

604 Emerging Issues in Wage and Hour Law

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Archangela M. DeSilva is associate general counsel with Duke Energy Corporation. Her responsibilities include all labor and employment law matters for Duke's gas operations and other Houston-based business units, including counseling management regarding discrimination complaints, collective bargaining negotiations, arbitrations, and employment-related litigation.

Prior to her employment with Duke Energy, Ms. DeSilva worked as in-house labor and employment counsel for Texaco Inc. and Standard Oil Production Company.

Ms. DeSilva has been a member of the ABA since her law school days. She is a member of the Section of Labor and Employment Law. She is also a member of the Labor and Employment Law Section of the State Bar of Texas and serves on its Pro Bono Committee. Ms. DeSilva has been actively involved in ACCA since she became a member over 10 years ago. She currently serves on ACCA's board of directors and on the board's Policy Committee. She has also served ACCA's Houston Chapter as president, board member, and chair of the Employment and Employee Benefits Committee. She was also previously chair of ACCA's Labor and Employment Law Committee. In addition to her bar association activities, Ms. DeSilva is a member of the board of directors of the Greater Houston Women's Foundation and the advisory board of Texas Accountants and Lawyers for the Arts. In 1996, Ms. DeSilva's volunteer activities were recognized by her employer when she received a Volunteer Excellence award from PanEnergy Corp.

Ms. DeSilva received a BS from Cornell University and is a graduate of Fordham University School of Law.

C. Kelley Evans

C. Kelley Evans is an associate counsel with the legal counsel department of Sutter Health, a California nonprofit public benefit corporation that operates an integrated healthcare delivery system in Northern California, including 28 acute care hospitals.

Prior to joining Sutter Health, Mr. Evans was an attorney in private practice with Diepenbrock, Wulff, Plant & Hannegan in Sacramento, California, and Damrell, Nelson, Schrimp, Pallios & Ladine in Modesto, California.

Mr. Evans is the president of ACCA's Sacramento Chapter and has just completed a two-year term as president of the board of the Sacramento Court Appointed Special Advocate (CASA) Program, which sponsors volunteers to assist abused and neglected children in Juvenile Court. He represented the Oxford University 1st XV and the Oxfordshire County 1st XV in rugby, and currently coaches his local high school rugby team.

Mr. Evans earned a bachelor's and a master's degree with honors from Oxford University. He obtained his law degree from the University of California at Davis, where he also received the BNA Law Student Award and the U.C. Davis Distinguished Scholar Award.

Beverly A. Stuart

Beverly A. Stuart is an attorney for Kaiser Foundation Health Plan, Inc. in Pasadena, California. She practices in the areas of labor and employment law and immigration law.

Prior to joining Kaiser, Ms. Stuart practiced with the law firm of Munger, Tolles & Rickershauser, concentrating on commercial litigation and employment law, and with the employment law firm of Mason & Mason. She also served as a visiting scholar with the International Labour Organisation in Geneva, Switzerland.

Ms. Stuart is a member of the Los Angeles County Bar Association and the National Bar Association.

Ms. Stuart is a graduate of the University of Southern California Law Center and received an LLM in Business and Taxation/Transnational Practice from University of the Pacific McGeorge School of Law.

2001 WAGE & HOUR LAW QUIZ

1. Happy Family Grocery offers delivery services to customers. The delivery personnel are required to stay at the Happy Family store and make deliveries when assigned by the Happy Family store manager or assistant manager. They are required to be at the store between 8 and 10 hours/day, 6 days/week. The delivery employees receive a flat rate of \$5.00 for each delivery completed, regardless of the time spent making the delivery, and are paid by Joe's Delivery Service. Do the delivery employees have a claim against Happy Family for overtime compensation under the FLSA?
 - A. No, they are independent contractors.
 - B. No, they are not employees of Happy Family; they are employees of Joe's Delivery Service.
 - C. Yes, they are performing work under the direction of Happy Family managers.
 - D. Yes, they are working at the Happy Family store.

2. You operate a training program aimed at hiring new employees for hard to fill jobs. Applicants accepted into the program receive six weeks of vocational level training and, if they successfully complete the training, they are offered positions with the company. The training also qualifies participants to work for various other employers. Must the trainees be treated as employees?
 - A. No, the training is offered for their benefit and they are not required to work for the company.
 - B. Yes, the fact that they are promised positions at the end of the training requires them to be treated as employees.
 - C. No, as long as they understand at the beginning that they will not be considered as employees.
 - D. No, as long as they do not displace regular employees.

3. Mega Energy, Inc. has an annual volunteer week in which all employees are encouraged to participate. During this week, volunteer opportunities are offered for the participation of employees and their families. Participation in such activities is voluntary; however, to the extent that such activities take place during an employee's regularly scheduled working time, the employee receives his or her regular compensation for time spent in such volunteer activities. During volunteer week, Suzy Cue, a file room clerk, participates in a story hour at a local library on Monday for 1 _ hours and also serves lunch to some nursing home residents on Wednesday for 2 hours. As a result of her participation in these activities, Suzy works 3 _ hours extra hours on Thursday evening in order to complete some filing that must be done by Friday. Is Suzy entitled to any overtime compensation for the week?

- A. No, Suzy did not work any overtime during the week.
 - B. No, Suzy did not obtain the approval of her supervisor to work the extra hours.
 - C. Yes, Suzy worked 3 _ hours of overtime.
 - D. Yes, because Mega Energy chose to compensate Suzy for the hours spent performing volunteer work, they must also compensate her for the extra hours worked on Thursday evening.
4. Janice is a nurse in San Diego. She attained a college degree in nursing and holds a professional license as a register nurse with the California Board of Nursing. Is Janice exempt from the overtime laws?
- A. No, nurses are specifically designated as non-exempt employees under California law.
 - B. Yes, nurses qualify as exempt employees under the professional exemption.
 - C. It depends. Generally nurses are non-exempt, but they may qualify as exempt employees under the executive or administrative exemptions.
5. California Insurance Agency employs a number of claims processors whose sole duties are the processing of insurance claims. They regularly work in excess of 8 hours a day and/or 40 hours a week to meet certain quantitative goals set by the Company. California Insurance Agency considers their claims processors to be exempt from the overtime provisions of wage and hour laws. Are these employees truly exempt employees?
- A. Yes, they are exempt because they are administrative employees.
 - B. Yes, they are exempt because they are professional employees.
 - C. No, they are not exempt because they are expected to work overtime.
 - D. No, they are not exempt because they are production employees.
6. Beth is a lawyer in Seattle who suffered a severe arm injury. When she had exhausted her sick and vacation leave, she asked her employer to return to work on a part-time schedule because her injury limited her work activities. Her employer granted her request, and compensated her on an hourly basis while she worked a reduced schedule. Her reduced schedule was not designated as FMLA leave. When she was able to work full time and perform all of her duties, the employer returned to paying her on a salary basis. Did Beth lose her status as an exempt employee?
- A. Yes, by paying her hourly, Beth's employer converted Beth into a non-exempt employee.
 - B. No, her leave qualified as FMLA leave, and therefore her exemption continued to apply.

- C. Yes, because Beth and her employer failed to designate her leave as FMLA leave.
7. Big Tex Well Services, Inc. regularly employs crews to service oil and gas wells in West Texas. The employees work a fluctuating workweek and are paid a fixed monthly wage plus a weekly overtime premium for all hours worked in excess of 40 in a week. The overtime premium is calculated by dividing the monthly wage rate by 4.3 to arrive at a weekly rate, then dividing the weekly rate by the number of hours worked in the particular week. This amount is then divided by _ to arrive at the overtime-premium rate. Is this permissible under the FLSA?
- A. Yes, this is an appropriate calculation of overtime under DOL regulations.
B. No, Big Tex is in for a big class action suit from its crews.
C. The answer depends upon whether or not the fixed salary compensates employees at a rate that is at least equal to the minimum wage rate.
D. The answer depends upon whether Big Tex has communicated its pay practices to the employees.
8. Kim is a receptionist for a hotel in San Diego. She works a regular 8/40, Sunday through Thursday. She asks her supervisor in writing to take time off on Monday for a dental appointment, and agrees with her supervisor to work during lunch so that she works 6 hours on Monday. She then works one extra hour each on Tuesday and Thursday. She is not paid any overtime. Is this legal?
- A. No, an employee in California is entitled to overtime pay for any hours worked in excess of 8 hours in a day.
B. No, an employer in California may not work an employee for a work period of more than 5 hours without giving the employee an uninterrupted half-hour meal period.
C. Yes
9. Lois is a waitress at a restaurant in San Francisco who is paid \$10 per hour and works a regular 8/40, Monday through Friday, 9:00 a.m. through 5:30 p.m. She is entitled to a half-hour lunch period and two fifteen-minute breaks each day. Because of her work commitments, she is unable to take her morning break on Monday, her lunch and afternoon break on Tuesday, or any of her meals or rest periods on Wednesday. She has all of her breaks on Thursday, but can only take ten minutes of her fifteen-minute afternoon break on Friday. Otherwise, she works the entire shift from 9:00 a.m. to 5:30 p.m. How much is her total pay for this week.
- A. \$450
B. \$480
C. \$490

10. Your building engineer's base hourly rate is \$15 per hour. She receives an additional \$.50 per hour as shift differential. Last year she received a \$5,000 bonus for meeting performance targets and a \$2,000 holiday bonus. What are the components of her regular hourly rate that must be used in order to calculate her time and a half overtime rate?
- A. Her base rate
 - B. Her base rate, her shift differential, and her holiday bonus
 - C. Her base rate and her shift differential
 - D. Her base rate, her shift differential, and her performance bonus
11. Several employees at a factory in Carson City receive two different straight-time rates of pay for different types of work during the same workweek. Their employer decides, without consulting the employees, to pay the employees overtime pay using the rate-in-effect method rather than the weighted average method. Can the employer do this?
- A. Yes, the employer has the discretion to choose which method to pay overtime for employees paid at different straight-time rates of pay for different types of work.
 - B. No, the employees must first agree with the employer to use the rate-in-effect method.
 - C. No, the employer must always use the weighted average method when calculating the overtime pay of employees paid at different straight-time rates of pay for different types of work.
12. Your hospital requires employees to wear certain protective clothing in a procedure room. The clothing is so hot that most employees have to shower after finishing their duties. You provide showers on site.
- A. The time spent changing into and out of the protective clothing and the time spent showering is compensable.
 - B. Only the time spent changing is compensable.
 - C. Only the time spent showering is compensable.
 - D. The time spent changing and showering is not compensable.
13. ChemBio, Inc.'s employees are represented by the Chemical and Waste Workers Union. These employees are required to wear special protective clothing and they spend approximately 15 minutes at the beginning and end of each shift changing clothes. The parties currently have a collective bargaining agreement that does not contain any provisions regarding compensation for this time. Should such time be included in the calculation of hours worked for overtime purposes?

- A. Yes, it is work time.
 - B. No, the collective bargaining agreement does not provide for such payment and it is not included in compensable time.
 - C. The answer depends upon the bargaining history, custom and practice of the parties.
 - D. No, this is not work time.
14. Bill is a factory worker in Sacramento, California, and is a member of a collective bargaining unit. His bargaining unit agrees to an 8/80 schedule with the employer so that overtime is only paid for work in excess of 8 hours in a day or 80 hours in the two-week period. Is this legal?
- A. No, the 8/80 schedule is only allowed for hospital employees.
 - B. Yes, members of collective bargaining units are exempt from the overtime laws.
 - C. No, the 8/80 schedule is not available in California.
15. Brad is a security guard in Los Angeles who works an alternative work schedule of 10-hour shifts four days a week, Wednesday through Saturday. Last week he was relieved of duty on Wednesday evening an hour early. Is Brad entitled to any overtime pay?
- A. No, he worked less than his schedule of 10-hours.
 - B. No, he worked less than 40 hours in the workweek.
 - C. Yes, if an employee has a regular shift in excess of 8 hours in a day and the employer sends the employee home after 8 hours of work in the day but before the end of the employee's shift, the employee is entitled to overtime for all hours worked in excess of 8 that day.

CALIFORNIA WAGE AND HOUR LAW

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CALIFORNIA WAGE AND HOUR LAW

A. DAILY OVERTIME AND OTHER SPECIAL CALIFORNIA REQUIREMENTS.

On July 20, 1999, California Governor Gray Davis signed into law the "Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999" (commonly known as Assembly Bill 60 or "AB 60"). This law took effect on January 1, 2000, and restored the daily overtime requirements to California that had been rescinded under Governor Wilson. This new law can now be found in California Labor Code sections 500, *et seq.*

AB 60 affected various areas of wage and hour law, in particular:

- n When overtime is applicable and at what rates.
- n Alternative work schedules such as 10 and 12 hour shifts.
- n Penalties imposed for not providing adequate meal periods and "rest periods" (i.e. breaks).
- n The definitions of exemptions from overtime.

This law also affected the Wage Orders issued by the California Industrial Welfare Commission ("IWC") that establish the terms and conditions surrounding wages, hours, and working conditions of employees not covered under a collective bargaining agreement. These Wage Orders were essentially rewritten and, after several revisions, the current 2001 Wage Orders went into effect on January 1, 2001.¹

Each of the Wage Orders applies to a specific industry or occupation. For instance, Wage Order 4-2001 is an Occupational Wage Order that applies to most office staff. The IWC added Wage Order 17-2001 as a catch-all for any employees not covered by a wage order. Here is a list of the Wage Orders with specific employees covered:

Wage Order No. 1-2001	Manufacturing Industry Employees
Wage Order No. 2-2001	Personal Service Industry Employees
Wage Order No. 3-2001	Canning, Freezing and Preserving Industry Employees
Wage Order No. 4-2001	Professional, Technical, Clerical, Mechanical and Similar Occupations
Wage Order No. 5-2001	Public Housekeeping (e.g., Hospital) Employees
Wage Order No. 6-2001	Laundry, Linen Supply, Dry Cleaning and Dyeing Industry
Wage Order No. 7-2001	Mercantile Industry Employees
Wage Order No. 8-2001	Industries Handling Products After Harvest
Wage Order No. 9-2001	Transportation Industry Employees
Wage Order No. 10-2001	Amusement and Recreation Industry Employees
Wage Order No. 11-2001	Broadcasting Industry Employees
Wage Order No. 12-2001	Motion Picture Industry Employees

¹ Wage Order 14-2001 (regarding Agricultural Employees) was further amended after January 1, 2001, and the new Wage Order 14-2001 went into effect July 1, 2001.

Wage Order No. 13-2001	Industries Preparing Agricultural Products for Market and on the Farm
Wage Order No. 14-2001	Agricultural Occupations
Wage Order No. 15-2001	Household Occupations
Wage Order No. 16-2001	Construction, Drilling, Logging and Mining Employees
Wage Order No. 17-2001	Miscellaneous Employees

It is important to note that the Wage Orders are accompanied by an interpretive guideline called the "Statement as to Basis".² Whenever one needs to interpret the California Wage and Hour laws, one should always review, in order, the statutes, the regulations (i.e., the IWC 2001 Wage Orders), the Statement as to the Basis, and finally the Division of Labor Standards Enforcement, Enforcement Policies and Interpretations Manual before making a final decision.

The California Wage Orders and the Statement as to Basis are available on the web site of the California Department of Industrial Relations at www.dir.ca.gov/IWC/iwc.html.

In the meantime, here is a brief synopsis of AB 60.

Overtime

AB 60 restored daily overtime and reinstated the 8/40 overtime schedule³ so that overtime is paid, effective January 1, 2000:

- n For hours worked in excess of 8 hours per day (pre-determined 24 hour period) or
- n For hours worked in excess of 40 hours in a workweek (7 consecutive 24-hour days).

Alternative Work Schedules

AB 60 only permitted a maximum daily schedule of 10 hours per day for an Alternative Work Schedule ("AWS"), although it allowed a daily schedule of up to 12 hours to continue for the health care industry through a "grandfathering" privilege. The IWC then held various meetings to deliberate AWS, and added provisions to the Wage Orders to allow schedules up to 12 hours in a day for employees in the health care industry who were involved in direct patient care (i.e. 11-hour schedules are acceptable).

In order to have an AWS, employers must have an election through secret ballot passed by two-thirds of the affected "identifiable work unit." There must be a duly noticed meeting at least 14 days in advance of the election for the employer to explain the AWS

² Please note that Wage Order 16-2001 has its own Statement as to Basis.

³ Federal and California application of the 8/80 work period was maintained for acute care hospitals.

and address any questions from the employees. Once the election is complete, the results need to be forwarded to the California Division of Labor Statistics and Research ("DLSR").

Meal Periods and Rest Periods (Breaks)

Although the basic requirements for an employer to provide meal periods and rest periods did not change, failure to provide them now incurs penalties to the employer:

- n One-hour penalty, when meal period is not provided (1/2 hour, uninterrupted).
- n Meal period waivers are allowed for:
 - n 1 of the 2 meal periods required in a 12-hour work shift
 - n Rare situations where the "nature of the work" precludes an employee from being fully relieved of duty.
 - n When the employee does not work in excess of 6 hours in a day.
- n Additional one-hour penalty when any of the 10-minute rest periods are not provided.
- n A maximum of two daily penalties for missed meal or rest periods.
- n Allowances are made if meal or rest periods are provided and an employee "voluntarily" chooses not to take them.⁴

Attached hereto are (a) a comparison sheet for the various shifts for meal/rest periods, and (b) some common questions and answers regarding meal/rest periods and AWS.

Make-up Time

Employees have the right to make up time during the same 40-hour workweek for time lost as a result of a personal obligation. The employee must make a request in writing and obtain the employer's approval. If the employer approves the employee's written request, 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 11 in a day or 40 in a week.

If an employee knows that he/she will be asking 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 4 weeks in advance. Again, any make-up time must occur in the same week that the work was lost.

Although an employer may inform an employee of this make-up time option, the employer may not encourage or solicit an employee to use this option.

⁴ It is important to obtain written documentation from the employee and the immediate supervisor as to the reason why the employee chose to not take his/her rest period(s) and/or meal period(s). The latter can be appropriately covered by a meal period waiver form signed by the employee and employer prior to the commencement of work.

Union Employees

The overtime provisions of AB 60 and the Wage Orders (e.g. AWS) do not apply to employees covered under a valid collective bargaining agreement provided the collective bargaining agreement meets three criteria. The collective bargaining agreement must provide for (a) the wages, hours or work, and working conditions of the employees, (b) premium wage rates for all overtime hours worked, and (c) a regular hourly rate for the employees of not less than 30% more than the California minimum wage. There is one exception: the AB 60 requirement of the equivalent of one days' rest in seven will apply to union employees, unless the agreement expressly provides otherwise.

All other provisions of AB 60 and the Wage Orders (e.g. meal period penalties) still apply to employees covered under a collective bargaining agreement.

Exemption from Overtime Requirements

The three categories of exemption (executive, administrative and professional) from overtime requirements were maintained with changes in the qualifying criteria and expansion to additional classifications previously excluded from overtime exemption. The basic "salary test" was increased and indexed to two (2) times the state minimum wage for full time employment (currently \$2,166.67/month).

The Professional Exemption now includes Certified Nurse Anesthetists, Nurse Practitioners, and Nurse Midwives who meet the salary test. Expansion and further detailed clarification on the circumstances under which computer professionals could be exempt were also added along with a salary test specific to that classification.

B. CASE LAW *et al.*

Cortez v. Purolator Air Filtration Products Co., 23 Cal.4th 163 (2000)

This case allowed an employee to bring a wage claim under California Business & Professions Code §17200 in addition to the California Labor Code. This is of particular interest because California Business & Professions Code §17200 carries additional penalties and a four-year statute of limitations.

Smith v. Rae-Venter Law Group, 89 Cal. App. 4th 239 (2001)

This case ruled that an employer has a defense to waiting time penalties under California Labor Code §203 where a bona fide dispute existed between the employer and the employee regarding the employee's wage claim. The case also held that the employer was entitled to an award of attorneys' fees where the employee appealed a decision of the

California Labor Commission, but was not successful at obtaining a more favorable result at trial.

Rowe v. Laidlaw Transit, Inc., 244 F.3d 1115 (9th Cir. 2001)

The Ninth Circuit ruled in this case that the failure by an employer and employee to designate a reduced schedule as FMLA leave did not result in the loss of exempt status because the salary was prorated.

In this case, the employee injured her ankle and asked to return to work on a part-time basis after she had exhausted all of her sick leave and vacation. The employer granted the request, and compensated her on an hourly basis while she worked a reduced schedule. Neither the employer nor the employee designated the reduced schedule as leave under FMLA. When the employee returned to work full time, the employer returned to pay her on the salary basis that she had been compensated prior to her injury. Following a subsequent dispute, the employee resigned and claimed that she was not exempt under the FLSA because she did not satisfy the salary test. The employee stated that the pro-rata reduction in her salary when she was working part-time demonstrated that she was truly paid on an hourly basis. The employer countered that her salary was properly reduced due to FMLA. The employee in turn argued that FMLA did not apply because there had been no designation of FMLA leave.

The court held that, even though there had been no designation, it was clear that the employee's injury qualified her for coverage under FMLA and that she requested part-time duty on that basis. Thus, her reduced schedule qualified as FMLA leave, and that, according to FMLA, providing FMLA leave does not affect an employee's status. The exemption therefore continued to apply.

Webster v. Public School Employees of Washington, Inc., 247 F.3d 910 (9th Cir. 2001)

The Ninth Circuit held that an employee was still exempt under the administrative exemption even though the employee submitted weekly timesheets and had his accrued sick leave and/or vacation time docked for portions of days missed in fifteen-minute increments if he worked less than 40 hours in a week.

The court recognized that, in *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990), it had held that deductions from paid leave time could be construed as inconsistent with the salary basis rule. But the court noted that it had rejected the *Abshire* ruling in *Barner v. City of Novato*, 17 F.3d 1256 (9th Cir. 1994), where it held that a reduction in the paid leave time does not affect the employee's status as a salaried employee. The court recognized the distinction between deductions from base-pay salary (which were impermissible) and deductions from fringe benefits. Because the leave time is not salary, the Ninth Circuit concluded that the *Barner* rule applied to accumulated leave that was convertible to cash.

Block v. City of Los Angeles, 253 F.3d 410 (9th Cir. 2001)

The Ninth Circuit held that salary deductions for partial week suspensions resulted in loss of exempt status under the FLSA. The FLSA permits deductions in the form of penalties imposed in good faith for infractions of safety rules of major significance without the loss of exempt status. In addition, a suspension of a salaried employee for a full week without pay does not affect the employee's salaried status.

In this case, the City of Los Angeles imposed disciplinary suspensions of less than a full workweek for reasons other than major safety violations. The Ninth Circuit therefore held that the salary basis test for overtime exemption was not met.

Miles Locker Letter (May 30, 2001)

Miles Locker, the Chief Counsel of the DLSE, wrote a formal opinion letter, dated May 30, 2001, interpreting the salary requirement for exempt status under California law. The opinion stated that, in order to qualify under California's exemption standards, employees paid on a salary basis must receive their full salary for any month in which they work, without regard to the number of days or hours worked. The opinion letter specifically stated that an employer must pay an exempt employee a monthly salary that may not be reduced except when an employee is absent for more than one day for personal reasons.

This opinion conflicts with the federal standard under the FLSA and past practice in California, which both measure the salary requirement on a weekly basis. Thus, the opinion letter engendered great controversy, resulting in its official withdrawal by California Labor Commissioner Lujan on June 22, 2001.

C. CONCLUSION.

Since January 1, 2000, over 200 wage and hour class action lawsuits have been filed against employers in California, most of them challenging the exempt status of employees. Companies that have been affected with such class action lawsuits around the country include Rite Aid, Taco Bell, U-Haul, Pepsi-Cola, AutoZone, Pacific Bell, Best Buy, Borders Books, Bridgestone/Firestone and Wal-Mart, and many of them have paid enormous sums to settle the charges. For instance, U-Haul was required to create a \$7.5 million fund to provide unpaid overtime and cover \$3.2 million in attorneys' fees and costs; also, Best Buy settled with the DOL for 5.4 million. Moreover, with the *Cortez* decision, employees may now use California Business & Professions Code §17200, with its additional penalties, to their advantage.

Therefore, because of the interplay of the federal wage and hour provisions with the detailed California wage and hour law, one must be extremely careful to ensure total compliance.

AB60 Comparison Sheet

Shift	Break Periods*	Meal Periods**	Rest/Meal Period Penalties/Waivers	Changes In Posted Schedule	Staff Meetings/Inservices
8 Hour Shifts	<p>One 10-minute rest period per four hours worked (or major portion thereof).</p> <p>Two 10-minute rest periods per 8-hour shift.</p> <p>Cannot be waived.</p> <p>Should be taken as close to the middle of each four-hour block of time as possible.</p>	<p>One 30 minute unpaid meal period for work shifts greater than five hours unless the total hours in the shift do not exceed six hours. Then the meal period can be waived by mutual agreement. Need not be in writing, but written agreement is strongly recommended.</p> <p>One 30-minute unpaid meal period per 8 hour shift.</p> <p>May be waived 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 meal period is agreed to.</p>	<p>An employee who is not provided the required meal period is paid for the meal period and a penalty equivalent to one hour of pay at the employee's straight time base rate is assessed for a missed meal period. An additional one hour of pay at the employee's straight time base rate of pay is paid for a missed rest period.</p> <p>A maximum of two penalties can be assessed each workday.</p> <p>If an employee has a meal period waiver on file a penalty can only be assessed for missed rest periods.</p> <p>The one hour penalty(ies) is not included in overtime calculations.</p>	<p>An employee's posted schedule can be changed without being subject to premium pay.</p>	<p>An employee may be required to attend staff meetings/inservices during unscheduled days without the hours being subject to premium pay, provided they do not exceed 8 hours/per day or 40 hours per week, or in the case where a facility has an 80-hour/pay period, 8/hours per day or 80-hours/pay period.</p>
10 Hour AWS	<p>One 10-minute rest period per four hours worked (or major portion thereof).</p> <p>Two 10-minute rest periods per 10-hour shift.</p> <p>Cannot be waived.</p> <p>Should be taken as close to the middle of each four-hour block of time as possible.</p> <p>If any overtime is worked, must provide an additional 10 minute rest period.</p>	<p>One 30 minute unpaid meal period for work shifts greater than five hours unless the total hours in the shift do not exceed six hours.</p> <p>One 30-minute unpaid meal period per 10- hour shift.</p> <p>May be waived 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 meal period is agreed to.</p>	<p>An employee who is not provided the required meal period is paid for the meal period, and a penalty equivalent to one hour of pay at the employee's straight time base rate of pay is assessed for a missed meal period. An additional one-hour penalty is paid for a missed rest period at the employee's straight time base rate of pay.</p> <p>A maximum of two penalties can be assessed each workday.</p> <p>If an employee has a meal period waiver on file a penalty can only be assessed for missed rest periods.</p> <p>The one hour penalty(ies) is not included in overtime calculations.</p>	<p>Any required changes to a posted schedule are subject to premium pay.</p> <p>Voluntary changes are not subject to premium pay, however it must be documented.</p>	<p>Employees should not be scheduled to work less than four hours.</p> <p>If you require an employee to attend a training session or a meeting for less than four hours, these hours are subject to premium pay.</p> <p>Employees may voluntarily attend training/meetings that are less than four hours. In this case, the hours are not subject to premium pay provided they are not in excess of 40 hours/week. Voluntary attendance at such training/meetings must be documented.</p>
12 Hour AWS	<p>One 10-minute rest period per four hours worked (or major portion thereof).</p> <p>Three 10-minute rest periods per 12-hour shift.</p> <p>Cannot be waived.</p> <p>Should be taken as close to the middle of each four-hour block of time as possible.</p>	<p>One 30 minute unpaid meal period for work shifts greater than five hours unless the total hours in the shift will not exceed six hours.</p> <p>Two 30-minute unpaid meal periods per 12-hour shift.</p> <p>An employee on a twelve-hour shift can only waive one meal period.</p>	<p>An employee who is not provided the required meal period is paid for the meal period, and a penalty equivalent to one hour of pay at the employee's straight time base rate of pay is assessed for a missed meal period. An additional one hour penalty is paid for a missed rest period at the employee's straight time base rate of pay. If a waiver for one meal period is in place, the employee must take the other meal period or a penalty will be assessed.</p> <p>A maximum of two penalties can be assessed each workday.</p>	<p>Any required changes to a posted schedule are subject to premium pay.</p> <p>Voluntary changes are not subject to premium pay however it must be documented.</p>	<p>Employees should not be scheduled to work less than four hours.</p> <p>If you require an employee to attend a training session or a meeting for less than four hours, these hours are subject to premium pay.</p> <p>Employees may voluntarily attend training/meetings that are less than four hours. In this case, the hours are not subject to premium pay provided they are not in excess of 40 hours/week. Voluntary attendance at such training/meetings must be documented.</p>

*Some companies provide 15-minute break/rest periods when feasible. However, AB60 only requires a break/rest period to be 10 minutes. *The 10-minute period must be continuous.* Break periods cannot be combined with each other or with a meal period or used at the beginning or end of the shift to shorten the length of the day.

**30-minute meal periods must be uninterrupted. Meal periods cannot be combined with break periods or used at the beginning or end of the shift to shorten the length of the day.

Questions and Answers

October 2001

Meal Period/Rest Break Penalties

What if an employee misses a meal period or break?

1. If an employer fails to provide an employee a meal period, it shall pay the employee one additional hour of pay at the employee's base (straight time) rate of compensation for each work day that the meal period is not provided.
2. In addition, if an employer fails to provide an employee with one or more of the rest periods required, it shall pay the employee an additional hour of pay per day at the employee's base rate of compensation.
3. The maximum penalty for each workday for missed meal period and/or rest period is two (2) hours at the straight rate of pay.
4. Managers need to ensure that a process is in place that allows each employee the opportunity for a meal period and the required number of rest periods. (Normally one rest period for each four hours worked. Employees working approved Alternate Work Schedule ("AWS") are eligible for additional meal periods/rest periods.)
5. This applies to all non-exempt employees regardless of schedule. The timecard should be revised to accurately document meal/break periods.

Can the meal periods or the meal/rest periods be waived?

The employer and employee can enter into an agreement that the meal period can be waived by mutual consent only when the nature of the work prevents the employee from being relieved. This allows you to pay them for the meal period and in some cases may result in overtime costs. Alternatively, the meal period can be waived by mutual agreement of the employer and employee if the employee only works 6 hours in a day.

The break/rest periods may **not** be waived.

Only one of the two required meal periods can be waived for employees on a 12-hour AWS.

The meal period and rest periods should be uninterrupted. An employee may wear a beeper; however, interruptions should be minimal and not require the employee to return to work.

Can employees combine their meal and break/rest periods?

No. California law requires the employer to provide 10-minute rest periods in the middle of each four-hour period worked. Rest periods should not be combined with or added onto meal periods, even at the employee's request. Nor should they be allowed to come in 10 minutes late or leave 10 minutes early, as a missed rest period penalty would still be required.

Do employers need to provide any documentation for meal period waivers or schedule changes?

Yes. It is very important that meal period waivers as well as documentation on voluntary schedule changes under an AWS must be maintained.

If an employee signs a meal period waiver, could the employee do an exception and note it on his/her timecard that a meal period was taken?

Yes. It is the intent that a meal period waiver be permitted because the nature of the work prevents the employee from being relieved of all duty. An employee must be paid for the entire on-duty meal period. If an employee is provided the opportunity to take a meal period, and they take it without interruption, the employee should document the exception in writing on the employee's timecard.

Alternative Work Schedules**Can employees work an Alternative Work Schedule (AWS)?**

Generally, employees may work an AWS up to 10 hours in a day. However, employees in the health care industry may work an AWS up to 12 hours in a day. There must be a secret ballot election with various procedures (see below).

In order to qualify to work a 12-hour shift, an employee must provide direct patient care or work primarily or regularly as a member of a patient care delivery team spending more than half (50%) of his/her work time engaged in such work. For example, clerical workers in a hospital may not work a 12 hour AWS (although they can still work a 10-hour AWS).

What is the process for implementing AWS?

The following guidelines must be followed:

1. Identify work unit(s) that will be covered (a work unit can be a division, department, job classification, shift or separate location, or even a single employee).
2. The employer must provide the affected employees with a disclosure statement of the new proposed AWS, sample ballot and the procedure to adopt the AWS.
3. Prior to the disclosure meeting, notification of the meeting must be communicated to all affected employees. Employees out on LOA or PTO must also be provided notification of the meeting. It is recommend that this notification be distributed at least 7 days prior to the disclosure meeting. If at least 5% of the affected employees primarily speak a non-English language, the disclosure and other documents must be translated into that non-English language and distributed to the employees.
4. The Disclosure Meeting will be held and a disclosure statement, ballot, and an agreement will be distributed at the meeting.
5. At least fourteen days from the disclosure meeting, the employer shall hold a secret ballot election. The results must be shared immediately with affected employees and reported to the California Division of Labor Statistics and Research. A two-thirds majority vote of employees eligible to vote is required to implement the AWS. Please keep in mind any affected employee who does not vote will automatically be considered a "no" vote for the purpose of tabulating the results.

6. Implementation of AWS must start no later than 30 days from the date of the vote.
7. While everyone in the work unit is subject to the new workweek arrangement, employers may try to arrange a schedule that does not exceed eight hours a day for employees who were eligible to vote, but cannot work the new schedule. Employers must also explore accommodations for workers whose religious beliefs or observances conflict with the schedule.

What are the minimum hours employees can work under AWS agreements?

AWS agreements shall provide for not less than four hours of work in any shift under both 10 and 12 hour AWS. Employers cannot schedule an employee less than 4 hours in a day under an AWS without incurring premium pay for those schedules hour less than 4.

How should employers handle per diem or on-call employees?

The IWC has stated that the same overtime standards shall apply to employees who are temporarily assigned to a work unit covered by an AWS. However, these employees need to be on a 40-hour workweek.

If staff meetings are considered voluntary but also part of the employee's annual performance evaluation, are employers required to pay employees the 4-hour premium if they attend on their day off?

No. As long as the employee voluntarily attends and the performance review does not address attendance at staff meetings to obtain a satisfactory (or better) rating on their performance review, the meeting can be considered voluntary.

If an employee on a 12 AWS (voted in a combination 12 hour and 8 hour) and on their scheduled 8 hour workday are required to stay over does the employee receive overtime?

Yes. The AWS voted in contained the number of days and number of hours in the workday. Since the employee worked beyond the number of hours on the scheduled workday, the employee is entitled to overtime.