

ALTERNATIVE WORKWEEK SCHEDULES

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In California, the general rule regarding overtime pay is that employers are required to pay one and one-half times an employee's "regular rate" if that employee works more than 40 hours per week or if that employee works more than eight hours per day. (Lab. Code § 510, subd. a.) In addition, employers are required to pay double the employee's "regular rate" if that employee works more than 12 hours per day. (*Ibid.*)

However, under both Labor Code Section 511 and most of the current IWC Wage Orders, certain overtime obligations can be avoided by implementing a valid alternative workweek schedule. This memo discusses the implementation requirements and other relevant considerations for employers instituting an alternative workweek schedule under IWC Wage Order 4-2001, as well as the impact that such a schedule has on overtime payment obligations.¹

I. REQUIREMENTS AND RESTRICTIONS FOR ESTABLISHING AN ALTERNATIVE WORKWEEK SCHEDULE

Both Labor Code Section 511 and Wage Order 4-2001 allow an employer to establish an alternative workweek schedule. Labor Code Section 511, subd. (a) states:

Upon the proposal of an employer, the employees of an employer may adopt a regularly scheduled alternative workweek that authorizes work by the affected employees for no longer than 10 hours per day within a 40-hour workweek without the payment to the affected employees of an overtime rate of compensation pursuant to this section.

Similarly, Wage Order 4-2001 Section 3, subd. (B) states:

(1) No employer shall be deemed to have violated the daily overtime provisions by instituting, pursuant to the election procedures set forth in this wage order, a regularly scheduled alternative workweek schedule of not more than 10 hours per day within a 40-hour workweek without payment of an overtime rate of compensation....

(8) Notwithstanding the above provisions regarding alternative workweek schedules, no employer of employees in the health care industry shall be deemed to have violated the daily overtime provisions by instituting, pursuant to the election procedures set forth in this wage order a regularly scheduled alternative workweek schedule that includes workdays exceeding 10 hours but not more than 12 hours within a 40-hour workweek without the payment of overtime compensation....

As such, alternative workweek schedules are a legitimate means for employers who wish to minimize their exposure to overtime payment obligations. While permissible, alternative workweek schedules are subject to specific implementation requirements and other restrictions with which employers must comply.

A. IMPLEMENTATION REQUIREMENTS

Properly establishing an alternative workweek schedule is a four-part process. The four steps required for proper implementation under Wage Order 4-2001 are as follows:

1. Proposed written agreement.

The employer must present a written proposal of the alternative workweek schedule to all employees in the affected work unit that “designate[s] a regularly scheduled alternative workweek in which the specified number of work days and work hours are regularly recurring. The actual days worked within that alternative workweek schedule need not be specified. The employer may propose a single work schedule...or a menu of work schedule options.” (IWC Wage Order 4-2001 § 3, subd. (C)(1).)

2. Disclosure of proposed written agreement.

The employer is bound to disclose, in writing, the proposed alternative schedule agreement, including the effects of the proposed arrangement on the employees’ wages, hours and benefits. (IWC Wage Order 4-2001 § 3, subd. (C)(3).) In addition, the employer is obligated to hold a meeting at least 14 days prior to the election, for the specific purpose of discussing the proposed alternative workweek schedule. (*Ibid.*) In addition, if at least 5 percent of the affected employees primarily speak a non-English language, the disclosure must be printed in English as well as in that non-English language. (*Ibid.*) Finally, the written disclosure must be mailed to any affected employee who does not attend the meeting. (*Ibid.*)

3. Secret ballot election.

Subsequent to the disclosure, the employer must hold an election where affected employees can vote on the alternative workweek schedule by secret ballot. (IWC Wage Order 4-2001 § 3, subd. (C)(2).) In order to be adopted, the alternative workweek schedule must pass by a two-thirds vote of the affected employees. (*Ibid.*) Employers should be mindful that this requirement refers to two-thirds of all those eligible to vote, and not merely to two-thirds of those employees who actually participate in the election by voting. Finally, the election must take place at the work site during regular working hours. (*Ibid.*)

4. Reporting requirements.

The results of any alternative workweek election, including the final tally of the votes, the size of the work unit, and the nature of the business of the employer, must be

reported to the Division of Labor Statistics and Research within 30 days. (IWC Wage Order 4-2001 § 3, subd. (C)(6).)

Assuming that an employer complies with these requirements, an alternative workweek schedule can be implemented. Employers are well advised to retain all documentation which evidences their compliance with the proposal, disclosure, election and reporting requirements.

B. ADDITIONAL CONSIDERATIONS

Even assuming proper implementation, an alternative workweek schedule can nevertheless be invalidated if an employer fails to comply with any of the various restrictions outlined by the relevant wage orders. As such, employers instituting an alternative workweek schedule under Wage Order 4-2001 should be mindful of the following considerations:

1. Not more than 10 hours of work scheduled in a day, except in the case of health care industry employees, who cannot be scheduled for more than 12 hours of work in a day.

Although the wage orders generally provide that an alternative workweek schedule can not require more than 10 hours of work in a day, under Wage Order 4-2001 Section 3, subd. (B)(8), employees in the health care industry are permitted to work 12-hour shifts, provided they do not work more than 40 hours per week. “Employees in the health care industry” are defined in the Wage Order 4-2001 as “employees in the health care industry working in a clinical or medical department, including pharmacists dispensing prescriptions in any practice setting.” (IWC Wage Order 4-2001 § 2, subd. (G)(2).) “Health care industry” is defined as “hospitals, skilled nursing facilities, intermediate care and residential care facilities, convalescent care institutions, home health agencies, clinics operating twenty-four hours per day, clinics performing surgery, urgent care, radiology, anesthesiology, pathology, neurology, or dialysis.” (IWC Wage Order 4-2001 § 2, subd. (J).)

Despite restrictions on the number of hours an employer can schedule, there is some authority supporting an employer's right to allow an employee to work additional hours on a regularly recurring basis, provided the requisite overtime is paid. This authority is somewhat inconsistent with Labor Code Section 511, subd. (a) which uses the language “no longer than” in reference to the “regularly scheduled alternative workweek.” However, Labor Code Section 511, subd. (b) refers to the fact that overtime will be due for employees who work beyond the scheduled hours, thus presuming that additional hours may in fact be worked. The IWC has concluded that “reading these two provisions of the Labor Code [511(a) and 511(b)] together, an employer who requires an employee to work beyond the number of hours established by the alternative workweek agreement, even if such overtime hours are worked on a *recurring basis*, does not violate the law if the appropriate compensation is paid.” (Simmons, Wage and Hour Manual (8th ed. 2001) §9.7, subd. (f)(3) p.352, emphasis in original.)

While this clarification from the IWC provides some guidance, it is not entirely clear how often an employer can require additional work hours and still fall within the permissible realm of the “recurring basis.” At least one court has found that a regular schedule which called for six overtime hours each week was permissible. In the case of *Mitchell v. Yoplait*, (2004) 122 Cal.App.4th Supp.8, the court examined an alternative work schedule that called for three 12-hour days and one six-hour day, with the employer paying six hours of overtime for the six-hour day. In upholding this alternative workweek schedule, the court noted that “the purpose of section 511 was not to limit the overall number of hours in an alternative workweek shift, but rather to ‘limit the alternative schedules to not more than 10 hours per day without triggering daily overtime.’” *Id.* at 12. The court went on to cite to the IWC language referenced above which discusses the permissibility of additional hours worked on a recurring basis.

Thus, although the Labor Code and wage orders appear to limit the number of work hours for the alternative workweek schedule, presumably additional work hours will not negate an alternative workweek, even if those additional hours are worked on a recurring basis.

2. Not less than four hours of work scheduled in any shift.

Wage Order 4-2001 Section 3, subd. 3.(B)(1) states that “any alternative workweek agreement adopted pursuant to this section shall provide for not less than four (4) hours of work in any shift.” Thus, it is permissible for an employer to establish a 4/10 schedule, where an employee works four 10-hour shifts during a week. Alternatively, it is permissible for an employer to establish a 9/80 schedule where an employee works four nine-hour shifts and one four-hour shift during a workweek.

3. Schedule must apply to all employees in the work unit.

Employers may define the “work unit” by division, department, job classification, shift, separate physical location, or recognized subdivision. (DLSE Manual, June 2002, § 56.8.2.)

4. 30-day grace period prior to implementing an approved alternative workweek schedule.

Employers may not implement a newly adopted alternative workweek schedule until at least 30 days after the announcement of final election results. (IWC Wage Order 4-2001 § 3, subd. (C)(7).)

5. Employer must accommodate employees who cannot or who will not work the alternative workweek schedule.

The employer is bound to explore any reasonable alternative means of accommodating certain employees who either cannot or will not work the alternative workweek schedule. Employees entitled to such accommodation include those who cannot work the alternative workweek schedule due to their religious beliefs, employees who were eligible to vote but who are unable to work the alternative schedule, and

employees who were hired subsequent to the election but are unable to work the alternative workweek schedule. (IWC Wage Order 4-2001 § 3, subds. (B)(4) – (6).)

6. Employer cannot reduce regular hourly rate of pay.

Wage Order 4-2001 Section 3, subd. (B)(3) states: “An employer shall not reduce an employee’s regular rate of hourly pay as a result of the adoption, repeal or nullification of an alternative workweek schedule.”

7. Additional Considerations.

Wage Order 4-2001 contains no requirement that the employee be given two consecutive days off. In addition, under Wage Order 4-2001 Section 3, subd. (M), make-up time is specifically permitted, provided the employee submits a written request and the time is made up within the same workweek.

II. IMPACT OF ALTERNATIVE WORKWEEK SCHEDULE ON OVERTIME PAYMENT OBLIGATIONS

To the extent that an employer has properly established an alternative workweek schedule that complies with any relevant restrictions, that employer may reduce his overtime payment obligations. Employers should note, however, that even where an alternative workweek schedule has been properly implemented, overtime payment may still be required.

Under Wage Order 4-2001, overtime pay obligations will differ depending upon whether the employee is qualified as a health care industry employee subject to an alternative workweek schedule that calls for 12-hour shifts. For employees meeting those specifications, hours worked in excess of the 12-hour shift must be compensated at a rate of double the employee’s regular pay and hours worked in excess of 40 hours in a workweek must be compensated at a rate of one and one-half times the employee’s regular rate of pay. (IWC Wage Order 4-2001 § 2, subds. (B)(8)(a) – (b).)

For all other employees subject to Wage Order 4-2001 and governed by an alternative workweek schedule, overtime pay will be due for all work performed in any workday beyond the established schedule up to 12 hours per day or beyond 40 hours per week at a rate of one and one-half times the employee’s regular rate of pay. (IWC Wage Order 4-2001 § 2, subd. (B)(1).) In addition, all work performed in excess of 12 hours per day and all work performed in excess of 8 hours (on days worked beyond the regularly scheduled workdays) shall be paid at double the employee’s regular rate of pay. (*Ibid.*) to the extent that an employee qualifies as an employee in the health care industry and is subject to an alternative workweek schedule that includes 12 hour shifts,

Finally, Wage Order 4-2001 also includes a “short-shift” penalty clause. This clause provides that where an employer requires an employee to work fewer hours than those regularly scheduled by the alternative workweek schedule agreement, the employer will be obligated to pay overtime at a rate of one and one-half times the employee’s

regular rate of pay for all hours worked in excess of 8 hours and double time for all hours worked in excess of 12 hours.

This article does not constitute legal advice to be applied in any specific circumstance or situation. Any such advice is conditioned upon the specifics of a particular case and, therefore, cannot be addressed generally.

¹ This memo only discusses alternative workweek schedules under IWC Wage Order 4-2001. Other requirements and restrictions that may apply to alternative workweek schedules under other wage orders are not discussed herein.