweek schedule. (IWC Orders generally, Section 3(C)(5))

56.17.4 Elections To Repeal May Be Held Not More Often Than Once Every Twelve Months (Six Months Under Order 16-2001) The election to repeal the alternative workweek schedule or to adopt a new alternative workweek must be held not more than 30 days after the petition is submitted to the employer, except that the election shall not be held less than twelve (12) months (six (6) months under Order 16-2001) after the date that the <u>same</u> group of employees voted in an election held to <u>adopt</u> <u>or</u> <u>repeal</u> an alternative workweek schedule. (IWC Orders generally, Section 3(C)(5))

56.17.5 Special Rule For Certain Existing Alternative Workweek Arrangements Under Orders 4-2000 and 5-2000. Where an alternative workweek schedule was adopted between October 1, 1999 and the effective date of Orders 4-2000 or 5-2000, a new secret ballot election to repeal that alternative workweek schedule shall not be subject to the 12-month interval between elections. (IWC Orders 4-2000 and 5-2000, Section 3(C)(5))

56.17.6 Employer Must Comply With Revocation Or Repeal Of Alternative Workweek Within Sixty (60) Days. If the alternative workweek schedule is revoked, the employer shall comply within sixty (60) days. Upon proper showing of undue hardship, the Division of Labor Standards Enforcement may grant an extension of time for compliance. (IWC Orders generally, Section 3(C)(5))

56.17.6.1 In the event an employer seeks a grant of extension from the DLSE, an investigation must be held to determine whether, in fact, a hardship exists which would warrant such an extension.

56.17.7 Alternative Workweek Schedules Repealed Under Order 16-2001. Order 16-2001 does not contain the language allowing an employer sixty days to comply with the repeal of the alternative workweek schedule. However, The Statement As To The Basis issued with Order 16-2001 indicates that it was the intent of the Commission to include the language found in Orders 1 through 13. (Statement As To The Basis, Order 16-2001)

56.17.8 Employee Not Required To Work Adopted Alternative Workweek Schedule Until 30 Days After Announcement Of Result Of Election. Employees affected by a change in work hours resulting from the adoption of an alternative workweek schedule are not required to work those new work hours for at least thirty (30) days after the announcement of the final results of the election. (IWC Orders generally, Section 3(C)(7))

56.18 Religious Beliefs Or Observances Of Employees Must Be Reasonably Accommodated When Adopting Alternative Workweek Arrangements. The employer must explore any available reasonable alternative means of accommodating the religious belief or observance of an affected employee that conflicts with an adopted alternative workweek schedule in accordance with Govt.Code § 12940(j) (IWC Orders generally, Section (B)(5))

56.18.1 Govt Code § 12940(j) requires that an employer must demonstrate that he has explored any available reasonable alternative means of accommodating the religious belief or observance, including the possibilities of excusing the person from those duties that conflict with his or her religious belief or observance or permitting those duties to be performed at another time or by another person, but is unable to reasonably accommodate the religious belief or observance without undue hardship on the conduct of the business of the employer or other entity covered by this part. Religious belief or observance, as used in the section, includes, but is not limited to, observance of a Sabbath or other religious holy day or days, and reasonable time necessary for travel prior and subsequent to a religious observance.

56.19 Employer Must Make A Reasonable Effort To Accommodate Current Employees Who Are Unable To Work The Alternative Workweek Schedule For Any Reason. If an employee who was eligible to vote in the election which resulted in the adoption of the Alternative Workweek schedule finds that he or she is unable to work that schedule, the employer must make a reasonable effort to accommodate that employee. (IWC Orders generally, Section 3(B)(6))

56.20 An Employer May Provide Alternate Arrangement For Employee Hired After The Date Of The Election. An employer may, but is not required to, provide a work schedule not to exceed eight hours in a workday to accommodate any employee who

was hired after the date of the election and who is unable to work the alternative schedule established as a result of that election. (IWC Orders generally, Section (B)(7))

56.21 Employer Engaged In Operation Of Licensed Hospital Or Providing Personnel For Operation Of Licensed Hospital Exception. An employer engaged in the operation of a licensed hospital or in providing personnel for operation of a licensed hospital who adopts an alternative workweek of no more than three (3) twelve- (12) hour days, is not required to offer a different work assignment to an employee if such work assignment is not available or if the employee was hired after the adoption of the twelve- (12) hour, three- (3) day alternative workweek schedule.

56.22 Labor Commissioner May Investigate Employee Complaints Regarding Conduct Of Any Election Held In Connection With An Alternative Workweek. The IWC Orders provide:

> "Upon complaint by an affected employee, and after an investigation by the Labor Commissioner, the Labor Commissioner may require the employer to select a neutral third party to conduct the election." (IWC Orders, Section 3(C)(4))

56.22.1 DLSE Interpretation And Enforcement Policy With Regard To Investigation Of Conduct Of Election. Clearly, not all problems with elections can be detected before the election is held. DLSE interprets the above language of Section 3(C)(4) of the Orders to allow an employee complaint regarding the conduct of the election (including any required pre-election obligations of the employer) to be filed by an affected employee either before or after the election is actually held. In the event the investigation by the DLSE finds that the procedure surrounding the conduct of the election did not meet the requirements of the law, the DLSE will notify the employer and the employees of its findings, void the previous election, and require, in the event a new election is proposed by the employer that such election be conducted by a neutral third party.

56.22.2 DLSE Does Not Have Authority To Set Aside Elections Except As Specifically Provided In The Orders. The Orders specifically grant the Labor Commissioner authority, in certain circumstances, to remedy what appears to be an unfair election. Given this specific authority, the rules of statutory construction generally preclude the extension of that authority. However, in the event that an investigation by the Labor Commissioner reveals serious violations of <u>any</u> of the election procedures which violations are such that the election was nothing more than a subterfuge, the investigating Deputy should contact his or her supervisor. The burden of proving the validity of the election which adopts an alternative workweek is on the employer who proposes to institute the alternative to the normal eight-hour day.

56.23 After The Election. In the event the employees adopt the four-day, ten-hour schedule, the employer must then assign each of the employees a regularly-scheduled alternative shift in which the "actual work days and the starting and ending time of the shift" is provided in advance. (Statement As To The Basis)

56.23.1 **Occasional Changes In Schedule**. The IWC has concluded that the employer must provide the employees with reasonable notice of any changes in the days or hours scheduled. Changes in the schedule are limited to "occasional" occurrences. (Statement As To The Basis). More frequent changes will result in the loss of the exemption from the 8-hour day requirements of California law.

56.23.2 **Reasonable Notice Of Change In Regular Alternative Workweek Schedule**. The term "reasonable notice" has not been defined by the IWC. For purposes of enforcement the DLSE will consider a one-week notice to be reasonable notice.

56.23.3 **Required Premium Overtime In Alternative Workweek Arrangement**. The alternative workweek arrangements adopted pursuant to the provisions in the Orders 1-3, 6-13 and 16 (and all employees subject to Orders 4-2001 or 5-2001 except those employed in the Health Care Industry) must provide that all work in excess of the schedule established by the agreement and up to twelve (12) hours a day or beyond forth (40) hours per week shall be paid at one and one-half (1 ½) times the employee's regular rate of pay. 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 regularly scheduled number of workdays established by the alternative workweek shall be paid at double the employee's regular rate of pay.

56.23.3.1 **Employees In The Health Care Industry** who have opted for a 12-hour shift in any one workday provided under Order 4-2001 and 5-2001 need not be paid a premium rate until after 12 hours in a day. All hours in excess of twelve in any one workday must be paid at the premium rate of double the employee's regular rate of pay. Health Care workers would be entitled to time and one-half the regular rate of pay for all hours over 40 in a workweek.

56.23.3.2 Health Care Industry employees assigned to work twelve (12) hour shifts may not be required to work more than 12 hours in a 24-hour period unless there is a "health care emergency" as defined at Section 2(I) of Orders 4-2001 and 5-2001.

56.23.4 **Health Care Emergency**. A "health care emergency" may be declared <u>only</u> by the Chief Nursing Officer or authorized executive of the hospital staff. (WC Orders 4-2001 and 5-2001, Section 3(B)(9). There must be an objective showing that:

1. All reasonable steps have been taken to provide required staffing, and

2. Considering overall operations status needs, continued overtime is necessary to provide required staffing.

56.23.4.1 Failure, on a regular recurring basis, to schedule reasonably required staffing will not meet the "reasonable steps" requirement under these definitions.

56.23.5 **Up To 13-Hour Shift If Relief Employee Is Late**. An employee on a 12-hour shift may be required to work up to thirteen hours in a twenty-four hour period even if no

"health care emergency" exists if the worker scheduled to relieve him or her does not report for duty as scheduled and has failed to inform the employer more than two hours in advance that he or she will not be appearing for duty as scheduled. (IWC Orders 4-2001 and 5-2001, Section 3(B)(11).

56.23.6 **16-Hour Overtime Shift**. Even during a health care emergency, no employee shall be required to work more than sixteen (16) hours in a 24-hour period unless by voluntary mutual agreement of the employee and the employer. (IWC Orders 4-2001 and 5-2001, Section 3(B)(11)).

56.23.7 **24-Hour Overtime Shift**. Notwithstanding a voluntary mutual agreement allowing for work in excess of sixteen hours during a health care emergency, under no circumstances may an employee in the Health Care Industry work more than twenty-four (24) consecutive hours until said employee receives no less than eight (8) consecutive hours off-duty immediately following twenty-four consecutive hours of work. (IWC Orders 4-2001 and 5-2001, Section 3(B)(10)).

56.23.8 **Days And Hours Worked Outside Of The Regularly-Scheduled Alternative Workweek.** The language adopted by the California Legislature in Labor Code § 511(b) and that used by the IWC is the same language used in the previous Orders concerning Alternative Workweeks. The DLSE has historically taken the position for enforcement purposes, that the IWC provided for a *regularly-scheduled week of work* and there are no "regularly scheduled" hours on those days in the workweek beyond the "schedule established by the agreement." The Legislature has now provided at Labor Code § 511(b) that in addition to the time and one half rate required for "any work in excess of the regularly scheduled hours established by the alternative workweek agreement" the employer is required to compensate employees at "[A]n overtime rate of compensation of no less than double the regular rate of pay of the employee…for any work in excess of 12 hours per day and for any work in excess of eight hours on those days worked beyond the regularly scheduled workdays established by the alternative workweek agreement." In addition, as discussed below, only the employee may request that he or she be allowed to substitute one "day of work" for another. The DLSE enforcement policy requires that if the employee is required to work on any non-scheduled day of an Alternative Workweek, any hours worked on the unscheduled day would be in excess of the number of hours agreed to pursuant to the agreement and would have to be paid at the applicable premium rate. Time and one-half would have to be paid for all work up to eight hours on any employer-required non-scheduled day. Pursuant to, and consistent with this enforcement policy, the specific language of the Orders provide a premium of double time after eight hours on those days.

56.23.9 **Substitution of One Shift For Another At Request Of Employee**. Section 3(B)(1) of the Orders allows an employer, at the request of the employee subject to an alternative workweek schedule, to substitute one day of work for another of the same length in the shift. The IWC states in the Statement Of The Basis that this provision

was intended to accommodate "the personal needs of employees" and, must, therefore, be utilized only at the request of the employee.

56.23.10 **With Approval Of Employer, Employee May Request A Move From One Menu Option To Another.** In addition to the "occasional" accommodation of an employee to work a different day within the alternative workweek, the IWC received inquiries concerning flexibility for employees switching alternative workweek options on a permanent basis 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. (Statement As To The Basis)

56.24 **Definition Of Alternative Workweek Schedule.** The Legislation (Labor Code § 500(c)) provides:

> "Alternative workweek schedule" means any regularly scheduled workweek requiring an employee to work more than eight hours in a 24-hour period.

56.25 **Hours In Excess Of Daily Regular Schedule.** The IWC notes that 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.(Statement As To The Basis) This allows an employer who has proposed, and whose employees have accepted, a ten-hour per day alternative workweek, to work employees on such a schedule more than ten hours in a day and only incur a premium obligation for those hours in excess of ten. This also allows the employer to propose, and the employees to accept, a twelve (12) hour per day alternative workweek. However, the employee(s) working on such a schedule would be entitled to receive a premium for those hours in excess of ten (10). *Mitchell v. Yoplait* (2004) 122 Cal.Ap.4th Supp 8. **Note:** This would not apply to Health Care Employees subject to Wage Orders 4- and 5-2001.

56.26 **Adoption Of Alternative Workweek Schedules As Subterfuge To Escape Eight-Hour Day Limitations.** The Legislature repeats in its "Legislative Finding", following each section of the "Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999", that it considers the 8-hour day to be the norm in California. Based on the common rules of statutory construction, any exception which allows a deviation from the historical 8-hour day norm must, as in the case of any remedial legislation, be narrowly construed.

56.26.1 Eliminated 1/30/07

56.26.2 Eliminated 1/30/07

56.26.3 Eliminated 1/30/07

56.27 Eliminated 1/30/07

56.28 Eliminated 1/30/07

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1998.10.05	52.3	Overtime: Administrative exemption
1998.12.23	46.6.4	Hours Worked: Uniforms, change time Hours Worked: Effect of CBA on determining
1998.12.28	45.1.5.1; 46.6.3; 47.5.5.1	Hours Worked
1998.12.28-1	19.3.1	Tip pooling
1999.01.09	4.6; 34.9	Discharge: Payment of commissions upon termination
1999.02.16	45.3.1	Rest Periods
1999.09.23	3.5	Works: Specific length of employment written contract but employee quits prior to completion; LC §§202, 203
2000.09.29	48.1.6	Belo contracts
2000.11.02	19.3.5	Service charge not gratuity
2001.09.17	45.3.5; 45.3.6.1	Rest periods; Rest periods, CBA exception
2002.01.22	22.1.1	Illegal to require payment to apply for employment
2002.01.29	43.6.4.1; 44.2.2; 47.4.2; 47.7.1	Hours worked: Public transit employees start and end shifts at different locations; minimum wage
2002.02.21	46.3; 46.3.1; 46.3.2; 47.5.1.1	Hours worked: Whether time spent traveling on out-of-town business trip constitutes
2002.02.22	45.3.3	Rest period
2002.03.01	51.6.6; 51.6.21.1	Wages: Salary basis test exempt employees

Letter No.	Manual Section	Description
2002.03.12	51.6.7	Exempt Employee: Reduction of salary in conjunction with reduction of hours in workday or days in workweek
2002.04.08	51.6.12; 51.6.15	Exempt Employee: No reduction in salary for day absent if there is a reasonable expectation that employee is to perform some duty
2002.05.01	51.6.10	Exempt Employee: Calculation of pro rata deduction from salary
2002.05.06	51.6.1	Wages: Salary requirement
2002.05.17	41.2.1	Non-exempt salaried employees paid semi-monthly
2002.05.22	56.11; 56.11.1	Alternative work week: reduction of pay not allowed
2002.06.18	55.2.1.1; 55.2.1.2; 55.2.1.2.1	Employer: Definition of employer

DIVISION OF LABOR STANDARDS ENFORCEMENT POLICIES AND INTERPRETATIONS MANUAL

Following is a compilation of the Federal Regulations which were in effect on July 1, 2000. The entire series of 29 CFR §§ 541.102 through 541.602 is included. Only parts of the regulations were adopted by the IWC for purposes of interpreting the administrative, executive (managerial) and professional exemptions. The portions which are not applicable are in strikeout and those which are utilized for enforcement without direction are in italics. The inapplicable sections are reproduced here simply as a guide and aid to enforcement staff in explaining the differences between the federal interpretations and those allowed under California law.

CODE OF FEDERAL REGULATIONS

TITLE 29--LABOR

SUBTITLE B--REGULATIONS RELATING TO LABOR

CHAPTER V--WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR

SUBCHAPTER A--REGULATIONS

PART 541--DEFINING AND DELIMITING THE TERMS "ANY EMPLOYEE EMPLOYED IN A BONA

FIDE EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL CAPACITY (INCLUDING ANY

EMPLOYEE EMPLOYED IN THE CAPACITY OF ACADEMIC ADMINISTRATIVE PERSONNEL OR

TEACHER IN ELEMENTARY OR SECONDARY SCHOOLS), OR IN THE CAPACITY OF OUTSIDE

SALESMAN"

SUBPART B--INTERPRETATIONS

EMPLOYEE EMPLOYED IN A BONA FIDE EXECUTIVE CAPACITY

Current through June 20, 2000; 65 FR 38332

§ 541.102 Management.

(a) In the usual situation the determination of whether a particular kind of work is exempt or nonexempt in nature is not difficult. In the vast majority of cases the bona fide executive employee performs managerial and supervisory functions which are easily recognized as within the scope of the exemption.

(b) For example, it is generally clear that work such as the following is exempt work when it is performed by an employee in the management of his department or the supervision of the employees under him: Interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing their work; maintaining their production or sales records for use in supervision or control; appraising their productivity and efficiency for the purpose of recommending promotions or other changes in their status; handling their complaints and grievances and disciplining them when necessary; planning the work; determining the techniques to be used; apportioning the work among the workers; determining the type of materials, supplies, machinery or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety of the men and the property.

~~Current through June 20, 2000; 65 FR 38332~~

~~§ 541.103 Primary duty.~~

~~A determination of whether an employee has management as his primary duty must be based on all the facts in a particular case. The amount of time spent in the performance of the managerial duties is a useful guide in determining whether management is the primary duty of an employee. In the ordinary case it may be taken as a good rule of thumb that primary duty means the major part, or over 50 percent, of the employee's time. Thus, an employee who spends over 50 percent of his time in management would have management as his primary duty. Time alone, however, is not the sole test, and in situations where the employee does not spend over 50 percent of his time in managerial duties, he might nevertheless have management as his primary duty if the other pertinent factors support such a conclusion. Some of these pertinent factors are the relative importance of the managerial duties as compared with other types of duties, the frequency with which the employee exercises discretionary powers, his relative freedom from supervision, and the relationship between his salary and the wages paid other employees for the kind of nonexempt work performed by the supervisor. For example, in some departments, or subdivisions of an establishment, an employee has broad responsibilities similar to those of the owner or manager of the establishment, but generally spends more than 50 percent of his time in production or sales work. While engaged in such work he supervises other employees, directs the work of warehouse and delivery men, approves advertising, orders merchandise, handles customer complaints, authorizes payment of bills, or performs other management duties as the day to day operations require. He will be considered to have management as his primary duty. In the data processing field an employee who directs the day-to-day activities of a single group of programmers and who performs the more complex or responsible jobs in programing will be considered to have management as his primary duty.~~

Current through June 20, 2000; 65 FR 38332

§ 541.104 Department or subdivision.

(a) In order to qualify under § 541.1, the employee's managerial duties must be performed with respect to the enterprise in which he is employed or a customarily recognized department or subdivision thereof. The phrase "a customarily recognized department or subdivision" is intended to distinguish between a mere collection of men assigned from time to time to a specific job or series of jobs

and a unit with permanent status and function. In order properly to classify an individual as an executive he must be more than merely a supervisor of two or more employees; nor is it sufficient that he merely participates in the management of the unit. He must be in charge of and have as his primary duty the management of a recognized unit which has a continuing function.

(b) In the vast majority of cases there is no difficulty in determining whether an individual is in charge of a customarily recognized department or subdivision of a department. For example, it is clear that where an enterprise comprises more than one establishment, the employee in charge of each establishment may be considered in charge of a subdivision of the enterprise. Questions arise principally in cases involving supervisors who work outside the employer's establishment, move from place to place, or have different subordinates at different times.

(c) In such instances, in determining whether the employee is in charge of a recognized unit with a continuing function, it is the division's position that the unit supervised need not be physically within the employer's establishment and may move from place to place, and that continuity of the same subordinate personnel is not absolutely essential to the existence of a recognized unit with a continuing function, although in the ordinary case a fixed location and continuity of personnel are both helpful in establishing the existence of such a unit. The following examples will illustrate these points.

(d) The projects on which an individual in charge of a certain type of construction work is employed may occur at different locations, and he may even hire most of his workforce at these locations. The mere fact that he moves his location would not invalidate his exemption if there are other factors which show that he is actually in charge of a recognized unit with a continuing function in the organization.

(e) Nor will an otherwise exempt employee lose the exemption merely because he draws the men under his supervision from a pool, if other factors are present which indicate that he is in charge of a recognized unit with a continuing function. For instance, if this employee is in charge of the unit which has the continuing responsibility for making all installations for his employer, or all installations in a particular city or a designated portion of a city, he would be in charge of a department or subdivision despite the fact that he draws his subordinates from a pool of available men.

(f) It cannot be said, however, that a supervisor drawn from a pool of supervisors who supervises employees assigned to him from a pool and who is assigned a job or series of jobs from day to day or week to week has the status of an executive. Such an employee is not in charge of a recognized unit with a continuing function.

<General Materials (GM) - References, Annotations, or Tables>

Current through June 20, 2000; 65 FR 38332

§ 541.105 Two or more other employees.

(a) An employee will qualify as an "executive" under § 541.1 only if he customarily and regularly supervises at least two full-time employees or the equivalent. For example, if the "executive" supervises one full-time and two part-time employees of whom one works morning and one, afternoons; or four part-time employees, two of whom work mornings and two afternoons, this requirement would be met.

(b) The employees supervised must be employed in the department which the "executive" is managing.

(c) It has been the experience of the divisions that a supervisor of a few as two employees usually performs nonexempt work in excess of the general 20- percent tolerance provided in § 541.1.

(d) In a large machine shop there may be a machine-shop supervisor and two assistant machine-shop supervisors. Assuming that they meet all the other qualifications § 541.1 and particularly that they are not working foremen, they should certainly qualify for the exemption. A small department in a plant or in an office is usually supervised by one person. Any attempt to classify one of the other workers in the department as an executive merely by giving him an honorific title such as assistant supervisor will almost inevitably fail as there will not be sufficient true supervisory or other managerial work to keep two persons occupied. On the other hand, it is incorrect to assume that in a large department, such as a large shoe department in a retail store which has separate sections for men's, women's, and children's shoes, for example, the supervision cannot be distributed among two or three employees, conceivably among more. In such instances, assuming that the other tests are met, especially the one concerning the performance of nonexempt work, each such employee "customarily and regularly directs the work of two or more other employees therein."

(e) An employee who merely assists the manager or buyer of a particular department and supervises two or more employees only in the actual manager's or buyer's absence, however, does not meet this requirement. For example, where a single unsegregated department, such as a women's sportswear department or a men's shirt department in a retail store, is managed by a buyer, with the assistance of one or more assistant buyers, only one employee, the buyer, can be considered an executive, even though the assistant buyers at times exercise some managerial and supervisory responsibilities. A shared responsibility for the supervision of the same two or more employees in the same department does not satisfy the requirement that the employee "customarily and regularly directs the work of two or more employees therein."

Current through June 20, 2000; 65 FR 38332

§ 541.106 Authority to hire or fire.

Section 541.1 requires that an exempt executive employee have the authority to hire or fire other employees or that his suggestions and recommendations as to hiring or firing and as to advancement and promotion or any other change of status of the employees who he supervises will be given particular weight. Thus, no employee, whether high or low in

the hierarchy of management, can be considered as employed in a bona fide executive capacity unless he is directly concerned either with the hiring or the firing and other change of status of the employees under his supervision, whether by direct action or by recommendation to those to who the hiring and firing functions are delegated.

Current through June 20, 2000; 65 FR 38332

§ 541.107 Discretionary powers.

(a) Section 541.1(d) requires that an exempt executive employee customarily and regularly exercise discretionary powers. A person whose work is so completely routinized that he has no discretion does not qualify for exemption.

(b) The phrase "customarily and regularly" signifies a frequency which must be greater than occasional but which, of course, may be less than constant. The requirement will be met by the employee who normally and recurrently is called upon to exercise and does exercise discretionary powers in the day-to-day performance of his duties. The requirement is not met by the occasional exercise of discretionary powers.

Current through June 20, 2000; 65 FR 38332

§ 541.108 Work directly and closely related.

(a) This phrase brings within the category of exempt work not only the actual management of the department and the supervision of the employees therein, but also activities which are closely associated with the performance of the duties involved in such managerial and supervisory functions or responsibilities. The supervision of employees and the management of a department include a great many directly and closely related tasks which are different from the work performed by subordinates and are commonly performed by supervisors because they are helpful in supervising the employees or contribute to the smooth functioning of the department for which they are responsible. Frequently such exempt work is of a kind which in establishments that are organized differently or which are larger and have greater specialization of function, may be performed by a nonexempt employee hired especially for that purpose. Illustration will serve to make clear the meaning to be given the phrase "directly and closely related".

(b) Keeping basic records of working time, for example, is frequently performed by a timekeeper employed for that purpose. In such cases the work is clearly not exempt in nature. In other establishments which are not large enough to employ a timekeeper, or in which the timekeeping function has been decentralized, the supervisor of each department keeps the basic time records of his own subordinates. In these instances, as indicated above, the timekeeping is directly related to the function of managing the particular department and supervising its employees. However, the preparation of a payroll by a supervisor, even the payroll of the employees under his supervision, cannot be considered to be exempt work, since the preparation of a payroll does not aid in the supervision of the employees or the management of the department. Similarly, the keeping by a supervisor of production or sales records of his own subordinates for use in supervision or control would be exempt work, while the maintenance of production records of employees not under his direction would not be exempt work.

(c) Another example of work which may be directly and closely related to the performance of management duties is the distribution of materials or merchandise and supplies. Maintaining control of the flow of materials or merchandise and supplies in a department is ordinarily a responsibility of the managerial employee in charge. In many nonmercantile establishments the actual distribution of materials is performed by nonexempt employees under the supervisor's direction. In other establishments it is not uncommon to leave the actual distribution of materials and supplies in the hands of the supervisor. In such cases it is exempt work since it is directly and closely related to the managerial responsibility of maintaining the flow of materials. In a large retail establishment, however, where the replenishing of stocks of merchandise on the sales floor is customarily assigned to a nonexempt employee, the performance of such work by the manager or buyer of the department is nonexempt. The amount of time the manager or buyer spends in such work must be offset against the statutory tolerance for nonexempt work. The supervision and control of a flow of merchandise to the sales floor, of course, is directly and closely related to the managerial responsibility of the manager or buyer.

(d) Setup work is another illustration of work which may be exempt under certain circumstances if performed by a supervisor. The nature of setup work differs in various industries and for different operations. Some setup work is typically performed by the same employees who perform the "production" work; that is, the employee who operates the machine also "sets it up" or adjusts it for the particular job at hand. Such setup work is part of the production operation and is not exempt. In other instances the setting up of the work is a highly skilled operation which the ordinary production worker or machine tender typically does not perform. In some plants, particularly large ones, such setup work may be performed by employees whose duties are not supervisory in nature. In other plants, however, particularly small plants, such work is a regular duty of the executive and is directly and closely related to his responsibility for the work performance of his subordinates and for the adequacy of the final product. Under such circumstances it is exempt work. In the data processing field the work of a supervisor when he performs the more complex or more responsible work in a program utilizing several computer programmers or computer operators would be exempt activity.

(e) Similarly, a supervisor who spot checks and examines the work of his subordinates to determine whether they are performing their duties properly, and whether the product is satisfactory, is performing work which is directly and closely related to his managerial and supervisory functions. However, this kind of examining and checking must be distinguished from the kind which is normally performed by an "examiner," "checker," or "inspector," and which is really a production operation rather than a part of the supervisory function. Likewise, a department manager or buyer in a retail or service establishment who goes about the sales floor

observing the work of sales personnel under his supervision to determine the effectiveness of their sales techniques, checking on the quality of customer service being given, or observing customer preferences and reactions to the lines, styles, types, colors, and quality of the merchandise offered, is performing work which is directly and closely related to his managerial and supervisory functions. His actual participation, except for supervisory training or demonstration purposes, in such activities as making sales to customers, replenishing stocks of merchandise on the sales floor, removing merchandise from fitting rooms and returning to stock or shelves, however, is not. The amount of time a manager or buyer spends in the performance of such activities must be included in computing the percentage limitation on nonexempt work.

(f) Watching machines is another duty which may be exempt when performed by a supervisor under proper circumstances. Obviously the mere watching of machines in operation cannot be considered exempt work where, as in certain industries in which the machinery is largely automatic, it is an ordinary production function. Thus, an employee who watches machines for the purpose of seeing that they operate properly or for the purpose of making repairs or adjustments is performing nonexempt work. On the other hand, a supervisor who watches the operation of the machinery in his department in the sense that he "keeps an eye out for trouble" is performing work which is directly and closely related to his managerial responsibilities. Making an occasional adjustment in the machinery under such circumstances is also exempt work.

(g) A word of caution is necessary in connection with these illustrations. The recordkeeping, material distributing, setup work, machine watching and adjusting, and inspecting, examining, observing and checking referred to in the examples of exempt work are presumably the kind which are supervisory and managerial functions rather than merely "production" work. Frequently it is difficult to distinguish the managerial type from the type which is a production operation. In deciding such difficult cases it should be borne in mind that it is one of the objectives of § 541.1 to exclude from the definition foremen who hold "dual" or combination jobs. (See discussion of working foremen in § 541.115.) Thus, if work of this kind takes up a large part of the employee's time it would be evidence that management of the department is not the primary duty of the employee, that such work is a production operation rather than a function directly and closely related to the supervisory or managerial duties, and that the employee is in reality a combination foreman- "setup" man, foreman-machine adjuster (or mechanic), or foreman-examiner, floorman-salesperson, etc., rather than a bona fide executive.

Current through June 20, 2000; 65 FR 38332

§ 541.109 Emergencies.

(a) Under certain occasional emergency conditions, work which is normally performed by nonexempt employees and is nonexempt in nature will be directly and closely related to the performance of the exempt functions of management and supervision and will therefore be exempt work. In effect, this means that a bona fide executive who performs work of a normally nonexempt nature on rare occasions because of the existence of a real emergency will not, because of the performance of such emergency work, lose the exemption. Bona fide executives include among their responsibilities the safety of the employees under their supervision, the preservation and protection of the merchandise, machinery or other property of the department or subdivision in their charge from damage due to unforeseen circumstances, and the prevention of widespread breakdown in production, sales, or service operations. Consequently, when conditions beyond control arise which threaten the safety of the employees, or a cessation of operations, or serious damage to the employer's property, any manual or other normally nonexempt work performed in an effort to prevent such results is considered exempt work and is not included in computing the percentage limitation on nonexempt work.

(b) The rule in paragraph (a) of this section is not applicable, however, to nonexempt work arising out of occurrences which are not beyond control or for which the employer can reasonably provide in the normal course of business.

(c) A few illustrations may be helpful in distinguishing routine work performed as a result of real emergencies of the kind for which no provision can practicably be made by the employer in advance of their occurrence and routine work which is not in this category. It is obvious that a mine superintendent who pitches in after an explosion and digs out the men who are trapped in the mine is still a bona fide executive during that week. On the other hand, the manager of a cleaning establishment who personally performs the cleaning operations on expensive garments because he fears damage to the fabrics if he allows his subordinates to handle them is not performing "emergency" work of the kind which can be considered exempt. Nor is the manager of a department in a retail store performing exempt work when he personally waits on a special or impatient customer because he fears the loss of the sale or the customer's goodwill if he allows a salesperson to serve him. The performance of nonexempt work by executives during inventory-taking, during other periods of heavy workload, or the handling of rush orders are the kinds of activities which the percentage tolerances are intended to cover. For example, pitching in on the production line in a canning plant during seasonal operations is not exempt "emergency" work even if the objective is to keep the food from spoiling. Similarly, pitching in behind the sales counter in a retail store during special sales or during Christmas or Easter or other peak sales periods is not "emergency" work, even if the objective is to improve customer service and the store's sales record. Maintenance work is not emergency work even if performed at night or during weekends. Relieving subordinates during rest or vacation periods cannot be considered in the nature of "emergency" work since the need for replacements can be anticipated. Whether replacing the subordinate at the workbench, or production line, or sales counter during the first day or partial day of an illness would be considered exempt emergency work would depend upon the circumstances in the particular case. Such factors as the size of the establishment and of the executive's department, the nature of the industry, the consequences that would flow

from the failure to replace the ailing employee immediately, and the feasibility of filling the employee's place promptly would all have to be weighed.

(d) All the regular cleaning up around machinery, even when necessary to prevent fire or explosion, is not "emergency" work. However, the removal by an executive of dirt or obstructions constituting a hazard to life or property need not be included in computing the percentage limitation if it is not reasonably practicable for anyone but the supervisor to perform the work and it is the kind of "emergency" which has not been recurring. The occasional performance of repair work in case of a breakdown of machinery, or the collapse of a display rack, or damage to or exceptional disarray of merchandise caused by accident or a customer's carelessness may be considered exempt work if the breakdown is one which the employer cannot reasonably anticipate. However, recurring breakdowns or disarrays requiring frequent attention, such as that of an old belt or machine which breaks down repeatedly or merchandise displays constantly requiring re-sorting or straightening, are the kind for which provision could reasonably be made and repair of which must be considered as nonexempt.

Current through June 20, 2000; 65 FR 38332

§ 541.110 Occasional tasks.

(a) In addition to the type of work which by its very nature is readily identifiable as being directly and closely related to the performance of the supervisory and management duties, there is another type of work which may be considered directly and closely related to the performance of these duties. In many establishments the proper management of a department requires the performance of a variety of occasional, infrequently recurring tasks which cannot practicably be performed by the production workers and are usually performed by the executive. These small tasks when viewed separately without regard to their relationship to the executive's overall functions might appear to constitute nonexempt work. In reality they are the means of properly carrying out the employee's management functions and responsibilities in connection with men, materials, and production. The particular tasks are not specifically assigned to the "executive" but are performed by him in his discretion.

(b) It might be possible for the executive to take one of his subordinates away from his usual tasks, instruct and direct him in the work to be done, and wait for him to finish it. It would certainly not be practicable, however, to manage a department in this fashion. With respect to such occasional and relatively inconsequential tasks, it is the practice in industry generally for the executive to perform them rather than to delegate them to other persons. When any one of these tasks is done frequently, however, it takes on the character of a regular production function which could be performed by a nonexempt employee and must be counted as nonexempt work. In determining whether such work is directly and closely related to the performance of the management duties, consideration should be given to whether it is (1) the same as the work performed by any of the subordinates of the executive; or (2) a specifically assigned task of the executive employees; or (3) practicably delegable to nonexempt employees in the establishment; or (4) repetitive and frequently recurring.

Current through June 20, 2000; 65 FR 38332

§ 541.111 Nonexempt work generally.

(a) As indicated in § 541.101 the term "nonexempt work," as used in this subpart, includes all work other than that described in § 541.1 (a) through (d) and the activities directly and closely related to such work.

(b) Nonexempt work is easily identifiable where, as in the usual case, it consists of work of the same nature as that performed by the nonexempt subordinates of the "executive." It is more difficult to identify in cases where supervisory employees spend a significant amount of time in activities not performed by any of their subordinates and not consisting of actual supervision and management. In such cases careful analysis of the employee's duties with reference to the phrase "directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section" will usually be necessary in arriving at a determination.

~~Current through June 20, 2000; 65 FR 38332~~

~~§ 541.112 Percentage limitations on nonexempt work.~~

~~(a) An employee will not qualify for exemption as an executive if he devotes more than 20 percent, or in the case of an employee of a retail or service establishment if he devotes as much as 40 percent, of his hours worked in the workweek to nonexempt work. This test is applied on a workweek basis and the percentage of time spent on nonexempt work is computed on the time worked by the employee.~~

~~(b) (1) The maximum allowance of 20 percent for nonexempt work applies unless the establishment by which the employee is employed qualifies for the higher allowance as a retail or service establishment within the meaning of the act. Such an establishment must be a distinct physical place of business, open to the general public, which is engaged on the premises in making sales of goods or services to which the concept of retail selling or servicing applies. As defined in section 13(a)(2) of the act, such an establishment must make at least 75 percent of its annual dollar volume of sales of goods or services from sales that are both not for resale and recognized as retail in the particular industry. Types of establishments which may meet these tests include stores selling consumer goods to the public; hotels; motels; restaurants; some types of amusement or recreational establishments (but not those offering wagering or gambling facilities); hospitals, or institutions primarily engaged in the care of the sick, the aged, the mentally ill, or defective residing on the premises, if open to the general public; public parking lots and parking garages; auto repair shops; gasoline service stations (but not truck stops); funeral homes; cemeteries; etc. Further explanation and illustrations of the establishments included in the term "retail or service establishment" as used in the act may be found in Part 779 of this chapter.~~

~~(2) Public and private elementary and secondary schools and institutions of higher education are, as a rule, not retail or service establishments, because they are not engaged in sales of goods or services to which the retail concept applies. Under section 13(a)(2)(iii) of the act prior to the 1966 amendments, it was possible for private schools for physically or mentally handicapped or gifted children to qualify as retail or service establishments if they met the statutory tests, because the special types of services provided to their students were considered by Congress to be of a kind that may be recognized as retail. Such schools, unless the nature of their operations has changed, may continue to qualify as retail or service establishments and, if they do, may utilize the greater tolerance for nonexempt work provided for executive and administrative employees of retail or service establishments under section 13(a)(1) of the act.~~

~~(3) The legislative history of the act makes it plain that an establishment engaged in laundering, cleaning, or repairing clothing or fabrics is not a retail or service establishment. When the act was amended in 1949, Congress excluded such establishments from the exemption under section 13(a)(2) because of the lack of a retail concept in the services sold by such establishments, and provided a separate exemption for them which did not depend on status as a retailer. Again in 1966, when this exemption was repealed, Congress made it plain by exclusionary language that the exemption for retail or service establishments was not to be applied to laundries or dry cleaners.~~

~~(c) There are two special exceptions to the percentage limitations of paragraph (a) of this section:~~

~~(1) That relating to the employee in "sole charge" of an independent or branch establishment, and~~

~~(2) That relating to an employee owning a 20 percent interest in the enterprise in which he is employed. These except the employee only from the percentage limitations on nonexempt work. They do not except the employee from any of the other requirements of § 541.1. Thus, while the percentage limitations on nonexempt work are not applicable, it is clear that an employee would not qualify for the exemption if he performs so much nonexempt work that he could no longer meet the requirement of § 541.1(a) that his primary duty must consist of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof.~~

Current through June 20, 2000; 65 FR 38332

~~§ 541.113 Sole-charge exception.~~

~~(a) An exception from the percentage limitations on nonexempt work is provided in § 541.1(e) for "an employee who is in sole charge of an independent establishment or a physically separated branch establishment * * * ". Such an employee is considered to be employed in a bona fide executive capacity even though he exceeds the applicable percentage limitation on nonexempt work.~~

~~(b) The term "independent establishment" must be given full weight. The establishment must have a fixed location and must be geographically separated from other company property. The management of operations within one among several buildings located on a single or adjoining tracts of company property does not qualify for the exemption under this heading. In the case of a branch, there must be a true and complete physical separation from the main office.~~

~~(c)(1) A determination as to the status as "an independent establishment or a physically separated branch establishment" of any part of the business operations on the premises of a retail or other establishment, however, must be made on the basis of the physical and economic facts in the particular situation. (See 29 CFR 779.225, 779.305, 779.306.) A leased department cannot be considered to be a separate establishment where, for example, it and the retail store in which it is located operate under a common trade name and the store may determine, or have the power to determine, the leased department's space location, the type of merchandise it will sell its pricing policy, its hours of operation and some or all of its hiring, firing, and other personnel policies, and matters such as advertising, adjustment, and credit operations, insurance and taxes, are handled on a unified basis by the store.~~

~~(2) A leased department may qualify as a separate establishment, however, where, among other things, the facts show that the lessee maintains a separate entrance and operates under a separate name, with its own separate employees and records, and in other respects conducts his business independently of the lessor's. In such a case the leased department would enjoy the same status as a physically separated branch store.~~

~~(d) Since the employee must be in "sole charge, only one person in any establishment can qualify as an executive under this exception, and then only if he is the top person in charge at that location. (It is possible for other persons in the same establishment to qualify for exemption as executive employees, but not under the exception from the nonexempt work limitation.) Thus, it would not be applicable to an employee who is in charge of a branch establishment but whose superior makes his office on the premises. An example is a district manager who has overall supervisory functions in relation to a number of branch offices, but makes his office at one of the branches. The branch manager at the branch where the district manager's office is located is not in "sole charge" of the establishment and does not come within the exception. This does not mean that the "sole-charge" status of an employee will be considered lost because of an occasional visit to the branch office of the superior of the person in charge, or, in the case of an independent establishment by the visit for a short period on 1 or 2 days a week of the proprietor or principal corporate officer of the establishment. In these situations the sole charge status of the employee in question will appear from the facts as to his functions, particularly in the intervals between visits. If, during these intervals, the decisions normally made by an executive in charge of a branch or an independent establishment are reserved for the superior, the employee is not in sole charge. If such decisions are not reserved for the superior, the sole-charge status will not be lost merely because of the superior's visits.~~

~~(e)~~ In order to qualify for the exception the employee must ~~ordinarily be in charge of all the company activities at the~~

~~location where he is employed. If he is in charge of only a portion of the company's activities at his location, then he cannot be said to be in sole charge of an independent establishment or a physically separated branch establishment. In exceptional cases the divisions have found that an executive employee may be in sole charge of all activities at a branch office except that one independent function which is not integrated with those managed by the executive is also performed at the branch. This one function is not important to the activities managed by the executive and constitutes only an insignificant portion of the employer's activities at that branch. A typical example of this type of situation is one in which "desk space" in a warehouse otherwise devoted to the storage and shipment of parts is assigned a salesman who reports to the sales manager or other company official located at the home office. Normally only one employee (at most two or three, but in any event an insignificant number when compared with the total number of persons employed at the branch) is engaged in the nonintegrated function for which the executive whose sole-charge status is in question is not responsible. Under such circumstances the employee does not lose his "sole-charge" status merely because of the desk space assignment.~~

~~Current through June 20, 2000; 65 FR 38332~~

~~§ 541.114 Exception for owners of 20-percent interest.~~

~~(a) An exception from the percentage limitations on nonexempt work is provided in § 541.1(e) for an employee "who owns at least a 20-percent interest in the enterprise in which he is employed". This provision recognizes the special status of a shareholder of an enterprise who is actively engaged in its management.~~

~~(b) The exception is available to an employee owning a bona fide 20-percent equity in the enterprise in which he is employed regardless of whether the business is a corporate or other type of organization.~~

Current through June 20, 2000; 65 FR 38332

§ 541.115 Working foremen.

(a) The primary purpose of the exclusionary language placing a limitation on the amount of nonexempt work is to distinguish between the bona fide executive and the "working" foreman or "working" supervisor who regularly performs "production" work or other work which is unrelated or only remotely related to his supervisory activities. (The term "working" foreman is used in this subpart in the sense indicated in the text and should not be construed to mean only one who performs work similar to that performed by his subordinates.)

(b) One type of working foreman or working supervisor most commonly found in industry works alongside his subordinates. Such employees, sometimes known as strawbosses, or gang or group leaders perform the same kind of work as that performed by their subordinates, and also carry on supervisory functions. Clearly, the work of the same nature as that performed by the employees' subordinates must be counted as nonexempt work and if the amount of such work performed is substantial the exemption does not apply. ("Substantial," as used in this section, means more than 20 percent. See discussion of the 20-percent limitation on nonexempt work in § 541.112.) A foreman in a dress shop, for example, who operates a sewing machine to produce the product is performing clearly nonexempt work. However, this should not be confused with the operation of a sewing machine by a foreman to instruct his subordinates in the making of a new product, such as a garment, before it goes into production.

(c) Another type of working foreman or working supervisor who cannot be classed as a bona fide executive is one who spends a substantial amount of time in work which, although not performed by his own subordinates, consists of ordinary production work or other routine, recurrent, repetitive tasks which are a regular part of his duties. Such an employee is in effect holding a dual job. He may be, for example, a combination foreman-production worker, supervisor-clerk, or foreman combined with some other skilled or unskilled occupation. His nonsupervisory duties in such instances are unrelated to anything he must do to supervise the employees under him or to manage the department. They are in many instances mere "fill-in" tasks performed because the job does not involve sufficient executive duties to occupy an employee's full time. In other instances the nonsupervisory, nonmanagerial duties may be the principal ones and the supervisory or managerial duties are subordinate and are assigned to the particular employee because it is more convenient to rest the responsibility for the first line of supervision in the hands of the person who performs these other duties. Typical of employees in dual jobs which may involve a substantial amount of nonexempt work are:

(1) Foremen or supervisors who also perform one or more of the "production" or "operating" functions, though no other employees in the plant perform such work. An example of this kind of employee is the foreman in a millinery or garment plant who is also the cutter, or the foreman in a garment factory who operates a multiple-needle machine not requiring a full-time operator;

(2) Foremen or supervisors who have as a regular part of their duties the adjustment, repair, or maintenance of machinery or equipment. Examples in this category are the foreman-fixer in the hosiery industry who devotes a considerable amount of time to making adjustments and repairs to the machines of his subordinates, or the planer-mill foreman who is also the "machine man" who repairs the machines and grinds the knives;

(3) Foremen or supervisors who perform clerical work other than the maintenance of the time and production records of their subordinates; for example, the foreman of the shipping room who makes out the bills of lading and other shipping records, the warehouse foreman who also acts as inventory clerk, the head shipper who also has charge of a finished goods stock room, assisting in placing goods on shelves and keeping perpetual inventory records, or the office manager, head bookkeeper, or chief clerk who performs routine bookkeeping. There is no doubt that the head bookkeeper, for example, who spends a substantial amount of his time keeping books of the same general nature as those kept by the other bookkeepers, even though his books are

confidential in nature or cover different transactions from the books maintained by the under bookkeepers, is not primarily an executive employee and should not be so considered.

Current through June 20, 2000; 65 FR 38332

§ 541.116 Trainees, executive.

The exemption is applicable to an employee employed in a bona fide executive capacity and does not include employees training to become executives and not actually performing the duties of an executive.

Current through June 20, 2000; 65 FR 38332

~~§ 541.117 Amount of salary required.~~

~~(a) Except as otherwise noted in paragraph (b) of this section, compensation on a salary basis at a rate of not less than $155 per week, exclusive of board, lodging, or other facilities, is required for exemption as an executive. The $155 a week may be translated into equivalent amounts for periods longer than 1 week. The requirement will be met if the employee is compensated biweekly on a salary basis of $310, semimonthly on a salary basis of $335.84 or monthly on a salary basis of $671.67. However, the shortest period of payment which will meet the requirement of payment "on a salary basis" is a week.~~

~~(b) In Puerto Rico, the Virgin Islands, and American Samoa, the salary test for exemption as an "executive" is $130 per week for other than an employee of the Federal Government.~~

~~(c) The payment of the required salary must be exclusive of board, lodging, or other facilities; that is, free and clear. On the other hand, the regulations in subpart A of this part do not prohibit the sale of such facilities to executives on a cash basis if they are negotiated in the same manner as similar transactions with other persons.~~

~~(d) The validity of including a salary requirement in the regulations in subpart A of this part has been sustained in a number of appellate court decisions. See, for example, Walling v. Yeakley, 140 F. (2d) 830 (C.A. 10); Helliwell v. Haberman, 140 F. (2d) 833 (C.A. 2); and Walling v. Morris, 155 F. (2d) 832 (C.A. 6) (reversed on another point in 332 U.S. 442); Wirtz v. Mississippi Publishers, 364 F. (2d) 603 (C.A. 5); Craig v. Far West Engineering Co., 265 F. (2d) 251 (C.A. 9) cert. den. 361 U.S. 816; Hofer v. Federal Cartridge Corp., 71 F. Supp. 243 (D.C. Minn.).~~

Current through June 20, 2000; 65 FR 38332

§ 541.118 Salary basis.

(a) An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.

(1) An employee will not be considered to be "on a salary basis" if deductions from his predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. Accordingly, if the employee is ready, willing, and able to work, deductions may not be made for time when work is not available.

(2) Deductions may be made, however, when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident. Thus, if an employee is absent for a day or longer to handle personal affairs, his salaried status will not be affected if deductions are made from his salary for such absences.

(3) Deductions may also be made for absences of a day or more occasioned by sickness or disability (including industrial accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability. Thus, if the employer's particular plan, policy or practice provides compensation for such absences, deductions for absences of a day or longer because of sickness or disability may be made before an employee has qualified under such plan, policy or practice, and after he has exhausted his leave allowance thereunder. It is not required that the employee be paid any portion of his salary for such days or days for which he receives compensation for leave under such plan, policy or practice. Similarly, if the employer operates under a State sickness and disability insurance law, or a private sickness and disability insurance plan, deductions may be made for absences of a working day or longer if benefits are provided in accordance with the particular law or plan. In the case of an industrial accident, the "salary basis" requirement will be met if the employee is compensated for loss of salary in accordance with the applicable compensation law or the plan adopted by the employer, provided the employer also has some plan, policy or practice of providing compensation for sickness and disability other than that relating to industrial accidents.

(4) Deductions may not be made for absences of an employee caused by jury duty, attendance as a witness, or temporary military leave. The employer may, however, offset any amounts received by an employee as jury or witness fees or military pay for a particular week against the salary due for that particular week without loss of the exemption.

(5) Penalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status. Safety rules of major significance include only those relating to the prevention of serious danger to the plant, or other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines.

(6) The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

(b) Minimum guarantee plus extras. It should be noted that the salary may consist of a predetermined amount constituting all or part of the employee's compensation. In other words, additional compensation besides the salary is not inconsistent with the salary basis of payment. The requirement will be met, for example, by a branch manager who

receives a salary of $155 or more a week and in addition, a commission of 1 percent of the branch sales. The requirement will also be met by a branch manager who receives a percentage of the sales or profits of the branch, if the employment arrangement also includes a guarantee of at least the minimum weekly salary (or the equivalent for a monthly or other period) required by the regulations. Another type of situation in which the requirement will be met is that of an employee paid on a daily or shift basis, if the employment arrangement includes a provision that the employee will receive not less than the amount specified in the regulations in any week in which the employee performs any work. Such arrangements are subject to the exceptions in paragraph (a) of this section. The test of payment on a salary basis will not be met, however, if the salary is divided into two parts for the purpose of circumventing the requirement of payment "on a salary basis". For example, a salary of $200 in each week in which any work is performed, and an additional $50 which is made subject to deductions which, are not permitted under paragraph (a) of this section.

(c) Initial and terminal weeks . Failure to pay the full salary in the initial or terminal week of employment is not considered inconsistent with the salary basis of payment. In such weeks the payment of a proportionate part of the employee's salary for the time actually worked will meet the requirement. However, this should not be construed to mean that an employee is on a salary basis within the meaning of the regulations if he is employed occasionally for a few days and is paid a proportionate part of the weekly salary when so employed. Moreover, even payment of the full weekly salary under such circumstances would not meet the requirement, since casual or occasional employment for a few days at a time is inconsistent with employment on a salary basis within the meaning of the regulations.

~~Current through June 20, 2000; 65 FR 38332~~

~~§ 541.119 Special proviso for high salaried executives.~~

~~(a) Except as otherwise noted in paragraph (b) of this section, § 541.1 contains an upset or high salary proviso for managerial employees who are compensated on a salary basis at a rate of not less than $250 per week exclusive of board, lodging, or other facilities. Such a highly paid employee is deemed to meet all the requirements in paragraphs (a) through (f) of § 541.1 if the employee's primary duty consists of the management of the enterprise in which employed or of a customarily recognized department or subdivision thereof and includes the customary and regular direction of the work of two or more other employees therein. If an employee qualifies for exemption under this proviso, it is not necessary to test that employee's qualifications in detail under paragraphs (a) through (f) of § 541.1 of this Part.~~

~~(b) In Puerto Rico, the Virgin Islands, and American Samoa the proviso of § 541.1(f) applies to those managerial employees (other than employees of the Federal Government) who are paid on a salary basis at a rate of not less than $200 per week.~~

~~(c) Mechanics, carpenters, linotype operators, or craftsmen of other kinds are not exempt under the proviso no matter how highly paid they might be.~~

CODE OF FEDERAL REGULATIONS

TITLE 29--LABOR

SUBTITLE B--REGULATIONS RELATING TO LABOR

CHAPTER V--WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR

SUBCHAPTER A--REGULATIONS

PART 541--DEFINING AND DELIMITING THE TERMS "ANY EMPLOYEE EMPLOYED IN A BONA

FIDE EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL CAPACITY (INCLUDING ANY

EMPLOYEE EMPLOYED IN THE CAPACITY OF ACADEMIC ADMINISTRATIVE PERSONNEL OR

TEACHER IN ELEMENTARY OR SECONDARY SCHOOLS), OR IN THE CAPACITY OF OUTSIDE

SALESMAN"

SUBPART B--INTERPRETATIONS

EMPLOYEE EMPLOYED IN A BONA FIDE ADMINISTRATIVE CAPACITY

§ 541.201 Types of administrative employees.

(a) Three types of employees are described in § 541.2(c) who, if they meet the other tests in § 541.2, qualify for exemption as "administrative" employees.

(1) Executive and administrative assistants . The first type is the assistant to a proprietor or to an executive or administrative employee. In modern industrial practice there has been a steady and increasing use of persons who assist an executive in the performance of his duties without themselves having executive authority. Typical titles of persons in this group are executive assistant to the president, confidential assistant, executive secretary, assistant to the general manager, administrative assistant and, in retail or service establishments, assistant manager and assistant buyer. Generally speaking, such assistants are found in large establishments where the official assisted has duties of such scope and which require so much attention that the work of personal scrutiny, correspondence, and interviews must be delegated.

(2) Staff employees .

(i) Employees included in the second alternative in the definition are those who can be described as staff rather than line employees, or as functional rather than departmental heads. They include among others employees who act as advisory specialists to the management. Typical examples of such advisory specialists are tax experts, insurance experts, sales research experts, wage- rate analysts, investment consultants, foreign exchange consultants, and statisticians.

(ii) Also included are persons who are in charge of a so-called functional department, which may frequently be a one-man department. Typical examples of such employees are credit managers, purchasing agents, buyers, safety directors, personnel directors, and labor relations directors.

(3) Those who perform special assignments.

(i) The third group consists of persons who perform special assignments. Among them are to be found a number of persons whose work is performed away from the employer's place of business. Typical titles of such persons are lease buyers, field representatives of utility companies, location managers of motion picture companies, and district gaugers

for oil companies. It should be particularly noted that this is a field which is rife with honorific titles that do not adequately portray the nature of the employee's duties. The field representative of a utility company, for example, may be a "glorified serviceman."

(ii) This classification also includes employees whose special assignments are performed entirely or partly inside their employer's place of business. Examples are special organization planners, customers' brokers in stock exchange firms, so-called account executives in advertising firms and contact or promotion men of various types.

(b) Job titles insufficient as yardsticks .

(1) The employees for whom exemption is sought under the term "administrative" have extremely diverse functions and a wide variety of titles. A title alone is of little or no assistance in determining the true importance of an employee to the employer or his exempt or nonexempt status under the regulations in subpart A of this part. Titles can be had cheaply and are of no determinative value. Thus, while there are supervisors of production control (whose decisions affect the welfare of large numbers of employees) who qualify for exemption under section 13(a)(1), it is not hard to call a rate setter (whose functions are limited to timing certain operations and jotting down times on a standardized form) a "methods engineer" or a "production-control supervisor."

(2) Many more examples could be cited to show that titles are insufficient as yardsticks. As has been indicated previously, the exempt or nonexempt status of any particular employee must be determined on the basis of whether his duties, responsibilities, and salary meet all the requirements of the appropriate section of the regulations in subpart A of this part.

(c) Individuals engaged in the overall academic administration of an elementary or secondary school system include the superintendent or other head of the system and those of his assistants whose duties are primarily concerned with administration of such matters as curriculum, quality and methods of instructing, measuring and testing the learning potential and achievement of students, establishing and maintaining academic and grading standards, and other aspects of the teaching program. In individual school establishments those engaged in overall academic administration include the principal and the vice principals who are responsible for the operation of the school. Other employees engaged in academic administration are such department heads as the heads of the mathematics department, the English department, the foreign language department, the manual crafts department, and the like. Institutions of higher education have similar organizational structure, although in many cases somewhat more complex.

Current through June 20, 2000; 65 FR 38332

§ 541.202 Categories of work.

(a) The work generally performed by employees who perform administrative tasks may be classified into the following general categories for purposes of the definition: (This classification is without regard to whether the work is manual or nonmanual. The problem of manual work as it affects the exemption of administrative employees is discussed in § 541.203.) (1) The work specifically described in paragraphs (a), (b), and (c) of § 541.2; (2) routine work which is directly and closely related to the performance of the work which is described in paragraphs (a), (b), and (c) of § 541.2; and (3) routine work which is not related or is only remotely related to the administrative duties. (As used in this subpart the phrase "routine work" means work which does not require the exercise of discretion and independent judgment. It is not necessarily restricted to work which is repetitive in nature.)

(b) The work in category 1, that which is specifically described in § 541.2 as requiring the exercise of discretion and independent judgment, is clearly exempt in nature.

(c) Category 2 consists of work which if separated from the work in category 1 would appear to be routine, or on a fairly low level, and which does not itself require the exercise of discretion and independent judgment, but which has a direct and close relationship to the performance of the more important duties. The directness and closeness of the relationship may vary depending upon the nature of the job and the size and organization of the establishment in which the work is performed. This "directly and closely related" work includes routine work which necessarily arises out of the administrative duties, and the routine work without which the employee's more important work cannot be performed properly. It also includes a variety of routine tasks which may not be essential to the proper performance of the more important duties but which are functionally related to them directly and closely. In this latter category are activities which an administrative employee may reasonably be expected to perform in connection with carrying out his administrative functions including duties which either facilitate or arise incidentally from the performance of such functions and are commonly performed in connection with them.

(d) These "directly and closely related" duties are distinguishable from the last group, category 3, those which are remotely related or completely unrelated to the more important tasks. The work in this last category is nonexempt and must not exceed the 20-percent limitation for nonexempt work (up to 40 percent or service establishment) if the exemption is to apply.

(e) Work performed by employees in the capacity of "academic administrative" personnel is a category of administrative work limited to a class of employees engaged in academic administration as contrasted with the general usable of "administrative" in the act. The term "academic administrative" denotes administration relating to the academic operations and functions in a school rather than to administration along the lines of general business operations. Academic administrative personnel are performing operations directly in the field of education. Jobs relating to areas outside the educational field are not within the definition of academic administration. Examples of jobs in school systems, and educational establishments and institutions, which are outside the term academic administration are jobs relating to building management and maintenance, jobs relating to the health of the students and

academic staff such as social workers, psychologist, lunch room manager, or dietitian. Employees in such work which is not considered academic administration may qualify for exemption under other provisions of § 541.2 or under other sections of the regulations in subpart A of this part provided the requirements for such exemptions are met.

Current through June 20, 2000; 65 FR 38332

§ 541.203 Nonmanual work.

(a) The requirement that the work performed by an exempt administrative employee must be office work or nonmanual work restricts the exemption to "white-collar" employees who meet the tests. If the work performed is "office" work it is immaterial whether it is manual or nonmanual in nature. This is consistent with the intent to include within the term "administrative" only employees who are basically white-collar employees since the accepted usage of the term "white-collar" includes all office workers. Persons employed in the routine operation of office machines are engaged in office work within the meaning of § 541.2 (although they would not qualify as administrative employees since they do not meet the other requirements of § 541.2).

(b) Section 541.2 does not completely prohibit the performance of manual work by an "administrative" employee. The performance by an otherwise exempt administrative employee of some manual work which is directly and closely related to the work requiring the exercise of discretion and independent judgment is not inconsistent with the principle that the exemption is limited to "white-collar" employees. However, if the employee performs so much manual work (other than office work) that he cannot be said to be basically a "white- collar" employee he does not qualify for exemption as a bona fide administrative employee, even if the manual work he performs is directly and closely related to the work requiring the exercise of discretion and independent judgment. Thus, it is obvious that employees who spend most of their time in using tools, instruments, machinery, or other equipment, or in performing repetitive operations with their hands, no matter how much skill is required, would not be bona fide administrative employees within the meaning of § 541.2. An office employee, on the other hand, is a "white-collar" worker, and would not lose the exemption on the grounds that he is not primarily engaged in "nonmanual" work, although he would lose the exemption if he failed to meet any of the other requirements.

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§ 541.205 Directly related to management policies or general business operations.

(a) The phrase "directly related to management policies or general business operations of his employer or his employer's customers" describes those types of activities relating to the administrative operations of a business as distinguished from "production" or, in a retail or service establishment, "sales" work. In addition to describing the types of activities, the phrase limits the exemption to persons who perform work of substantial importance to the management or operation of the business of his employer or his employer's customers.

(b) The administrative operations of the business include the work performed by so-called white-collar employees engaged in "servicing" a business as, for, example, advising the management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control. An employee performing such work is engaged in activities relating to the administrative operations of the business notwithstanding that he is employed as an administrative assistant to an executive in the production department of the business.

(c) As used to describe work of substantial importance to the management or operation of the business, the phrase "directly related to management policies or general business operations" is not limited to persons who participate in the formulation of management policies or in the operation of the business as a whole. Employees whose work is "directly related" to management policies or to general business operations include those work affects policy or whose responsibility it is to execute or carry it out. The phrase also includes a wide variety of persons who either carry out major assignments in conducting the operations of the business, or whose work affects business operations to a substantial degree, even though their assignments are tasks related to the operation of a particular segment of the business.

(1) It is not possible to lay down specific rules that will indicate the precise point at which work becomes of substantial importance to the management or operation of a business. It should be clear that the cashier of a bank performs work at a responsible level and may therefore be said to be performing work directly related to management policies or general business operations. On the other hand, the bank teller does not. Likewise it is clear that bookkeepers, secretaries, and clerks of various kinds hold the run-of-the-mine positions in any ordinary business and are not performing work directly related to management policies or general business operations. On the other hand, a tax consultant employed either by an individual company or by a firm of consultants is ordinarily doing work of substantial importance to the management or operation of a business.

(2) An employee performing routine clerical duties obviously is not performing work of substantial importance to the management or operation of the business even though he may exercise some measure of discretion and judgment as to the manner in which he performs his clerical tasks. A messenger boy who is entrusted with carrying large sums of money or securities cannot be said to be doing work of importance to the business even though serious consequences may flow from his neglect. An employee operating very expensive equipment may cause serious loss to his employer by the improper performance of his duties. An inspector, such as, for example, an inspector for an insurance company, may cause loss to his employer by the failure to perform his job properly. But such employees, obviously, are not performing work of such substantial importance to the management or operation of the business that it can be said to be "directly related to management policies or general business operations" as that phrase is used in § 541.2.

(3) Some firms employ persons whom they describe as "statisticians." If all such a person does, in effect, is to tabulate data, he is clearly not exempt. However, if such an employee makes analyses of data and draws conclusions which are important to the determination of, or which, in fact, determine financial, merchandising, or other policy, clearly he is doing work directly related to management policies or general business operations. Similarly, a personnel employee may be a clerk at a hiring window of a plant, or he may be a man who determines or effects personnel policies affecting all the workers in the establishment. In the latter case, he is clearly doing work directly related to management policies or general business operations. These examples illustrate the two extremes. In each case, between these extreme types there are many employees whose work may be of substantial importance to the management or operation of the business, depending upon the particular facts.

(4) Another example of an employee whose work may be important to the welfare of the business is a buyer of a particular article or equipment in an industrial plant or personnel commonly called assistant buyers in retail or service establishments. Where such work is of substantial importance to the management or operation of the business, even though it may be limited to purchasing for a particular department of the business, it is directly related to management policies or general business operations.

(5) The test of "directly related to management policies or general business operations" is also met by many persons employed as advisory specialists and consultants of various kinds, credit managers, safety directors, claim agents and adjusters, wage-rate analysts, tax experts, account executives of advertising agencies, customers' brokers in stock exchange firms, promotion men, and many others.

(6) It should be noted in this connection that an employer's volume of activities may make it necessary to employ a number of employees in some of these categories. The fact that there are a number of other employees of the same employer carrying out assignments of the same relative importance or performing identical work does not affect the determination of whether they meet this test so long as the work of each such employee is of substantial importance to the management or operation of the business.

(7) In the data processing field some firms employ persons described as systems analysts and computer programmers. If such employees are concerned with the planning, scheduling, and coordination of activities which are required to develop systems for processing data to obtain solutions to complex business, scientific, or engineering problems of his employer or his employer's customers, he is clearly doing work directly related to management policies or general business operations.

(d) Under § 541.2 the "management policies or general business operations" may be those of the employer or the employer's customers. For example, many bona fide administrative employees perform important functions as advisers and consultants but are employed by a concern engaged in furnishing such services for a fee. Typical instances are tax experts, labor relations consultants, financial consultants, systems analysts, or resident buyers. Such employees, if they meet the other requirements of § 541.2, qualify for exemption regardless of whether the management policies or general business operations to which their work is directly related are those of their employer's clients or customers or those of their employer.

~~Current through June 20, 2000; 65 FR 38332~~

~~§ 541.206 Primary duty.~~

~~(a) The definition of "administrative" exempts only employees who are primarily engaged in the responsible work which is characteristic of employment in a bona fide administrative capacity. Thus, the employee must have as his primary duty office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers, or, in the case of "academic administrative personnel," the employee must have as his primary duty work that is directly related to academic administration or general academic operations of the school in whose operations he is employed.~~

~~(b) In determining whether an employee's exempt work meets the "primary duty" requirement, the principles explained in § 541.103 in the discussion of "primary duty" under the definition of "executive" are applicable.~~

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§ 541.207 Discretion and independent judgment.

(a) In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The term as used in the regulations in Subpart A of this part, more over, implies that the person has the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance. (Without actually attempting to define the term, the courts have given it this meaning in applying it in particular cases. See, for example, Walling v. Sterling Ice Co., 69 F. Supp. 655, reversed on other grounds, 165 F. (2d) 265 (CCA 10). See also Connell v. Delaware Aircraft Industries, 55 Atl. (2d) 637.)

(b) The term must be applied in the light of all the facts involved in the particular employment situation in which the question arises. It has been most frequently misunderstood and misapplied by employers and employees in cases involving the following: (1) Confusion between the exercise of discretion and independent judgment, and the use of skill in applying techniques, procedures, or specific standards; and (2) misapplication of the term to employees making decisions relating to matters of little consequence.

(c) Distinguished from skills and procedures:

(1) Perhaps the most frequent cause of misapplication of the term "discretion and independent judgment" is the failure to distinguish it from the use of skill in various respects. An employee who merely applies his knowledge in following prescribed procedures or determining which procedure to follow, or who determines whether specified standards are

met or whether an object falls into one or another of a number of definite grades, classes, or other categories, with or without the use of testing or measuring devices, is not exercising discretion and independent judgment within the meaning of § 541.2. This is true even if there is some leeway in reaching a conclusion, as when an acceptable standard includes a range or a tolerance above or below a specific standard.

(2) A typical example of the application of skills and procedures is ordinary inspection work of various kinds. Inspectors normally perform specialized work along standardized lines involving well-established techniques and procedures which may have been cataloged and described in manuals or other sources. Such inspectors rely on techniques and skills acquired by special training or experience. They may have some leeway in the performance of their work but only within closely prescribed limits. Employees of this type may make recommendations on the basis of the information they develop in the course of their inspections (as for example, to accept or reject an insurance risk or a product manufactured to specifications), but these recommendations are based on the development of the facts as to whether there is conformity with the prescribed standards. In such cases a decision to depart from the prescribed standards or the permitted tolerance is typically made by the inspector's superior. The inspector is engaged in exercising skill rather than discretion and independent judgment within the meaning of the regulations in Subpart A of this part.

(3) A related group of employees usually called examiners or graders perform similar work involving the comparison of products with established standards which are frequently cataloged. Often, after continued reference to the written standards, or through experience, the employee acquires sufficient knowledge so that reference to written standards is unnecessary. The substitution of the employee's memory for the manual of standards does not convert the character of the work performed to work requiring the exercise of discretion and independent judgment as required by the regulations in subpart A of this part. The mere fact that the employee uses his knowledge and experience does not change his decision, i.e., that the product does or does not conform with the established standard, into a real decision in a significant matter.

(4) For example, certain "graders" of lumber turn over each "stick" to see both sides, after which a crayon mark is made to indicate the grade. These lumber grades are well established and the employee's familiarity with them stems from his experience and training. Skill rather than discretion and independent judgment is exercised in grading the lumber. This does not necessarily mean, however, that all employees who grade lumber or other commodities are not exercising discretion and independent judgment. Grading of commodities for which there are no recognized or established standards may require the exercise of discretion and independent judgment as contemplated by the regulations in Subpart A of this part. In addition, in those situations in which an otherwise exempt buyer does grading, the grading even though routine work, may be considered exempt if it is directly and closely related to the exempt buying.

(5) Another type of situation where skill in the application of techniques and procedures is sometimes confused with discretion and independent judgment is the "screening" of applicants by a personnel clerk. Typically such an employee will interview applicants and obtain from them data regarding their qualifications and fitness for employment. These data may be entered on a form specially prepared for the purpose. The "screening" operation consists of rejecting all applicants who do not meet standards for the particular job or for employment by the company. The standards are usually set by the employee's superior or other company officials, and the decision to hire from the group of applicants who do meet the standards is similarly made by other company officials. It seems clear that such a personnel clerk does not exercise discretion and independent judgment as required by the regulations in Subpart A of this part. On the other hand an exempt personnel manager will often perform similar functions; that is, he will interview applicants to obtain the necessary data and eliminate applicants who are not qualified. The personnel manager will then hire one of the qualified applicants. Thus, when the interviewing and screening are performed by the personnel manager who does the hiring they constitute exempt work, even though routine, because this work is directly and closely related to the employee's exempt functions.

(6) Similarly, comparison shopping performed by an employee of a retail store who merely reports to the buyer his findings as to the prices at which a competitor's store is offering merchandise of the same or comparable quality does not involve the exercise of discretion and judgment as required in the regulations. Discretion and judgment are exercised, however, by the buyer who evaluates the assistants' reports and on the basis of their findings directs that certain items be re-priced. When performed by the buyer who actually makes the decisions which affect the buying or pricing policies of the department he manages, the comparison shopping, although in itself a comparatively routine operation, is directly and closely related to his managerial responsibility.

(7) In the data processing field a systems analyst is exercising discretion and independent judgment when he develops methods to process, for example, accounting, inventory, sales, and other business information by using electronic computers. He also exercises discretion and independent judgment when he determines the exact nature of the data processing problem, and structures the problem in a logical manner so that a system to solve the problem and obtain the desired results can be developed. Whether a computer programmer is exercising discretion and independent judgment depends on the facts in each particular case. Every problem processed in a computer first must be carefully analyzed so that exact and logical steps for its solution can be worked out. When this preliminary work is done by a computer programmer he is exercising discretion and independent judgment. A computer programmer would also be using discretion and independent judgment when he determines exactly what information must be used to prepare the necessary documents and by ascertaining the exact form

in which the information is to be presented. Examples of work not requiring the level of discretion and judgment contemplated by the regulations are highly technical and mechanical operations such as the preparation of a flow chart or diagram showing the order in which the computer must perform each operation, the preparation of instructions to the console operator who runs the computer or the actual running of the computer by the programmer, and the debugging of a program. It is clear that the duties of data processing employees such as tape librarians, keypunch operators, computer operators, junior programmers and programmer trainees are so closely supervised as to preclude the use of the required discretion and independent judgment.

(d) Decisions in significant matters.

(1) The second type of situation in which some difficulty with this phrase has been experienced relates to the level or importance of the matters with respect to which the employee may make decisions. In one sense almost every employee is required to use some discretion and independent judgment. Thus, it is frequently left to a truck driver to decide which route to follow in going from one place to another; the shipping clerk is normally permitted to decide the method of packing and the mode of shipment of small orders; and the bookkeeper may usually decide whether he will post first to one ledger rather than another. Yet it is obvious that these decisions do not constitute the exercise of discretion and independent judgment of the level contemplated by the regulations in Subpart A of this part. The divisions have consistently taken the position that decisions of this nature concerning relatively unimportant matters are not those intended by the regulations in Subpart A of this part, but that the discretion and independent judgment exercised must be real and substantial, that is, they must be exercised with respect to matters of consequence. This interpretation has also been followed by courts in decisions involving the application of the regulations in this part, to particular cases.

(2) It is not possible to state a general rule which will distinguish in each of the many thousands of possible factual situations between the making of real decisions in significant matters and the making of choices involving matters of little or no consequence. It should be clear, however, that the term "discretion and independent judgment," within the meaning of the regulations in Subpart A of this part, does not apply to the kinds of decisions normally made by clerical and similar types of employees. The term does apply to the kinds of decisions normally made by persons who formulate or participate in the formulation of policy within their spheres of responsibility or who exercise authority within a wide range to commit their employer in substantial respects financially or otherwise. The regulations in Subpart A of this part, however, do not require the exercise of discretion and independent judgment at so high a level. The regulations in Subpart A of this part also contemplate the kind of discretion and independent judgment exercised by an administrative assistant to an executive, who without specific instructions or prescribed procedures, arranges interviews and meetings, and handles callers and meetings himself where the executive's personal attention is not required. It includes the kind of discretion and independent judgment exercised by a customer's man in a brokerage house in deciding what recommendations to make to a customer for the purchase of securities. It may include the kind of discretion and judgment exercised by buyers, certain wholesale salesmen, representatives, and other contact persons who are given reasonable latitude in carrying on negotiation on behalf of their employers.

(e) Final decisions not necessary.

(1) The term "discretion and independent judgment" as used in the regulations in Subpart A of this part does not necessarily imply that the decisions made by the employee must have a finality that goes with unlimited authority and a complete absence of review. The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action. The fact that an employee's decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment within the meaning of the regulations in Subpart A of this part. For example, the assistant to the president of a large corporation may regularly reply to correspondence addressed to the president. Typically, such an assistant will submit the more important replies to the president for review before they are sent out. Upon occasion, after review, the president may alter or discard the prepared reply and direct that another be sent instead. This action by the president would not, however, destroy the exempt character of the assistant's function, and does not mean that he does not exercise discretion and independent judgment in answering correspondence and in deciding which replies may be sent out without review by the president.

(2) The policies formulated by the credit manager of a large corporation may be subject to review by higher company officials who may approve or disapprove these policies. The management consultant who has made a study of the operations of a business and who has drawn a proposed change in organization, may have the plan reviewed or revised by his superiors before it is submitted to the client. The purchasing agent may be required to consult with top management officials before making a purchase commitment for raw materials in excess of the contemplated plant needs for a stated period, say 6 months. These employees exercise discretion and independent judgment within the meaning of the regulations despite the fact that their decisions or recommendations are reviewed at a higher level.

(f) Distinguished from loss through neglect: A distinction must also be made between the exercise of discretion and independent judgment with respect to matters of consequence and the cases where serious consequences may result from the negligence of an employee, the failure to follow instruction or procedures, the improper application of skills, or the choice of the wrong techniques. The operator of a very intricate piece of machinery, for example, may cause a complete stoppage of production or a breakdown of his very expensive machine merely by pressing the wrong button. A bank teller who is engaged in receipt and disbursement of money at a teller's window and in related routine bookkeeping duties may, by crediting the wrong

account with a deposit, cause his employer to suffer a large financial loss. An inspector charged with responsibility for loading oil onto a ship may, by not applying correct techniques fail to notice the presence of foreign ingredients in the tank with resulting contamination of the cargo and serious loss to his employer. In these cases, the work of the employee does not require the exercise of discretion and independent judgment within the meaning of the regulations in Subpart A of this part.

(g) Customarily and regularly: The work of an exempt administrative employee must require the exercise of discretion and independent judgment customarily and regularly. The phrase "customarily and regularly" signifies a frequency which must be greater than occasional but which, of course, may be less than constant. The requirement will be met by the employee who normally and recurrently is called upon to exercise and does exercise discretion and independent judgment in the day-to-day performance of his duties. The requirement is not met by the occasional exercise of discretion and independent judgment.

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§ 541.208 Directly and closely related.

(a) As indicated in § 541.202, work which is directly and closely related to the performance of the work described in § 541.2 is considered exempt work. Some illustrations may be helpful in clarifying the differences between such work and work which is unrelated or only remotely related to the work described in § 541.2.

(b)(1) For purposes of illustration, the case of a high-salaried management consultant about whose exempt status as an administrative employee there is no doubt will be assumed. The particular employee is employed by a firm of consultants and performs work in which he customarily and regularly exercises discretion and independent judgment. The work consists primarily of analyzing, and recommending changes in, the business operations of his employer's client. This work falls in the category of exempt work described in § 541.2.

(2) In the course of performing that work, the consultant makes extensive notes recording the flow of work and materials through the office and plant of the client. Standing alone or separated from the primary duty such notemaking would be routine in nature. However, this is work without which the more important work cannot be performed properly. It is "directly and closely related" to the administrative work and is therefore exempt work. Upon his return to the office of his employer the consultant personally types his report and draws, first in rough and then in final form, a proposed table of organization to be submitted with it. Although all this work may not be essential to the performance of his more important work, it is all directly and closely related to that work and should be considered exempt. While it is possible to assign the typing and final drafting to nonexempt employees and in fact it is frequently the practice to do so, it is not required as a condition of exemption that it be so delegated.

(3) Finally, if because this particular employee has a special skill in such work, he also drafts tables or organization proposed by other consultants, he would then be performing routine work wholly unrelated, or at best only remotely related, to his more important work. Under such conditions, the drafting is nonexempt.

(c) Another illustration is the credit manager who makes and administers the credit policy of his employer. Establishing credit limits for customers and authorizing the shipment of orders on credit, including the decisions to exceed or otherwise vary these limits in the case of particular customers, would be exempt work of the kind specifically described in § 541.2. Work which is directly and closely related to these exempt duties may include such activities as checking the status of accounts to determine whether the credit limit would be exceeded by the shipment of a new order, removing credit reports from the files for analysis and writing letters giving credit data and experience to other employers or credit agencies. On the other hand, any general office or bookkeeping work is nonexempt work. For instance, posting to the accounts receivable ledger would be only remotely related to his administrative work and must be considered nonexempt.

(d) One phase of the work of an administrative assistant to a bona fide executive or administrative employee provides another illustration. The work of determining whether to answer correspondence personally, call it to his superior's attention, or route it to someone else for reply requires the exercise of discretion and independent judgment and is exempt work of the kind described in § 541.2. Opening the mail for the purpose of reading it to make the decisions indicated will be directly and closely related to the administrative work described. However, merely opening mail and placing it unread before his superior or some other person would be related only remotely, if at all, to any work requiring the exercise of discretion and independent judgment.

(e) The following additional examples may also be of value in applying these principles. A traffic manager is employed to handle the company's transportation problems. The exempt work performed by such an employee would include planning the most economical and quickest routes for shipping merchandise to and from the plant, contracting for common-carrier and other transportation facilities, negotiating with carriers for adjustments for damages to merchandise in transit and making the necessary rearrangements resulting from delays, damages, or irregularities in transit. This employee may also spend part of his time taking city orders (for local deliveries) over the telephone. The order-taking is a routine function not directly and closely related to the exempt work and must be considered nonexempt.

(f) An office manager who does not supervise two or more employees would not meet the requirements for exemption as an executive employee but may possibly qualify for exemption as an administrative employee. Such an employee may perform administrative duties, such as the executive of the employer's credit policy, the management of the company's traffic, purchasing, and other responsible office

work requiring the customary and regular exercise of discretion and judgment, which are clearly exempt. On the other hand, this office manager may perform all the bookkeeping, prepare the confidential or regular payrolls, and send out monthly statements of account. These latter activities are not directly and closely related to the exempt functions and are not exempt.

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~~§ 541.209 Percentage limitations on nonexempt work.~~

~~(a) Under § 541.2(d), an employee will not qualify for exemption as an administrative employee if he devotes more than 20 percent, or, in the case of an employee of a retail or service establishment if he devotes as much as 40 percent, of his hours worked in the workweek to nonexempt work; that is, to activities which are not directly and closely related to the performance of the work described in § 541.2 (a) through (c).~~

~~(b) This test is applied on a workweek basis and the percentage of time spent on nonexempt work is computed on the time worked by the employee.~~

~~(c) The tolerance for nonexempt work allows the performance of nonexempt manual or nonmanual work within the percentages allowed for all types of nonexempt work.~~

~~(d) Refer to § 541.112(b) for the definition of a retail or service establishment as this term is used in paragraph (a) of this section.~~

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§ 541.210 Trainees, administrative.

The exemption is applicable to an employee employed in a bona fide administrative capacity and does not include employees training for employment in an administrative capacity who are not actually performing the duties of an administrative employee.

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~~§ 541.211 Amount of salary or fees required.~~

~~(a) Except as otherwise noted in paragraphs (b) and (c) of this section, compensation on a salary or fee basis at a rate of not less than $155 a week, exclusive of board, lodging or other facilities, is required for exemption as an administrative employee. The requirement will be met if the employee is compensated biweekly on a salary basis of $310, semimonthly on a salary basis of $335.84, or monthly on a salary basis of $671.67.~~

~~(b) In Puerto Rico, the Virgin Islands, and American Samoa, the salary test for exemption as an administrative employee is $125 per week for other than an employee of the Federal Government.~~

~~(c) In the case of academic administrative personnel, the compensation requirement for exemption as an administrative employee may be met either by the payment described in paragraph (a) or (b) of this section, whichever is applicable, or alternatively by compensation on a salary basis in an amount which is at least equal to the entrance salary for teachers in the school system, or educational establishment or institution by which the employee is employed.~~

~~(d) The payment of the required salary must be exclusive of board, lodging, or other facilities; that is, free and clear. On the other hand, the regulations in Subpart A of this part do not prohibit the sale of such facilities to administrative employees on a cash basis if they are negotiated in the same manner as similar transactions with other persons.~~

Current through June 20, 2000; 65 FR 38332

§ 541.212 Salary basis.

The explanation of the salary basis of payment made in § 541.118 in connection with the definition of "executive" is also applicable in the definition of "administrative".

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~~§ 541.213 Fee basis.~~

~~The requirements for exemption as an administrative employee may be met by an employee who is compensated on a fee basis as well as by one who is paid on a salary basis. For a discussion of payment of a fee basis, see § 541.313.~~

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~~§ 541.214 Special proviso for high salaried administrative employees.~~

~~(a) Except as otherwise noted in paragraph (b) of this section, § 541.2 contains a special proviso including within the definition of "administrative" an employee who is compensated on a salary or fee basis at a rate of not less than $250 per week exclusive of board, lodging, or other facilities, and whose primary duty consists of either the performance of office or nonmanual work directly related to management policies or general business operations of the employer or the employer's customers, or the performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein, where the performance of such primary duty includes work requiring the exercise of discretion and independent judgment. Such a highly paid employee having such work as his or her primary duty is deemed to meet all the requirements in § 541.2 (a) through (c). If an employee qualifies for exemption under this proviso, it is not necessary to test the employee's qualifications in detail under § 541.2 (a) through (c).~~

~~(b) In Puerto Rico, the Virgin Islands, and American Samoa, the proviso of § 541.2(c) applies to those administrative employees other than an employee of the Federal Government who are compensated on a salary or fee basis or not less than $200 per week.~~

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§ 541.215 Elementary or secondary schools and other educational establishments and institutions.

To be considered for exemption as employed in the capacity of academic administrative personnel, the employment must be in connection with the operation of an elementary or

secondary school system, an institution of higher education, or other educational establishment or institution. Sections 3(v) and 3(w) of the act define elementary and secondary schools as those day or residential schools which provide elementary or secondary education, as determined under State law. Under the laws of most States, such education includes the curriculums in grades 1 through 12; under many it includes also the introductory programs in kindergarten. Such education in some States may include also nursery school programs in elementary education and junior college curriculums in secondary education. Education above the secondary school level is in any event included in the programs of institutions of higher education. Special schools for mentally or physically handicapped or gifted children are included among the educational establishments in which teachers and academic administrative personnel may qualify for the administrative exemption, regardless of any classification of such schools as elementary, secondary, or higher. Also, for purposes of the exemption, no distinction is drawn between public or private schools. Accordingly, the classification for other purposes of the school system, or educational establishment or institution, is ordinarily not a matter requiring consideration in a determination of whether the exemption applies. If the work is that of a teacher or academic personnel as defined in the regulations, in such an educational system, establishment, or institution, and if the other requirement of the regulations, are met, the level of instruction involved and the status of the school as public or private or operated for profit or not for profit will not alter the availability of the exemption.

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CODE OF FEDERAL REGULATIONS

TITLE 29--LABOR

SUBTITLE B--REGULATIONS RELATING TO LABOR

CHAPTER V--WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR

SUBCHAPTER A--REGULATIONS

PART 541--DEFINING AND DELIMITING THE TERMS "ANY EMPLOYEE EMPLOYED IN A BONA

FIDE EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL CAPACITY (INCLUDING ANY

EMPLOYEE EMPLOYED IN THE CAPACITY OF ACADEMIC ADMINISTRATIVE PERSONNEL OR

TEACHER IN ELEMENTARY OR SECONDARY SCHOOLS), OR IN THE CAPACITY OF OUTSIDE

SALESMAN"

SUBPART B--INTERPRETATIONS

EMPLOYEE EMPLOYED IN A BONA FIDE PROFESSIONAL CAPACITY

~~§ 541.300 General.~~

~~The term "professional" is not restricted to the traditional professions of law, medicine, and theology. It includes those professions which have a recognized status and which are based on the acquirement of professional knowledge through prolonged study. It also includes the artistic professions, such as acting or music. Since the test of the bona fide professional capacity of such employment is different in character from the test for persons in the learned professions, an alternative test for such employees is contained in the regulations, in addition to the requirements common to both groups.~~

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§ 541.301 Learned professions.

(a) The "learned" professions are described in § 541.3(a)(1) as those requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study as distinguished from a general academic education and from an apprenticeship and from training in the performance of routine mental, manual, or physical processes.

(b) The first element in the requirement is that the knowledge be of an advanced type. Thus, generally speaking, it must be knowledge which cannot be attained at the high school level.

(c) Second, it must be knowledge in a field of science or learning. This serves to distinguish the professions from the mechanical arts where in some instances the knowledge is of a fairly advanced type, but not in a field of science or learning.

(d) The requisite knowledge, in the third place, must be customarily acquired by a prolonged course of specialized intellectual instruction and study. Here it should be noted that the word "customarily" has been used to meet a specific problem occurring in many industries. As is well known, even in the classical profession of law, there are still a few practitioners who have gained their knowledge by home study and experience. Characteristically, the members of the profession are graduates of law schools, but some few of their fellow professionals whose status is equal to theirs, whose attainments are the same, and whose word is the same did not enjoy that opportunity. Such persons are not barred from the exemption. The word "customarily" implies that in the vast majority of cases the specific academic training is a prerequisite for entrance into the profession. It makes the exemption available to the occasional lawyer who has not gone to law school, or the occasional chemist who is not the possessor of a degree in chemistry, etc., but it does not include the members of such quasi-professions as journalism in which the bulk of the employees have acquired their skill by experience rather than by any formal specialized training. It should be noted also that many employees in these quasi-professions may qualify for exemption under other sections of the regulations in Subpart A of this part or under the alternative paragraph of the "professional" definition applicable to the artistic fields.

~~(e)(1) Generally speaking the professions which meet the requirement for a prolonged course of specialized intellectual instruction and study include law, medicine, nursing, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical, and biological~~

~~sciences, including pharmacy and registered or certified medical technology and so forth. The typical symbol of the professional training and the best prima facie evidence of its possession is, of course, the appropriate academic degree, and in these professions an advanced academic degree is a standard (if not universal) prerequisite. In the case of registered (or certified) medical technologists, successful completion of 3 academic years of preprofessional study in an accredited college or university plus a fourth year of professional course work in a school of medical technology approved by the Council of Medical Education of the American Medical Association will be recognized as a prolonged course of specialized intellectual instruction and study. Registered nurses have traditionally been recognized as professional employees by the Division in its enforcement of the act. Although, in some cases, the course of study has become shortened (but more concentrated), nurses who are registered by the appropriate State examining board will continue to be recognized as having met the requirement of § 541.3(a)(1) of the regulations.~~

~~(2) The areas in which professional exemptions may be available are expanding. As knowledge is developed, academic training is broadened, degrees are offered in new and diverse fields, specialties are created and the true specialist, so trained, who is given new and greater responsibilities, comes closer to meeting the tests. However, just as an excellent legal stenographer is not a lawyer, these technical specialists must be more than highly skilled technicians. Many employees in industry rise to executive or administrative positions by their natural ability and good commonsense, combined with long experience with a company, without the aid of a college education or degree in any area. A college education would perhaps give an executive or administrator a more cultured and polished approach but the necessary know-how for doing the executive job would depend upon the person's own inherent talent. The professional person, on the other hand, attains his status after a prolonged course of specialized intellectual instruction and study.~~

~~(f) Many accountants are exempt as professional employees (regardless of whether they are employed by public accounting firms or by other types of enterprises). (Some accountants may qualify for exemption as bona fide administrative employees.) However, exemption of accountants, as in the case of other occupational groups (see § 541.308), must be determined on the basis of the individual employee's duties and the other criteria in the regulations. It has been the Divisions' experience that certified public accountants who meet the salary requirement of the regulations will, except in unusual cases, meet the requirements of the professional exemption since they meet the tests contained in § 541.3. Similarly, accountants who are not certified public accountants may also be exempt as professional employees if they actually perform work which requires the consistent exercise of discretion and judgment and otherwise meet the tests prescribed in the definition of "professional" employee. Accounting clerks, junior accountants, and other accountants, on the other hand, normally perform a great deal of routine work which is not an essential part of and necessarily incident to any professional work which they may do. Where these facts are found such accountants are not exempt. The title "Junior Accountant," however, is not determinative of failure to qualify for exemption any more than the title "Senior Accountant" would necessarily imply that the employee is exempt.~~

~~(g)(1) A requisite for exemption as a teacher is the condition that the employee is "employed and engaged" in this activity as a teacher in the school system, or educational establishment or institution by which he is employed.~~

~~(2) "Employed and engaged as a teacher" denotes employment and engagement in the named specific occupational category as a requisite for exemption. Teaching consists of the activities of teaching, tutoring, instructing, lecturing, and the like in the activity of imparting knowledge. Teaching personnel may include the following (although not necessarily limited to): Regular academic teachers' teachers of kindergarten or nursery school pupils or of gifted or handicapped children; teachers of skilled and semiskilled trades and occupations; teachers engaged in automobile driving instruction; aircraft flight instructors; home economics teachers; and vocal or instrumental music instructors. Those faculty members who are engaged as teachers but also spend a considerable amount of their time in extracurricular activities such as coaching athletic teams or acting as moderators or advisers in such areas as drama, forensics, or journalism are engaged in teaching. Such activities are a recognized part of the school's responsibility in contributing to the educational development of the student.~~

~~(3) Within the public schools of all the States, certificates, whether conditional or unconditional, have become a uniform requirement for employment as a teacher at the elementary and secondary levels. The possession of an elementary or secondary teacher's certificate provide a uniform means of identifying the individuals contemplated as being within the scope of the exemption provided by the statutory language and defined in § 541.3(a)(3) with respect to all teachers employed in public schools and those private schools who possess State certificates. However, the private schools of all the States are not uniform in requiring a certificate for employment as an elementary or secondary school teacher and teacher's certificates are not generally necessary for employment as a teacher in institutions of higher education or other educational establishments which rely on other qualification standards. Therefore, a teacher who is not certified but is engaged in teaching in such a school may be considered for exemption provided that such teacher is employed as a teacher by the employing school or school system and satisfies the other requirements of § 541.3.~~

~~(4) Whether certification is conditional or unconditional will not affect the determination as to employment within the scope of the exemption contemplated by this section. There is no standard terminology within the States referring to the different kinds of certificates. The meanings of such labels as permanent, standard, provisional, temporary, emergency, professional, highest standard, limited, and unlimited vary widely. For the purpose of this section, the terminology affixed by the particular State in designating the certificates~~

~~does not affect the determination of the exempt status of the individual.~~

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§ 541.302 Artistic professions.

(a) The requirements concerning the character of the artistic type of professional work are contained in § 541.3(a)(2). Work of this type is original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee.

(b) The work must be "in a recognized field of artistic endeavor." This includes such fields as music, writing, the theater, and the plastic and graphic arts.

(c)(1) The work must be original and creative in character, as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training. In the field of music there should be little difficulty in ascertaining the application of the requirement. Musicians, composers, conductors, soloists, all are engaged in original and creative work within the sense of this definition. In the plastic and graphic arts the requirement is, generally speaking, met by painters who at most are given the subject matter of their painting. It is similarly met by cartoonists who are merely told the title or underlying concept of a cartoon and then must rely on their own creative powers to express the concept. It would not normally be met by a person who is employed as a copyist, or as an "animator" of motion-picture cartoons, or as a retoucher of photographs since it is not believed that such work is properly described as creative in character.

(2) In the field of writing the distinction is perhaps more difficult to draw. Obviously the requirement is met by essayists or novelists or scenario writers who choose their own subjects and hand in a finished piece of work to their employers (the majority of such persons are, of course, not employees but self-employed). The requirement would also be met, generally speaking, by persons holding the more responsible writing positions in advertising agencies.

(d) Another requirement is that the employee be engaged in work "the result of which depends primarily on the invention, imagination, or talent of the employee." This requirement is easily met by a person employed as an actor, or a singer, or a violinist, or a short-story writer. In the case of newspaper employees the distinction here is similar to the distinction observed above in connection with the requirement that the work be "original and creative in character." Obviously the majority of reporters do work which depends primarily on intelligence, diligence, and accuracy. It is the minority whose work depends primarily on "invention, imaging, or talent." On the other hand, this requirement will normally be met by actors, musicians, painters, and other artists.

(e)(1) The determination of the exempt or nonexempt status of radio and television announcers as professional employees has been relatively difficult because of the merging of the artistic aspects of the job with the commercial. There is considerable variation in the type of work performed by various announcers, ranging from predominantly routine to predominantly exempt work. The wide variation in earnings as between individual announcers, from the highly paid "name" announcer on a national network who is greatly in demand by sponsors to the staff announcer paid a comparatively small salary in a small station, indicates not only great differences in personality, voice and manner, but also in some inherent special ability or talent which, while extremely difficult to define, is nevertheless real.

(2) The duties which many announcers are called upon to perform include: Functioning as a master of ceremonies; playing dramatic, comedy, or straight parts in a program; interviewing; conducting farm, fashion, and home economics programs; covering public events, such as sports programs, in which the announcer may be required to ad lib and describe current changing events; and acting as narrator and commentator. Such work is generally exempt. Work such as giving station identification and time signals, announcing the names of programs, and similar routine work is nonexempt work. In the field of radio entertainment as in other fields of artistic endeavor, the status of an employee as a bona fide professional under § 541.3 is in large part dependent upon whether his duties are original and creative in character, and whether they require invention, imagination or talent. The determination of whether a particular announcer is exempt as a professional employee must be based upon his individual duties and the amount of exempt and nonexempt work performed, as well as his compensation.

(f) The field of journalism also employs many exempt as well as many nonexempt employees under the same or similar job titles. Newspaper writers and reporters are the principal categories of employment in which this is found.

(1) Newspaper writers, with possible rare exceptions in certain highly technical fields, do not meet the requirements of § 541.3(a)(1) for exemption as professional employees of the "learned" type. Exemption for newspaper writers as professional employees is normally available only under the provisions for professional employees of the "artistic" type. Newspaper writing of the exempt type must, therefore, be "predominantly original and creative in character." Only writing which is analytical, interpretative or highly individualized is considered to be creative in nature. (The writing of fiction to the extent that it may be found on a newspaper would also be considered as exempt work.) Newspaper writers commonly performing work which is original and creative within the meaning of § 541.3 are editorial writers, columnists, critics, and "top-flight" writers of analytical and interpretative articles.

(2) The reporting of news, the rewriting of stories received from various sources, or the routine editorial work of a newspaper is not predominantly original and creative in character within the meaning of § 541.3 and must be considered as nonexempt work. Thus, a reporter or news writer ordinarily collects facts about news events by investigation, interview, or personal observation and writes stories reporting these events for publication, or submits the

facts to a rewrite man or other editorial employees for story preparation. Such work is nonexempt work. The leg man, the reporter covering a police beat, the reporter sent out under specific instructions to cover a murder, fire, accident, ship arrival, convention, sport event, etc., are normally performing duties which are not professional in nature within the meaning of the act and § 541.3.

(3) Incidental interviewing or investigation, when it is performed as an essential part of and is necessarily incident to an employee's professional work, however, need not be counted as nonexempt work. Thus, if a dramatic critic interviews an actor and writes a story around the interview, the work of interviewing him and writing the story would not be considered as nonexempt work. However, a dramatic critic who is assigned to cover a routine news event such as a fire or a convention would be doing nonexempt work since covering the fire or the convention would not be necessary and incident to his work as a dramatic critic.

~~Current through June 20, 2000; 65 FR 38332~~

~~§ 541.303 Computer Related Occupations Under Public Law 101-583.~~

~~(a) Pursuant to Public Law 101-583, enacted November 15, 1990, § 541.3(a)(4) provides that computer systems analysts, computer programmers, software engineers, or other similarly skilled workers in the computer software field are eligible for exemption as professionals under section 13(a)(1) of the Act. Employees who qualify for this exemption are highly-skilled in computer systems analysis, programming, or related work in software functions. Employees who perform these types of work have varied job titles. Included among the more common job titles are computer programmer, systems analyst, computer systems analyst, computer programmer analyst, applications programmer, applications systems analyst, applications systems analyst/programmer, software engineer, software specialist, systems engineer, and systems specialist. These job titles are illustrative only and the list is not intended to be all-inclusive. Further, because of the wide variety of job titles applied to computer systems analysis and programming work, job titles alone are not determinative of the applicability of this exemption.~~

~~(b) To be considered for exemption under § 541.3(a)(4), an employee's primary duty must consist of one or more of the following:~~

~~(1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;~~

~~(2) The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;~~

~~(3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or~~

~~(4) a combination of the aforementioned duties, the performance of which requires the same level of skills.~~

~~(c) The exemption provided by § 541.3(a)(4) applies only to highly-skilled employees who have achieved a level of proficiency in the theoretical and practical application of a body of highly-specialized knowledge in computer systems analysis, programming, and software engineering, and does not include trainees or employees in entry level positions learning to become proficient in such areas or to employees in these computer related occupations who have not attained a level of skill and expertise which allows them to work independently and generally without close supervision. The level of expertise and skill required to qualify for this exemption is generally attained through combinations of education and experience in the field. While such employees commonly have a bachelor's or higher degree, no particular academic degree is required for this exemption, nor are there any requirements for licensure or certification, as is required for the exemption for the learned professions.~~

~~(d) The exemption does not include employees engaged in the operation of computers or in the manufacture, repair, or maintenance of computer hardware and related equipment. Employees whose work is highly dependent upon, or facilitated by, the use of computers and computer software programs, e.g., engineers, drafters, and others skilled in computer-aided design software like CAD/CAM, but who are not in computer systems analysis and programming occupations, are also excluded from this exemption.~~

~~(e) Employees in computer software occupations within the scope of this exemption, as well as those employees not within its scope, may also have managerial and administrative duties which may qualify the employees for exemption under § 541.1 or § 541.2 (see §§ 541.205(c)(7) and 541.207(c)(7) of this subpart).~~

~~Current through June 20, 2000; 65 FR 38332~~

~~§ 541.304 Primary duty.~~

~~(a) For a general explanation of the term "primary duty" see the discussion of this term under "executive" in § 541.103. See also the discussion under "administrative" in § 541.206.~~

~~(b) The "primary duty" of an employee as a teacher must be that of activity in the field of teaching. Mere certification by the State, or employment in a school will not suffice to qualify an individual for exemption within the scope of § 541.3(a)(3) if the individual is not in fact both employed and engaged as a teacher (see § 541.302(g)(2)). The words "primary duty" have the effect of placing major emphasis on the character of the employee's job as a whole. Therefore, employment and engagement in the activity of imparting knowledge as a primary duty shall be determinative with respect to employment within the meaning of the exemption as "teacher" in conjunction with the other requirements of § 541.3.~~

~~Current through June 20, 2000; 65 FR 38332~~

~~§ 541.305 Discretion and judgment.~~

~~(a) Under § 541.3 a professional employee must perform work which requires the consistent exercise of discretion and judgment in its performance.~~

~~(b) A prime characteristic of professional work is the fact that the employee does apply his special knowledge or talents with discretion and judgment. Purely mechanical or routine work is not professional.~~

Current through June 20, 2000; 65 FR 38332

§ 541.306 Predominantly intellectual and varied.

(a) Section 541.3 requires that the employee be engaged in work predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work. This test applies to the type of thinking which must be performed by the employee in question. While a doctor may make 20 physical examinations in the morning and perform in the course of his examinations essentially similar tests. It requires not only judgment and discretion on his part but a continual variety of interpretation of the tests to perform satisfactory work. Likewise, although a professional chemist may make a series of similar tests, the problems presented will vary as will the deductions to be made therefrom. The work of the true professional is inherently varied even though similar outward actions may be performed.

(b) Another example of this is the professional medical technologist who performs complicated chemical, microscopic, and bacteriological tests and procedures. In a large medical laboratory or clinic, the technologist usually specializes in making several kinds of related tests in areas such as microbiology, parasitology, biochemistry, hematology, histology, cytology, and nuclear medical technology. The technologist also does the blood banking. He will also conduct tests related to the examination and treatment of patients, or do research on new drugs, or on the improvement of laboratory techniques, or teach and perform administrative duties. The simple, routine, and preliminary tests are generally performed by laboratory assistants or technicians. However, technologists who work in small laboratories may perform tasks that are performed by nonexempt employees in larger establishments. This type of activity will not necessarily be considered nonexempt (see § 541.307).

(c) On the other hand, X-ray technicians have only limited opportunity for the exercise of independent discretion and judgment, usually performing their duties under the supervision of a more highly qualified employee. The more complex duties of interpretation and judgment in this field are performed by obviously exempt professional employees.

Current through June 20, 2000; 65 FR 38332

§ 541.307 Essential part of and necessarily incident to.

(a) Section 541.3(d), it will be noted, has the effect of including within the exempt work activities which are an essential part of and necessarily incident to the professional work described in § 541.3 (a) through (c). This provision recognizes the fact that there are professional employees whose work necessarily involves some of the actual routine physical tasks also performed by obviously nonexempt employees. For example, a chemist performing important and original experiments frequently finds it necessary to perform himself some of the most menial tasks in connection with the operation of his experiments, even though at times these menial tasks can be conveniently or properly assigned to laboratory assistants. See also the example of incidental interviewing or investigation in § 541.303(a)(3).

(b) It should be noted that the test of whether routine work is exempt work is different in the definition of "professional" from that in the definition of "executive" and "administrative." Thus, while routine work will be exempt if it is "directly and closely related" to the performance of executive or administrative duties, work which is directly and closely related to the performance of the professional duties will not be exempt unless it is also "an essential part of and necessarily incident to" the professional work.

(c) Section 541.3(d) takes into consideration the fact that there are teaching employees whose work necessarily involves some of the actual routine duties and physical tasks also performed by nonexempt employees. For example, a teacher may conduct his pupils on a field trip related to the classroom work of his pupils and in connection with the field trip engage in activities such as driving a school bus and monitoring the behavior of his pupils in public restaurants. These duties are an essential part of and necessarily incident to his job as teacher. However, driving a school bus each day at the beginning and end of the schools day to pick up and deliver pupils would not be exempt type work.

Current through June 20, 2000; 65 FR 38332

§ 541.308 Nonexempt work generally.

(a) It has been the Divisions' experience that some employers erroneously believe that anyone employed in the field of accountancy, engineering, or other professional fields, will qualify for exemption as a professional employee by virtue of such employment. While there are many exempt employees in these fields, the exemption of individual depends upon his duties and other qualifications.

(b) It is necessary to emphasize the fact that section 13(a)(1) exempts "any employee employed in a bona fide * * * professional capacity." It does not exempt all employees of professional employers, or all employees in industries having large numbers of professional members, or all employees in any particular occupation. Nor does it exempt, as such those learning a profession. Moreover, it does not exempt persons with professional training, who are working in professional fields, but performing subprofessional or routine work. For example, in the field of library science there are large numbers of employees who are trained librarians but who, nevertheless, do not perform professional work or receive salaries commensurate with recognized professional status. The field of "engineering" has many persons with "engineer" titles, who are not professional engineers, as well as many who are trained in the engineering profession, but are actually working as trainees, junior engineers, or draftsmen.

Current through June 20, 2000; 65 FR 38332

§ 541.309 20-percent nonexempt work limitation.

~~Time spent in nonexempt work, that is, work which is not an essential part of and necessarily incident to the exempt work, is limited to 20 percent of the time worked by the employee in the workweek.~~

Current through June 20, 2000; 65 FR 38332

§ 541.310 Trainees, professional.

The exemption applies to an employee employed in a bona fide professional capacity and does not include trainees who are not actually performing the duties of a professional employee.

~~Current through June 20, 2000; 65 FR 38332~~

~~§ 541.311 Amount of salary or fees required.~~

~~(a) Except as otherwise noted in paragraphs (b) and (c) of this section, compensation on a salary or fee basis at a rate of not less than $170 per week, exclusive of board, lodging or other facilities, is required for exemption as a "professional employee." An employee will meet this requirement if paid a biweekly salary of $340, a semi-monthly salary of $368.33 or a monthly salary of $736.67.~~

~~(b) In Puerto Rico, the Virgin Islands, and American Samoa the salary test for exemption as a "professional" for other than employees of the Federal Government is $150 per week.~~

~~(c) The payment of the compensation specified in paragraph (a) or (b) of this section is not a requisite for exemption in the case of employees exempted from this requirement by the proviso to § 541.3(e), as explained in § 541.314.~~

~~(d) The payment of the required salary must be exclusive of board, lodging, or other facilities; that is, free and clear. On the other hand, the regulations in Subpart A of this part do not prohibit the sale of such facilities to professional employees on a cash basis if they are negotiated in the same manner as similar transactions with other persons.~~

~~Current through June 20, 2000; 65 FR 38332~~

~~§ 541.312 Salary basis.~~

~~The salary basis of payment is explained in § 541.118 in connection with the definition of "executive." Pursuant to Public Law 101-583, enacted November 15, 1990, payment "on a salary basis" is not a requirement for exemption in the case of those employees in computer-related occupations, as defined in § 541.3(a)(4) and § 541.303, who otherwise meet the requirements of § 541.3 and who are paid on an hourly basis if their hourly rate of pay exceeds 6 1/2 times the minimum wage provided by section 6 of the Act.~~

~~[57 FR 46745, Oct. 9, 1992]~~

~~Current through June 20, 2000; 65 FR 38332~~

~~§ 541.313 Fee basis.~~

~~(a) The requirements for exemption as a professional (or administrative) employee may be met by an employee who is compensated on a fee basis as well as by one who is paid on a salary basis.~~

~~(b) Little or no difficulty arises in determining whether a particular employment arrangement involves payment on a fee basis. Such arrangements are characterized by the payment of an agreed sum for a single job regardless of the time required for its completion. These payments in a sense resemble piecework payments with the important distinction that generally speaking a fee payment is made for the kind of job which is unique rather than for a series of jobs which are repeated an indefinite number of times and for which payment on an identical basis is made over and over again. Payments based on the number of hours or days worked and not on the accomplishment of a given single task are not considered payments on a fee basis. The type of payment contemplated in the regulations in Subpart A of this part is thus readily recognized.~~

~~(c) The adequacy of a fee payment. Whether it amounts of payment at a rate of not less than $170 per week to a professional employee or at a rate of not less than $155 per week to an administrative employee can ordinarily be determined only after the time worked on the job has been determined. In determining whether payment is at the rate specified in the regulations in Subpart A of this part the amount paid to the employee will be tested by reference to a standard workweek of 40 hours. Thus compliance will be tested in each case of a fee payment by determining whether the payment is at a rate which would amount to at least $170 per week to a professional employee or at a rate of not less than $155 per week to an administrative employee if 40 hours were worked.~~

~~(d) The following examples will illustrate the principle stated above:~~

~~(1) A singer receives $50 for a song on a 15-minute program (no rehearsal time is involved). Obviously the requirement will be met since the employee would earn $170 at this rate of pay in far less than 40 hours.~~

~~(2) An artist is paid $100 for a picture. Upon completion of the assignment, it is determined that the artist worked 20 hours. Since earnings at this rate would yield the artist $200 if 40 hours were worked, the requirement is met.~~

~~(3) An illustrator is assigned the illustration of a pamphlet at a fee of $150. When the job is completed, it is determined that the employee worked 60 hours. If the employee worked 40 hours at this rate, the employee would have earned only $100. The fee payment of $150 for work which required 60 hours to complete therefore does not meet the requirement of payment at a rate of $170 per week and the employee must be considered nonexempt. It follows that if in the performance of this assignment the illustrator worked in excess of 40 hours in any week, overtime rates must be paid. Whether or not the employee worked in excess of 40 hours in any week, records for such an employee would have to be kept in accordance with the regulations covering records for nonexempt employees (Part 516 of this chapter).~~

~~Current through June 20, 2000; 65 FR 38332~~

~~§ 541.314 Exception for physicians, lawyers, and teachers.~~

~~(a) A holder of a valid license or certificate permitting the practice of law or medicine or any of their branches, who is actually engaged in practicing the profession, or a holder of the requisite academic degree for the general practice of medicine who is engaged in an internship or resident program pursuant to the practice of his profession, or an employee employed and engaged as a teacher in the activity~~

~~of imparting knowledge, is excepted from the salary or fee requirement. This exception applies only to the traditional professions of law, medicine, and teaching and not to employees in related professions which merely serve these professions.~~

~~(b) In the case of medicine:~~

~~(1) The exception applies to physicians and other practitioners licensed and practicing in the field of medical science and healing or any of the medical specialties practiced by physicians or practitioners. The term physicians means medical doctors including general practitioners and specialists, and osteopathic physicians (doctors of osteopathy). Other practitioners in the field of medical science and healing may include podiatrists (sometimes called chiropodists), dentists (doctors of dental medicine), optometrists (doctors of optometry or bachelors of science in optometry).~~

~~(2) Physicians and other practitioners included in paragraph (b)(1) of this section, whether or not licensed to practice prior to commencement of an internship or resident program, are excepted from the salary or fee requirement during their internship or resident program, where such a training program is entered upon after the earning of the appropriate degree required for the general practice of their profession.~~

~~(c) In the case of medical occupations, the exception from the salary or fee requirement does not apply to pharmacists, nurses, therapists, technologists, sanitarians, dietitians, social workers, psychologists, psychometrists, or other professions which service the medical profession.~~

~~Current through June 20, 2000; 65 FR 38332~~

~~§ 541.315 Special proviso for high salaried professional employees.~~

~~(a) Except as otherwise noted in paragraph (b) of this section, the definition of "professional" contains a special proviso for employees who are compensated on a salary or fee basis at a rate of at least $250 per week exclusive of board, lodging, or other facilities. Under this proviso, the requirements for exemption in § 541.3 (a) through (e) will be deemed to be met by an employee who receives the higher salary or fees and whose primary duty consists of the performance of work requiring knowledge of an advanced type in a field of science or learning, or work as a teacher in the activity of imparting knowledge, which includes work requiring the consistent exercise of discretion and judgment, or consists of the performance of work requiring invention, imagination, or talent in a recognized field of artistic endeavor. Thus, the exemption will apply to highly paid employees employed either in one of the "learned" professions or in an "artistic" profession and doing primarily professional work. If an employee qualifies for exemption under this proviso, it is not necessary to test the employee's qualifications in detail under § 541.3 (a) through (e).~~

~~(b) In Puerto Rico, the Virgin Islands, and American Samoa the second proviso of § 541.3(e) applies to those "professional" employees (other than employees of the Federal government) who are compensated on a salary or fee basis of not less than $200 per week.~~

~~Current through June 20, 2000; 65 FR 38332~~

~~§ 541.500 Definition of "outside salesman."~~

~~Section 541.5 defines the term "outside salesman" as follows: The term "employee employed * * * in the capacity of outside salesman" in section 13(a)(1) of the act shall mean any employee:~~

~~(a) Who is employed for the purpose of and who is customarily and regularly engaged away from his employer's place or places of business in:~~

~~(1) Making sales within the meaning of section 3(k) of the act; or~~

~~(2) Obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and~~

~~(b) Whose hours of work of a nature other than that described in paragraph (a)(1) or (2) of this section do not exceed 20 percent of the hours worked in the workweek by nonexempt employees of the employers: Provided, That work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall not be regarded as nonexempt work.~~

~~Current through June 20, 2000; 65 FR 38332~~

~~§ 541.501 Making sales or obtaining orders.~~

~~(a) Section 541.5 requires that the employee be engaged in: (1) Making sales within the meaning of section 3(k) of the act, or (2) obtaining orders or contracts for services or for the use of facilities.~~

~~(b) Generally speaking, the divisions have interpreted section 3(k) of the act to include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property. Thus sales of automobiles, coffee, shoes, cigars, stocks, bonds, and insurance are construed as sales within the meaning of section 3(k). (Sec. 3(k) of the act states that "sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.)~~

~~(c) It will be noted that the exempt work includes not only the sales of commodities, but also "obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer." "Obtaining orders or * * * for the use of facilities" includes the selling of time on the radio, the solicitation of advertising for newspapers and other periodicals and the solicitation of freight for railroads and other transportation agencies.~~

~~(d) The word "services" extends the exemption as outside salesmen to employees who sell or take orders for a service, which is performed for the customer by someone other than the person taking the order. For example, it includes the salesman of a typewriter repair service who does not himself do the repairing. It also includes otherwise exempt outside salesmen who obtain orders for the laundering of the customer's own linens as well as those who obtain orders for the rental of the laundry's linens.~~

~~(e) The inclusion of the word "services" is not intended to exempt persons who, in a very loose sense, are sometimes~~

~~described as selling "services". For example, it does not include persons such as servicemen even though they may sell the service which they themselves perform. Selling the service in such cases would be incidental to the servicing rather than the reverse. Nor does it include outside buyers, who in a very loose sense are sometimes described as selling their employer's "service" to the person from whom they obtain their goods. It is obvious that the relationship here is the reverse of that of salesman-customer.~~

~~Current through June 20, 2000; 65 FR 38332~~

~~§ 541.502 Away from his employer's place of business.~~

~~(a) Section 541.5 requires that an outside salesman be customarily and regularly engaged "away from his employer's place or places of business". This requirement is based on the obvious connotation of the word "outside" in the term "outside salesman". It would obviously lie beyond the scope of the Administrator's authority that "outside salesman" should be construed to include inside salesmen. Inside sales and other inside work (except such as is directly in conjunction with and incidental to outside sales and solicitations, as explained in paragraph (b) of this section) is nonexempt.~~

~~(b) Characteristically the outside salesman is one who makes his sales at his customer's place of business. This is the reverse of sales made by mail or telephone (except where the telephone is used merely as an adjunct to personal calls). Thus any fixed site, whether home or office, used by a salesman as a headquarters or for telephonic solicitation of sales must be construed as one of his employer's places of business, even though the employer is not in any formal sense the owner or tenant of the property. It should not be inferred from the foregoing that an outside salesman loses his exemption by displaying his samples in hotel sample rooms as he travels from city to city; these sample rooms should not be considered as his employer's places of business.~~

~~Current through June 20, 2000; 65 FR 38332~~

~~§ 541.503 Incidental to and in conjunction with sales work.~~

~~Work performed "incidental to and in conjunction with the employee's own outside sales or solicitation" includes not only incidental deliveries and collections which are specifically mentioned in § 541.5(b), but also any other work performed by the employee in furthering his own sales efforts. Work performed incidental to and in conjunction with the employee's own outside sales or solicitations would include, among other things, the writing of his sales reports, the revision of his own catalog, the planning of his itinerary and attendance at sales conferences.~~

~~Current through June 20, 2000; 65 FR 38332~~

~~§ 541.504 Promotion work.~~

~~(a) Promotion work is one type of activity often performed by persons who make sales, which may or may not be exempt work, depending upon the circumstances under which it is performed. Promotion men are not exempt as "outside salesmen." (This discussion relates solely to the exemption under § 541.5, dealing with outside salesmen. Promotion men who receive the required salary and otherwise qualify may be exempt as administrative employees.) However, any promotional work which is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is clearly exempt work. On the other hand, promotional work which is incidental to sales made, or to be made, by someone else cannot be considered as exempt work. Many persons are engaged in certain combinations of sales and promotional work or in certain types of promotional work having some of the characteristics of sales work while lacking others. The types of work involved include activities in borderline areas in which it is difficult to determine whether the work is sales or promotional. Where the work is promotional in nature it is sometimes difficult to determine whether it is incidental to the employee's own sales work.~~

~~(b)(1) Typically, the problems presented involve distribution through jobbers (who employ their own salesmen) or through central warehouses of chainstore organizations or cooperative retail buying associations. A manufacturer's representative in such cases visits the retailer, either alone or accompanied by the jobber's salesman. In some instances the manufacturer's representative may sell directly to the retailer; in others, he may urge the retailer to buy from the jobber.~~

~~(2) This manufacturer's representative may perform various types of promotional activities such as putting up displays and posters, removing damaged or spoiled stock from the merchant's shelves or rearranging the merchandise. Such persons can be considered salesmen only if they are actually employed for the purpose of and are engaged in making sales or contracts. To the extent that they are engaged in promotional activities designed to stimulate sales which will be made by someone else the work must be considered nonexempt. With such variations in the methods of selling and promoting sales each case must be decided upon its facts. In borderline cases the test is whether the person is actually engaged in activities directed toward the consummation of his own sales, at least to the extent of obtaining a commitment to buy from the person to whom he is selling. If his efforts are directed toward stimulating the sales of his company generally rather than the consummation of his own specific sales his activities are not exempt. Incidental promotional activities may be tested by whether they are "performed incidental to and in conjunction with the employee's own outside sales or solicitations" or whether they are incidental to sales which will be made by someone else.~~

~~(c)(1) A few illustrations of typical situations will be of assistance in determining whether a particular type of work is exempt or nonexempt under § 541.5. One situation involves a manufacturer's representative who visits the retailer for the purpose of obtaining orders for his employer's product, but transmits any orders he obtains to the local jobber to be filled. In such a case the employee is performing sales work regardless of the fact that the order is filled by the jobber rather than directly by his own employer. The sale in this instance has been "consummated" in the sense that the salesman has obtained a commitment from the customer.~~

~~(2) Another typical situation involves facts similar to those described in the preceding illustration with the difference that the jobber's salesman accompanies the representative of the company whose product is being sold. The order in this instance is taken by the jobber's salesman after the manufacturer's representative has done the preliminary work which may include arranging the stock, putting up a display or poster, and talking to the retailer for the purpose of getting him to place the order for the product with the jobber's salesman. In this instance the sale is consummated by the jobber's salesman. The work performed by the manufacturer's representative is not incidental to sales made by himself and is not exempt work. Moreover, even if in a particular instance the sale is consummated by the manufacturer's representative it is necessary to examine the nature of the work performed by the representative to determine whether his promotional activities are directed toward paving the way for his own present and future sales, or whether they are intended to stimulate the present and future sales of the jobber's salesman. If his work is related to his own sales it would be considered exempt work, while if it is directed toward stimulating sales by the jobber's representative it must be considered nonexempt work.~~

~~(3) Another type of situation involves representatives employed by utility companies engaged in furnishing gas or electricity to consumers. In a sense these representatives are employed for the purpose of "selling" the consumer an increased volume of the product of the utility. This "selling" is accomplished indirectly by persuading the consumer to purchase appliances which will result in a greater use of gas or electricity. Different methods are used by various companies. In some instances the utility representative after persuading the consumer to install a particular appliance may actually take the order for the appliance which is delivered from stock by his employer, or he may forward the order to an appliance dealer who then delivers it. In such cases the sales activity would be exempt, since it is directed at the consummation of a specific sale by the utility representative, the employer actually making the delivery in the one case, while in the other the sale is consummated in the sense that the representative obtains an order or commitment from the customer. In another type of situation the utility representative persuades the consumer to buy the appliance and he may even accompany the consumer to an appliance store where the retailer shows the appliance and takes the order. In such instances the utility representative is not an outside salesman since he does not consummate the sale or direct his efforts toward making the sale himself. Similarly, the utility representative is not exempt as an outside salesman if he merely persuades the consumer to purchase an appliance and the consumer then goes to an appliance dealer and places his order.~~

~~(4) Still another type of situation involves the company representative who visits chainstores, arranges the merchandise on shelves, replenishes stock by replacing old with new merchandise, consults with the manager as to the requirements of the store, fills out a requisition for the quantity wanted and leaves it with the store manager to be transmitted to the central warehouse of the chainstore company which later ships the quantity requested. The arrangement of merchandise on the shelves or the replenishing of stock is not exempt work unless it is incidental to and in conjunction with the employee's own outside sales. Since the manufacturer's representative in this instance does not consummate the sale nor direct his efforts toward the consummation of a sale (the store manager often has no authority to buy) this work must be counted as nonexempt.~~

~~Current through June 20, 2000; 65 FR 38332~~

~~§ 541.505 Driver salesmen.~~

~~(a) Where drivers who deliver to an employer's customers the products distributed by the employer also perform functions concerned with the selling of such products, and questions arise as to whether such an employee is employed in the capacity of outside salesman, all the facts bearing on the content of the job as a whole must be scrutinized to determine whether such an employee is really employed for the purpose of making sales rather than for the service and delivery duties which he performs and, if so, whether he is customarily and regularly engaged in making sales and his performance of nonexempt work is sufficiently limited to come within the tolerance permitted by § 541.5. The employee may qualify as an employee employed in the capacity of outside salesman if, and only if, the facts clearly indicate that he is employed for the purpose of making sales and that he is customarily and regularly engaged in such activity within the meaning of the act and this part. As in the case of outside salesmen whose jobs do not involve delivery of products to customers, the employee's chief duty or primary function must be the making of sales or the taking of orders if he is to qualify under the definition in § 541.5. He must be a salesman by occupation. If he is, all work that he performs which is actually incidental to and in conjunction with his own sales effort is exempt work. All other work of such an employee is nonexempt work. A determination of an employee's chief duty or primary function must be made in terms of the basic character of the job as a whole. All of the duties performed by an employee must be considered. The time devoted to the various duties is an important, but not necessarily controlling, element.~~

~~(b) Employees who may perform a combination of selling or sales promotion activities with product deliveries are employed in a number of industries. Distributors of carbonated beverages, beer, bottled water, food and dairy products of various kinds, cigars and other nonfood products commonly utilize such employees, variously known as routemen, route drivers, route salesmen, dealer salesmen, distributor salesmen, or driver salesmen. Some such employees deliver at retail to customers' homes; others deliver on wholesale routes to such customers as retail stores, restaurants, hospitals, hotels, taverns, and other business establishments. Whether such an employee qualifies as an outside salesman under the regulations depends, as stated in paragraph (a) of this section, on the content of the job as a whole and not on its title or designation or the kind of business in which the employer is engaged. Hearings in 1964 concerning the application of § 541.5 to such employees demonstrated that there is great~~

~~variation in the nature and extent of sales activity and its significance as an element of the job, as among drivers whose duties are performed with respect to different products or different industries and also among drivers engaged in the same industry in delivering products to different types of customers. In some cases the facts may make it plain that such an employee is employed for the purpose of making sales; in other cases the facts are equally clear that he is employed for another purpose. Thus, there is little question that a routeman who provides the only sales contact between the employer and the customers, who calls on customers and takes orders for products which he delivers from stock in his vehicle or procures and delivers to the customer on a later trip, and who receives compensation commensurate with the volume of products sold, is employed for the purpose of making sales. It is equally clear, on the other hand, that a routeman whose chief duty is to transport products sold by the employer through vending machines and to keep such machines stocked, in good operating condition, and in good locations, is not selling his employer's product or employed for the purpose of making sales but is employed for purposes which, although important to the promotion of sales to customers using the machines, plainly cannot characterize the employee as a salesman by occupation. In other cases there may be more difficulty in determining whether the employee is employed for the purpose of making sales within the meaning of this part. The facts in such cases must be weighed in the light of the principles stated in paragraph (a) of this section, giving due consideration to the factors discussed in subsequent paragraphs of this section.~~

~~(c) One source of difficulty in determining the extent to which a route driver may actually be engaged in making sales arises from the fact that such a driver often calls on established customers day after day or week after week, delivering a quantity of his employer's products at each call. Plainly, such a driver is not making sales when he delivers orders to customers to whom he did not make the initial sale in amounts which are exactly or approximately prearranged by customer or contractual arrangement or in amounts specified by the customer and not significantly affected by solicitations of the customer by the delivering driver. Making such deliveries, as well as recurring deliveries the amounts of which are determined by the volume of sales by the customer since the previous delivery rather than by any sales effort of the driver, do not qualify the driver as an outside salesman nor are such deliveries and the work incident thereto directly to the making or soliciting of sales by the driver so as to be considered exempt work. On the other hand, route drivers are making sales when they actually obtain or solicit, at the stops on their routes, orders for their employer's products from persons who have authority to commit the customer for purchases. A driver who calls on new prospects for customers along his route and attempts to convince them of the desirability of accepting regular delivery of goods is likewise engaged in sales activity and is making sales to those from whom he obtains a commitment. Also, a driver salesman calling on established customers on his route, carrying an assortment of the articles which his employer sells, may be making sales by persuading regular customers to accept delivery of increased amounts of goods or of new products, even though the initial sale or agreement for delivery of the employer's products may have been made by someone else. Work which is performed incidental to and in conjunction with such sales activities will also be considered exempt work, provided such solicitation of the customer is frequent and regular. Incidental activities include loading the truck with the goods to be sold by the driver salesman, driving the truck, delivering the products sold, removing empty containers for return to the employer, and collecting payment for the goods delivered.~~

~~(d) Neither delivery of goods sold by others nor sales promotion work as such constitutes making sales within the meaning of § 541.5; delivery men and promotion men are not employed in the capacity of outside salesmen for purposes of section 13(a)(1) of the act although both delivery work and promotion work are exempt salesman as an incident to his own sales or efforts to sell. The distinction between the making of sales and the promotion of sales is explained in more detail in the discussion and illustrations contained in § 541.504. Under the principles there stated a route driver, just as any other employee, must have as his chief duty and primary function the making of sales in the sense of obtaining and soliciting commitments to buy from the persons upon whom he calls if he is to qualify under the regulations as an employee employed in the capacity of outside salesman. For this reason, a route driver primarily engaged in making deliveries to his employer's customers and performing activities intended to promote sales by customers, including placing point of sale and other advertising materials, price stamping commodities, arranging merchandise on shelves or in coolers or cabinets, rotating stock according to date, and cleaning and otherwise servicing display cases, is not employed in the capacity of an outside salesman by reason of such work. Such work is nonexempt work for purposes of this part unless it is performed as an incident to or in conjunction with sales actually made by the driver to such customers. If the driver who performs such functions actually takes orders or obtains commitments from such customers for the products which he delivers, and the performance of the promotion work is in furtherance of his own sales efforts, his activities for that purpose in the customer's establishment would be exempt work.~~

~~(e) As indicated in paragraph (a) of this section, whether a route driver can qualify as an outside salesman depends on the facts which establish the content of his job as a whole. Accordingly, in borderline cases a determination of whether the driver is actually employed for the purpose of, is customarily and regularly engaged in, and has as his chief duty and primary function the making of sales, may involve consideration of such factors as a comparison of his duties with those of other employees engaged as (1) truckdrivers and (2) salesmen; possession of a salesman's or solicitor's license when such license is required by law or ordinances; presence or absence of customary or contractual prearrangements concerning amounts of products to be delivered; description of the employee's occupation in union contracts; the employer's specifications as to qualifications for hiring; sales training; attendance at sales conferences; method of payment; proportion of earnings directly attributable to sales effort; and other factors that may have a~~

~~bearing on the relationship to sales of the employee's work. However, where it is clear that an employee performs nonexempt work in excess of the amount permitted by § 541.5, he would be nonexempt in any event and consideration of such factors as the foregoing would not be pertinent.~~

~~(f) The following examples will further illustrate the factual situations in which, under the principles discussed previously in this section, routemen engaged in recurrent deliveries of goods may qualify or may fail to qualify for exemption as outside salesmen.~~

~~(1) A retail routeman who regularly calls on established retail customers to deliver goods of generally prearranged amounts and kinds may also exert considerable effort not only to keep such customers satisfied to continue their orders for such goods but also to make such customers aware of other products which he would like to sell to them and to offer to take orders for such products or for increased amounts of the products which he is already delivering to the customer. In addition, he may call at prospective retail customers' homes for the purpose of persuading such persons to order the goods which he sells. A routeman who customarily and regularly calls on customers for these purposes and takes orders from them for products which he delivers to them, in addition to those products for which delivery has been prearranged, who is in practical effect his employer's exclusive sales contact with such customers, and whose earnings are in large part directly attributable to sales made to such customers, will be considered to be employed in the capacity of outside salesman and within the exemption provided by section 13(a)(1) of the Act if he does not perform nonexempt work in excess of the tolerance permitted by § 541.5.~~

~~(2) A routeman who calls on retail stores which are among his employer's established customers may also qualify for exemption as an outside salesman notwithstanding the goods he delivers to them are of kinds and in amounts which are generally prearranged. Other facts may show that making sales is his chief duty and primary function and that he is customarily and regularly engaged in performing this function. Thus, such a routeman whose regular calls on established customers involve not only delivery of prearranged items but also active efforts to persuade such customers to continue or increase their orders for such goods and to solicit their orders for other kinds of products which he offers for sale, who also calls on retail stores which are prospective customers, talks to persons who are authorized to order goods for such stores, and solicits orders from them for the goods which he sells, and whose compensation is based primarily on the volume of sales attributable to his efforts, will be considered exempt as an outside salesman if he does not perform nonexempt work in excess of the tolerance permitted by § 541.5.~~

~~(3) If a routeman delivers goods to branch business establishments whose personnel have no authority to place orders or make commitments with respect to the kinds and amounts of such goods, and if the kinds and amounts of goods delivered are not determined pursuant to orders placed by the authorized personnel of the customer's enterprise as a result of sales solicitation by the routeman, it is clear that the routeman's calls on such branch establishments are not a part of the making of sales by him or incidental to sales made by him. If such work is his chief duty or primary function or if he spends a greater proportion of the workweek in such work than is allowed for nonexempt work under § 541.5, such a routeman cannot qualify for exemption as an "outside salesman".~~

~~(4) A routeman who delivers to supermarkets after the enterprise has been persuaded, by a salesman of the routeman's employer, to accept delivery of goods, and whose functions other than such deliveries are primarily to arrange merchandise, rotate stocks, place point-of-sale and other advertising materials, and engage in other activities which are intended to promote sales by the supermarkets of the goods he has delivered, is not employed primarily for the purpose of selling and is not customarily and regularly engaged in making sales. Rather, he is employed primarily to deliver goods and to perform activities in the supermarkets of a nature usually performed by store employees not employed as salesmen. Such a routeman is not employed in the capacity of outside salesman within the exemption provided by section 13(a)(1).~~

~~(5) Some employees are engaged in a combination of activities involving delivery, the selling of services, and the performance of the services. For example, some drivers call on customers for the purpose of selling pesticides and, if a sale is consummated, applying the pesticides on the customer's property. Such employees, like those referred to in § 541.501(e), are not exempt as outside salesmen. They are primarily engaged in delivery or service functions, not in outside selling.~~

~~Current through June 20, 2000; 65 FR 38332~~

~~§ 541.506 Nonexempt work generally~~

~~Nonexempt work is that work which is not sales work and is not performed incidental to and in conjunction with the outside sales activities of the employee. It includes outside activities like meter-reading, which are not part of the sales process. Inside sales and all work incidental thereto are also nonexempt work. So is clerical warehouse work which is not related to the employee's own sales. Similarly, the training of other salesmen is not exempt as outside sales work, with one exception. In some concerns it is the custom for the salesman to be accompanied by the trainee while actually making sales. Under such circumstances it appears that normally the trainer-salesman and the trainee make the various sales jointly, and both normally receive a commission thereon. In such instances, since both are engaged in making sales, the work of both is considered exempt work. However, the work of a helper who merely assists the salesman in transporting goods or samples and who is not directly concerned with effectuating the sale is nonexempt work.~~

~~Current through June 20, 2000; 65 FR 38332~~

~~§ 541.507 20-percent limitation on nonexempt work.~~

~~Nonexempt work in the definition of "outside salesman" is limited to "20 percent of the hours worked in the workweek by nonexempt employees of the employer." The 20 percent is computed on the basis of the hours worked by nonexempt employees of the employer who perform the kind of nonexempt work performed by the outside salesman. If there are no employees of the employer performing such nonexempt work, the base to be taken is 40 hours a week, and the amount of nonexempt work allowed will be 8 hours a week.~~

~~Current through June 20, 2000; 65 FR 38332~~

~~§ 541.508 Trainees, outside salesmen.~~

~~The exemption is applicable to an employee employed in the capacity of outside salesman and does not include employees training to become outside salesmen who are not actually performing the duties of an outside salesman (see also § 541.506).~~

~~Current through June 20, 2000; 65 FR 38332~~

~~§ 541.600 Combination exemptions~~

~~(a) The divisions' position under the regulations in Subpart A of this part permits the "tacking" of exempt work under one section of the regulations in Subpart A to exempt work under another section of those regulations, so that a person who, for example, performs a combination of executive and professional work may qualify for exemption. In combination exemptions, however, the employee must meet the stricter of the requirements on salary and nonexempt work. For instance, if the employee performs a combination of an executive's and an outside salesman's function (regardless of which occupies most of his time) he must meet the salary requirement for executives. Also, the total hours of nonexempt work under the definition of "executive" together with the hours of work which would not be exempt if he were clearly an outside salesman, must not exceed either 20 percent of his own time or 20 percent of the hours worked in the workweek by the nonexempt employees of the employer, whichever is the smaller amount.~~

~~(b) Under the principles in paragraph (a) of this section combinations of exemptions under the other sections of the regulations in Subpart A of this part are also permissible. In short, under the regulations in Subpart A, work which is "exempt" under one section of the regulations in Subpart A will not defeat the exemption under any other section.~~

~~Current through June 20, 2000; 65 FR 38332~~

~~§ 541.601 Special provision for motion picture producing industry.~~

~~Under § 541.5a, the requirement that the employee be paid "on a salary basis" does not apply to an employee in the motion picture producing industry who is compensated at a base rate of at least $250 a week (exclusive of board, lodging, or other facilities). Thus, an employee in this industry who is otherwise exempt under §§ 541.1, 541.2, or 541.3 and who is employed at a base rate of at least $250 a week is exempt if he is paid at least prorata (based on a week of not more than 6 days) for any week when he does not work a full workweek for any reason. Moreover, an otherwise exempt employee in this industry qualifies for exemption if he is employed at a daily rate under the following circumstances: (a) The employee is in a job category for which a weekly base rate is not provided and his daily base rate would yield at least $250 if 6 days were worked; or (b) the employee is in a job category having a weekly base rate of at least $250 and his daily base rate is at least one-sixth of such weekly base rate. The higher minimum salary tests will be effective on April 1, 1975.~~

~~[40 FR 7094, Feb. 19, 1975]~~

~~Current through June 20, 2000; 65 FR 38332~~

~~§ 541.602 Special proviso concerning executive and administrative employees in multi-store retailing operations.~~

~~(a) The tolerance of up to 40 percent of the employee's time which is allowed for nonexempt work performed by an executive or administrative employee of a retail or service establishment does not apply to employees of a multiunit retailing operation, such as a chainstore system or a retail establishment having one or more branch stores, who perform central functions for the organization in physically separated establishments such as warehouses, central office buildings or other central service units or by traveling from store to store. Nor does this special tolerance apply to employees who perform central office, warehousing, or service functions in a multi-unit retailing operation by reason of the fact that the space provided for such work is located in a portion or portions of the building in which the main retail or service establishment or another retail outlet of the organization is also situated. Such employees are subject to the 20-percent limitation on nonexempt work.~~

~~(b) With respect to executive or administrative employees stationed in the main store of a multistore retailing operation who engage in activities (other than central office functions) which relate to the operations of the main store, and also to the operations of one or more physically separated units, such as branch stores, of the same retailing operation, the Divisions will, as an enforcement policy, assert no disqualification of such an employee for the section 13(a-1) exemption by reason of nonexempt activities if the employee devotes less than 40 percent of his time to such nonexempt activities. This enforcement policy would apply, for example, in the case of a buyer who works in the main store of a multistore retailing operation and who not only manages the millinery department in the main store, but is also responsible for buying some or all of the merchandise sold in the millinery departments of the branch stores.~~

Current through June 20, 2000; 65 FR 38332

Appendix to Part 541--Occupational Index

[NOTE BY DLSE: The following list is placed here for the sole purpose of illustrating the possible differences between California and federal law. The list is not to be relied upon in any way, but may be used to find terms. (DLSE training guide)]

Note: This index lists, for ease of reference, the sections of this part which refer to job titles. The user should note, however, that where job titles do appear in the illustrations in

the text, they should not be construed to mean that employees holding such titles are either exempt or nonexempt or that they meet any one of the specific requirements for exemption.

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Tax expert, 541.201, 541.205
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