STATE OF CALIFORNIA PETE WILSON, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
Division of Labor Standards Enforcement
Legal Section
455 Golden Gate Avenue, Room 3166
San Francisco, CA 94102

January 29, 1992

David E. Miller
Pacific Employers
3200 S. Fairway, Suite H
P.O. Box 3982
Visalia, CA 93278

Re: **Explicit Wage Agreements**

Dear Mr. Miller:

Your letter of December 23, 1991, together with Deputy Jose Millan's letter to you of January 14, 1992, have been referred to this office for response.

I have reviewed your December 23rd letter wherein you trace the caselaw history of the requirement for an explicit wage agreement which sets forth the "regular rate of pay" in terms of an hourly wage. While most of what you state is correct, you appear to come to a conclusion which is not supported by the facts you submit.

Initially, we would like to address the law in more detail than you have done in your letter. Most important, we want to detail the reasons for the law.

As both California and federal courts have concluded, the reason for the imposition of a premium rate for overtime hours is to discourage the employment of workers for hours which are "prejudicial to the health or welfare of employees." (See Labor Code §1178.5) The "premium" charged the employer for requiring or permitting the employee to work excess hours is based on the "regular rate" at which the employee is actually paid for the normal, non-overtime workweek. As the federal courts have pointed out: "This [the regular rate] is an actual fact, and in testing the validity of a wage agreement...the courts are required to look beyond that which the parties have purported to do." *Madison Ave. Corp. v. Asselta,* 331 U.S. 199 at 204 (1947). In other words, the regular rate may not be a rate the parties have agreed upon, but must reflect the actual rate paid.

Inasmuch as your letter concerns employment agreements between dairymen and their employees, for purposes of this letter we will assume that all work is being performed under Order 14-80.

In order to set up an explicit wage agreement under California law, employer and employee must agree on a formula which takes the total number of straight time hours that an employee is expected to

work in any one workweek on a "salary" schedule and add to that figure the sum of one and one-half the total number of hours in excess of ten in any one day and double the number for hours in excess of eight on the seventh day of work and divide that number into the amount which the employee is to receive as a "salary" for the week, the result is the employee's regular rate of pay[1].

In California, the explicit agreement must specifically set out the number of hours per day and the number of days per week which the employee is expected to work. In addition, of course, the employee must be aware of the true "regular rate" of pay. The DLSE, for that reason, strongly suggests that the explicit agreement be in writing. As the court pointed out in the case of *Nunn's Battery & Electric Co. v. Goldberg* 298 F.2d 516 at 519:

> "When employees regularly work more than forty hours in a week and receive a standard wage each week, the question arises whether the weekly payment genuinely represents payment at a regular rate for the first forty hours plus time and a half for the excess hours or, instead, represents a single wage rate applied to the first forty hours and the excess hours uniformily. Courts have often disregarded an employer's assertion of an overtime payment system and have found that a fixed weekly wage covered all hours indiscriminately."

It must be remembered that the burden of showing that the overtime obligation has been complied with is upon the employer. Having a written, explicit agreement which sets out the regular hourly rate of pay and the method employed to reach that regular hourly rate protects both the employer and the employee in the event of differences in the future.

Obviously, under these arrangements, any work in excess of the scheduled hours which exceed either ten in one day or sixty in one week must be paid at the appropriate premium rate (time and one-half or double time).

However, we must disagree with your assertion that this type of arrangement would be akin to a "fluctuating workweek". That is not true. A "fluctuating workweek" is allowed under the federal law but prohibited under California law. (See *Skyline Homes v. DIR* (1985) 165 Cal.App.3d 239) Under the "fluctuating workweek" arrangement, the employee's salary pays for all hours worked regardless of the number. The federal regulations allow the employer to

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[1] While your method of calculating the regular rate on a yearly basis reaches substantially the same hourly rate, it is misleading. As discussed below it has led you to assume, for instance, that overtime calculations may be "averaged" over a one month period. The regular rate of pay must be calculated based on the wages earned in any one week.

divide the total number of hours worked in the workweek into the total sum received. The result is the "regular hourly rate of pay". The employee is entitled to recover one-half of that "regular hourly rate of pay" for each hour in excess of forty hours in a workweek.

The **explicit** agreement you describe in your letter anticipates that the regular rate of pay is a true rate which is calculated by dividing the number of hours worked into the amount received using the formula set out in your letter or the formula we cited above. Under those circumstances the regular rate is not an assumed rate or a fluctuating rate.

We must advise you that employers in California may not employ workers on a fluctuating workweek using a salary.

The Employment Contract which you submit does appear to authorize a "fluctuating workweek" and that is one of the reasons the proposal does not meet the requirements of California law. Actually, the proposal would not meet the requirements of federal law if that were applicable. Among the reasons the proposed Contract fails are: 1) the proposed contract does not set out the number of hours the individual is to work in any one workday, but simply provides for a premium rate of one and one-half times the stated hourly wage after ten hours in any one day[2] (a premium rate for overtime is, of course, already guaranteed by the IWC Order); 2) the agreement does not call for a specific number of hours in a week which is evidenced by the fact that the weekly work schedule is not limited to sixty[3] but is "averaged for a month"; 3) the proposed contract appears to set out an agreement to work through a lunch period (while such an arrangement may be made if there is a showing that the nature of the work requires an on-duty meal period, there is no showing that the work which is anticipated under the terms of this agreement would require such an exception); 4) the withholding of a "cleaning fee" from the employee's check violates Labor Code §224.

The proposed "Employment Contract" you submit does not reflect the analysis of the law which you broadly discussed in your letter. This is not an "explicit agreement" as contemplated by the caselaw. If the employer wishes to enter into an agreement to pay the worker the minimum wage plus overtime, simply delete paragraph 3(d).

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[2] You should also note that the proposed agreement makes no provision for the payment of double time after eight hours on the seventh day of work as required by the Order.

[3] Overtime must be paid on a daily and weekly basis and may not be "averaged for a month".

Again, it is not legal in California to provide a "fluctuating workweek". Even if it were legal, this is not a contract for a fluctuating workweek as contemplated in federal law. This agreement purports to pay a "salary" or minimum wage plus overtime whichever is the greater. Such an arrangement does not comport with the requirement for the overtime premium to be based upon a multiple of the actual "regular rate" of pay.

I hope this adequately addresses the questions you raised in your letter.

Yours truly,

H. THOMAS CADELL, JR.
Chief Counsel

c.c. Victoria Bradshaw
Jose Millan