

Department of Industrial  
Division of Labor Standards Enforcement

# MEMORANDUM

**Date:** December 23, 1999

**From:** Miles E. Locker  
Chief Counsel for the Labor Commissioner

Marcy V. Saunders  
State Labor Commissioner

**To:** All DLSE Professional Staff  
Andrew Baron, IWC Executive Secretary

**Subject:** Understanding AB 60: An In Depth Look at the Provisions of  
the "Eight Hour Day Restoration and Workplace Flexibility  
Act of 1999"

*This Memo was drafted prior to the IWC's adoption of the Interim Wage Order, and as such, this Memo does not purport to interpret the Interim Wage Order. To the extent that any provisions of the Interim Wage Order may be inconsistent with this Memo, the Wage Order provisions would prevail.*

AB 60, which was enacted by the Legislature and signed by Governor Davis earlier this year, will take effect on January 1, 2000. It is therefore critically important that all DLSE professional staff take some time to learn about the provisions of this law, and to understand some of the questions that will arise in its interpretation and enforcement. This memo will summarize each section of the bill, with a focus on whether and how it changes existing law. We will also discuss commonly asked questions about AB 60, and by summarizing from recently issued or pending opinion letters, provide the answers to these questions.

## AB 60 ---- An Introduction to the Substantive Provisions

The Legislature named AB 60 the "Eight Hour Day Restoration and Workplace Flexibility Act of 1999. That name tells us the two primary purposes behind the legislation --- first, to restore daily overtime in California; that is, to bring back the general requirement for overtime pay after eight hours of work in a day, a requirement that the Industrial Welfare Commission ("IWC") had eliminated from Wage Orders 1 (manufacturing industry), 4 (professional, technical, clerical, and mechanical occupations), 5 (public housekeeping industry), 7 (mercantile industry), and 9 (transportation industry), with the adoption of the 1998 wage orders. Section 21 of AB 60 provides that these 1998 wage orders (1-98, 4-98, 5-98, 7-98, and 9-98) shall be null and void; and that in their place, the pre-1998 wage orders (1-89, 4-89 as amended in 1993, 5-89 as amended in 1993, 7-80, and 9-90, are reinstated from January 1, 2000 until no later than July 1, 2000, at which point the IWC is required, pursuant to section 11 of the bill (which adds section 517 to the Labor Code) to adopt new wage orders.

It is very important to understand, however, that although only 5 of the 15 IWC wage orders that are currently in effect will become null and void on January 1, 2000, AB 60 as a whole applies to all California workers except for those who are expressly exempted by the bill itself, or those who were expressly exempted from a pre-1998 wage order. Section 9 of AB 60 adds section 515 to the Labor Code, which provides, at subsection (b)(2), that except for AB 60's new test for the administrative, executive and professional exemption found at section 515(a), "nothing in this section requires [the IWC] to alter any exemption from provisions regulating hours of work that was contained in any valid wage order in effect in 1997," and that "except as otherwise provided in [AB 60], the [IWC] may review, retain or eliminate any exemption from provisions regulating hours of work that was contained in any valid wage order in effect in 1997."

With these general principles in mind, we can answer the most commonly asked questions about AB 60 coverage. 13 of the pre-1998 wage orders expressly exempt public employees from their coverage. These public employees, who would otherwise be covered by a wage order but for the exemption "contained in" the wage order, are therefore exempt from AB 60. Likewise, truck drivers whose hours of service are regulated by the United States Department of Transportation (under 49 C.F.R. §395.1, et seq.) or by the California Highway Patrol or the State Public Utilities Commission (under 13 C.C.R. §1200, et seq.) are expressly exempt from the overtime provisions of the pre-1998 IWC orders. These workers are therefore exempted from the overtime provisions of AB 60. On the other hand, workers who were not expressly exempted from any pre-1998 wage order, such as on-site construction, drilling, mining and logging employees, are covered by AB 60. We should note, however, that Labor Code §515(b)(1) provides that until January 1, 2005, the IWC may establish additional exemptions from the overtime provisions of AB 60. Thus, employees engaged in on-site construction, drilling, mining and logging will be covered by AB 60 unless and until the IWC chooses to expressly exempt any of them from its provisions.

The statutory provisions of AB 60, or any other state law, will prevail over any inconsistent provision in the pre-1998 wage orders. For example, the current \$5.75 an hour state minimum wage, which was established by the electorate

with the passage of the Living Wage Act of 1996, now codified at Labor Code section 1182.11, prevails over the lower minimum wage rates contained in the pre-1998 wage orders. Likewise, AB 60's salary basis test, which requires a monthly salary equivalent of at least twice the minimum wage, currently \$1,993.33 per month, as a prerequisite for the administrative, executive and professional exemptions from overtime, prevails over the remuneration test (and lower monthly amounts) for the administrative and executive exemptions in the pre-1998 wage orders. Therefore, starting on January 1, 2000, employers must comply with the pre-1998 wage orders, to the extent they are not inconsistent with AB 60 or any other controlling statutes, in which case the requirements of the statute will apply.

The second important purpose behind AB 60 is the intent to provide more options for work schedule flexibility than had been available in the pre-1998 wage orders. AB 60 maintains, with some changes, two of the mechanisms under the pre-1998 wage orders which permitted work schedules of more than eight hours per day without payment of daily overtime -- namely, the provisions for secret ballot elections to implement an "alternative workweek schedule," and the collective bargaining agreement opt-out provision. In addition to these mechanisms, there are two new provisions in AB 60 that permit individual employees to work more than eight hours in a day (but not more than the alternative number of hours -- either ten or eleven -- permitted by the statute), at the employee's request and under clearly specified conditions, without payment of overtime. The first of these new provisions allows for individual "make-up time" under which an employee can take time off for personal reasons and during the same workweek, make up that time by working up to eleven hours in a day without the payment of overtime. The second of these new provisions allows individual employees who were working on July 1, 1999 under a schedule that provided for up to 10 hours in a day to continue working this schedule without payment of daily overtime, even if this schedule was not established by an alternative workweek election. We will return to these flexible work schedule arrangements later in this memo. For now, we will simply note that although AB 60 allows for increased flexibility in work schedules, the statute imposes limits on the total hours that can be worked in a day under most flexible arrangements, and sets out strict procedures that must be followed in order to work more than eight hours in a day without the payment of daily overtime.

Finally, before embarking on a detailed review of AB 60, we should note that for DLSE, in its function as an enforcement agency, perhaps the most important change brought about by this new law is creation of a new method for enforcing overtime obligations. Under section 14 of the bill, section 558 is added to the Labor Code, under which the DLSE may issue a civil penalty citation to an employer that violates the provisions of AB 60 or any provision regulating hours and days of work in any IWC order. These penalties are set at the amount of \$50 for an initial violation (or \$100 for any subsequent violation) per underpaid employee for each pay period in which the employee was underpaid. In addition, the civil penalty citation may include the amount owed to employees for underpaid overtime wages.

#### A Section by Section Look at AB 60

Definitions: Section 3 of AB 60 adds section 500 to the Labor Code, defining certain words that are used in the statute. The word "workday" is defined as "any consecutive 24 hour period commencing at the same time each calendar day." The word "workweek" is defined as "any seven consecutive days, starting with the same calendar day each week," and as "a fixed and regularly recurring period of 168 hours" made up of "seven consecutive 24-hour periods." Finally, the term "alternative workweek schedule" is defined as "any regularly scheduled workweek requiring an employee to work more than eight hours in a 24-hour period." These definitions are unchanged from the pre-1998 wage orders. An employer may designate the period of the workday and the workweek. Absent pre-designation by the employer, DLSE will treat each workday as starting at midnight, and each workweek as starting at midnight on Sunday, so that Sunday is the first day of the workweek and Saturday the last.

The Basic Overtime Law: Section 4 of AB 60 amends Labor Code §510, to set out California's new basic overtime law. First, it requires overtime compensation at the rate of no less than one and one-half the employee's regular rate of pay for all hours worked in excess of eight in one workday, and for all hours worked in excess of 40 in one workweek, and for "the first eight hours worked on the seventh day of work in any one workweek". Second, it requires overtime compensation at the rate of double the employee's regular rate of pay for all hours worked in excess of 12 hours in one day and "for any work in excess of eight hours on any seventh day of a workweek."

This basic overtime law is the heart of AB 60. It restores daily overtime, and takes the basic overtime provisions found in almost all of the pre-1998 wage orders -- time and a half for all hours worked in a workday in excess of 8 and up to 12; double time for all hours worked in a workday in excess of 12; time and a half for all hours worked in excess of 40 in a workweek; and seventh day premium pay -- and enshrines these provisions as statutory requirements.

We have received many inquiries concerning the provision for seventh day premium pay. The time and a half provision reads slightly differently than the double time provision: time and a half for "the first eight hours worked on the seventh day of work in any one workweek," and double time for "any work in excess of eight hours on any seventh day of a workweek." This raises the question whether AB 60 requires double time for any work performed in excess of eight hours on the seventh day of the workweek, even if the employee has not worked all seven days of that workweek. We do not believe this would be a logical reading of the statute; rather, both the time and a half and double time provisions for seventh day premium pay must be harmonized to require that the employee work all seven days of the workweek in order to qualify for this type of premium pay. The purpose of seventh day premium pay is to provide extra compensation to workers who are denied the opportunity to have a day off during the workweek; not to reward someone who may only be scheduled to work one day a week for having fortuitously been scheduled to work on what is the seventh day of the employer's workweek. This reading of AB 60 is consistent with the provisions for seventh day premium pay contained in the pre-1998 wage orders, and we are unable to discern any intent on the part of the Legislature to modify those provisions.

Example: An employer has no pre-designated workweek. An employee of that employer works the following schedule: Sunday-off; Monday-off; Tuesday-8 hours; Wednesday-8 hours; Thursday-8 hours; Friday-8 hours; Saturday-8 hours; Sunday-8 hours; Monday-8 hours; Tuesday-8 hours; Wednesday-8 hours; Thursday-8 hours; Friday-off; Saturday-off. Is the employee entitled to any overtime pay or seventh day premium pay? Answer-NO. There is no daily overtime, because the employee never worked more than eight hours in a day. There is no weekly overtime, because the employee did not work more than 40 hours during each of the two workweeks (running from Sunday to Saturday). And even though the employee worked ten days in a row, there is no seventh day premium pay, because the employee did not work seven consecutive days in any one workweek.

The statute also provides that "nothing in this section requires an employer to combine more than one rate of overtime compensation in order to calculate the amount to be paid to an employee for any hour of overtime work." This is consistent with DLSE's enforcement of the pre-1998 wage orders. It simply means that there is no "pyramiding" of separate forms of overtime pay for the same hours worked. Once an hour is counted as an overtime hour under some form of overtime, it cannot be counted as an hour worked for the purpose of another form of overtime. When an employee works ten hours in one day, the two daily overtime hours cannot also be counted as hours worked for the purpose of weekly overtime.

Example: An employee works 12 hours on Monday, Tuesday, Wednesday, and Thursday. How many non-overtime and overtime hours did the employee work that week? Answer-- The employee is credited with 4 hours of

daily overtime each day worked, for a total of 16 daily overtime hours, and these daily overtime hours cannot be counted for the purpose of determining when to start paying time and a half for hours worked in excess of 40 in a week. Because pyramiding is not allowed, there are no weekly overtime hours, even though the employee worked 48 total hours during the workweek. Only 32 of these hours were regular, non-daily overtime hours, and they are the only hours that count towards weekly overtime computations.

Labor Code §510 provides for certain exceptions from the basic overtime law. The overtime requirements of section 510 do not apply to an employee working pursuant to:

1. an alternative workweek schedule adopted pursuant to Labor Code §511, discussed below, or
2. an alternative workweek schedule adopted by a collective bargaining agreement pursuant to Labor Code §514, discussed below, or
3. an alternative workweek schedule for any person employed in an agricultural occupation, as defined in IWC Order 14. (Section 9 of AB 60 amends section 554 of the Labor Code to exclude persons employed in agricultural occupations from all of AB 60, except for section 558, the section that sets out civil penalties for violations of the overtime provisions contained in AB 60 or in any IWC order. Thus, the basic overtime law, now found at Labor Code §510, does not apply to workers covered by IWC Order 14. However, an agricultural employer that violates the special overtime provisions of Order 14 will be subject to a penalty citation just like any other employer.)

Finally, section 510 retains the existing provision regarding "ridesharing," which states that time spent commuting to and from the first place at which an employee's presence is required by the employer shall not be considered to be part of a day's work, when the employee commutes in a vehicle that is owned, leased or subsidized by the employer, and is used for the purpose of ridesharing. Of course, once the employee reaches the first place at which his or her presence is required by the employer, all time spent subject to the control of the employer (whether or not the employee is then engaged in physical or mental labor), and all time during which the employee is suffered or permitted to work, must count as hours worked under the various IWC orders.

Non-Collectively Bargained Alternative Workweek Schedules: Section 5 of AB 60 adds section 511 to the Labor Code, which permits certain non-collectively bargained alternative workweek schedules. Under subsection (a), an employer may propose a "regularly scheduled alternative workweek" authorizing work by the affected employees "for no longer than 10 hours per day within a 40-hour workweek" without payment of overtime compensation. The proposed "regularly scheduled alternative workweek" may be "a single work schedule that would become the standard schedule" for all of the workers in the work unit, or "a menu of work schedule options, from which each employee in the unit would be entitled to choose."

Whether it is the only work schedule for an entire work unit or one of several options on a menu available to the workers in the unit, the "regularly scheduled alternative workweek" must provide for specified workdays and specified work hours, and these workdays and work hours must be fixed and regularly recurring.

Adoption of an alternative workweek schedule under section 511(a) requires a secret ballot election with approval by at least two-thirds of the affected employees. We have received many inquiries concerning the procedures to be followed in holding such an election. Section 11 of AB 60 adds section 517 to the Labor Code, which requires the IWC, no later than July 1, 2000, to adopt wage orders which must include procedures for conducting elections to establish or repeal alternative workweek schedules, procedures for implementing such alternative schedules, the procedures for petitioning to repeal an alternative workweek schedule, the conditions under which an employer can unilaterally repeal such a schedule, the contents of any required notices or disclosures to employees, and the factors in designating a work unit for purposes of an election. Until such new wage orders are adopted by the IWC, employers must comply with the procedures dealing with alternative workweek elections that are found in the applicable pre-1998 IWC wage order, to the extent that those procedures are not inconsistent with AB 60.

Each worker eligible to vote in an election must be informed, prior to the election, of the precise work schedule -- that is, the precise workdays and work hours -- that he or she will be assigned to work (or, in the case of an election to establish a "menu of work schedule options", allowed to choose from) if the alternative work schedule is adopted. We have been asked whether an employer can establish a menu of work schedule options through an election, and then, if too many or too few workers choose to work one of the alternative schedules, assign workers to work schedules on some basis other than the workers' choice. The answer to this is no, as the statute clearly provides that "each employee in the unit would be entitled to choose" among the various work schedule options on the "menu." If the employer's business needs preclude allowing its employees to freely choose among work schedule options, the employer should not propose a "menu of work schedule options". Instead, the employer may be able to propose more than one alternative work schedule by dividing the workforce into separate work units, and proposing a different alternative work schedule for each unit, so that each worker knows exactly what schedule he or she is voting for.

A "regularly scheduled alternative workweek" permitted by section 511(a) cannot provide for *regularly scheduled* workdays in excess of 10 hours or *regularly scheduled* workweeks in excess of 40 hours. Thus, *regularly scheduled* workdays for longer than 10 hours (except within the health care industry, which is discussed below) are not permitted under a non-collectively bargained alternative workweek schedule, and if an employer whose employees are working pursuant to an alternative workweek schedule *regularly scheduled* workdays in excess of 10 hours, DLSE will conclude that these employees are not working an alternative workweek schedule permitted under section 511(a), and thus, the employer will be required to pay overtime compensation for all hours worked in excess of eight in a day or 40 in a week, as required by section 510.

Example: An employer covered by Wage Order 7, whose employees have voted to adopt a 4/10 alternative workweek schedule (4 workdays a week, 10 hours per workday, for a total of 40 hours worked each workweek) pursuant to section 511(a), seeks to have its employees regularly work 12 hours each workday, and asks whether it can do this by paying two hours overtime, at time and a half, for the extra two hours each workday. The answer is NO. A regularly scheduled 12 hour workday is not permitted under section 511(a), so this is not a valid regularly scheduled alternative workweek. As such, section 510 will apply to require time and a half for all hours worked in excess of eight in a workday. The employer must pay time and a half for 4 overtime hours each workday.

However, it is expected that there will be occasions, *not regularly recurring*, when an employee working under an alternative workweek schedule adopted pursuant to section 511 will be required to work extra hours beyond those that are regularly scheduled. These occasions are addressed by subsection (b) of section 511, which provides that an employee working under an alternative workweek schedule adopted pursuant to subsection (a) shall be paid overtime compensation at the rate of no less than one and one-half times the employee's regular rate of pay for any work in excess of the regularly scheduled hours established by the alternative workweek agreement and for all hours worked in excess of 40 per week, and at the rate of no less than double the employee's regular rate of pay for all hours worked in excess of 12 hours per day and for any work in excess of 8 hours on days worked other than workdays that are regularly scheduled under the alternative workweek. The same prohibition of "pyramiding" different types of overtime pay, found at section 510, is contained in section 511.



prerequisites for a regularly scheduled alternative workweek under AB 60, so they are not nullified by operation of statute. These prerequisites are a maximum of ten hours work in a workday, a maximum of 40 hours in a workweek, adoption by a secret ballot election with a 2/3 vote of approval by the affected employees, with the election conducted pursuant to the procedures specified in the applicable wage order.

We have received many inquiries from employers that unilaterally adopted an alternative workweek under the 1998 wage orders, and that now wish to establish alternative workweek schedules that will not be nullified upon the effective date of AB 60. Of course, those employers could wait until January 1, 2000, to propose alternative workweek schedules that may then be adopted by a two-thirds vote in secret ballot elections conducted pursuant to the procedures specified in the applicable reinstated pre-1998 wage order. But many employers would like to establish a "nullification-proof" alternative workweek schedule in advance of January 1, 2000, so as to allow for a seamless transition. These employers have focused on the requirement that the election have been held "pursuant to wage orders . . . that were in effect prior to 1998," and have asked whether this means that to be valid and not subject to nullification, the election must: (1) have been held or be held on a date when the applicable pre-1998 wage order was or will be in effect (that is, prior to January 1, 1998, or after January 1, 2000), or (2) have been held or be held at any time until the IWC adopts the post-AB 60 wage orders, including the period until December 31, 1999 while the 1998 wage orders remain in effect, as long as the employer complied with the election procedures (including requirements for employee notification, etc.) contained in the applicable pre-1998 wage order. We believe that the intent of AB 60 is best effectuated by construing this ambiguous provision in accordance with the latter interpretation, so as to allow employers who are presently subject to a 1998 wage order to conduct an election by following all of the procedures provided in the applicable pre-1998 wage order.

Finally, turning to those alternative workweek schedules that will not be nullified by operation of AB 60 on January 1, 2000, subsection (f) provides that "any type of alternative workweek schedule that is authorized by this code and that was in effect on January 1, 2000, may be repealed by the affected employees." Procedures for repeal will be contained in the IWC's post-AB 60 wage orders. Until those orders are adopted, procedures for repeal are governed by the applicable pre-1998 wage order. Under long-standing DLSE enforcement policy, an employer that wants to terminate an alternative workweek schedule can do so unilaterally, without holding a repeal election, after providing reasonable advance notice to its employees. If the IWC wishes to prohibit such unilateral repeals, it may do so through its post-AB 60 regulations.

Two Important Exceptions to Subsection (f) of Labor Code §511:

- - The first exception to subsection (f) is found at subsection(g), which deals with the health care industry. It provides that an alternative workweek schedule in the health care industry adopted by a two-thirds vote of affected employees in a secret ballot election pursuant to Wage Order 4-89 as amended in 1993, or Wage Order 5-89 as amended in 1993, that provided for workdays exceeding 10 hours but not exceeding 12 hours in a day without the payment of overtime compensation, shall be valid until July 1, 2000. Of course, if the alternative workweek schedule adopted pursuant to such an election provided for a workday that does not exceed 10 hours, it would meet the criteria set out in subsection (f), and it would therefore remain valid indefinitely.

Several health industry employers have asked whether there is any possibility, under AB 60, for extending alternative workweek schedules that provide for 12 hour workdays past July 1, 2000. At present, it would appear that any regularly scheduled non-collectively bargained alternative workweek in the health care industry that provides for workdays that exceed 10 hours will be nullified by operation of the statute following July 1, 2000; and unless the affected employees adopt an alternative workweek schedule that comports with AB 60's limits and any provisions that may be adopted by the IWC, the basic overtime requirements of section 510 will apply.

- - The second exception to subsection (f) of Labor Code §511 is found at subsection (h), which permits an individual employee to continue to work an alternative workweek schedule without the payment of daily overtime compensation, even if the schedule was established by the employer unilaterally, without an election, under the 1998 wage orders, if all of the following conditions exist:

1. the employee was employed on July 1, 1999, and
2. the employee was then voluntarily working an alternative workweek schedule, and
3. this schedule did not provide for work in excess of 10 hours of work in a workday, and
4. this employee makes a written request to the employer to continue working this schedule, and
5. the employer approves the written request.

Employees hired after July 1, 1999 will not be eligible for this non-collectively bargained, non-secret ballot approved, individual alternative workweek schedule. If the employee, as of July 1, 1999, was working an alternative workweek with regularly scheduled workdays of more than 10 hours, this option is unavailable, even if the employee and employer are now willing to limit the workday to 10 hours. A written request to continue working this individual alternative workweek without payment of daily overtime will only be effective as to work performed after the date of the request; the employer must pay the applicable daily overtime compensation for any work performed prior to the date that the written request is executed and approved. Finally, because this exception allows for individual voluntary agreements, DLSE has determined that the employee can, at anytime, revoke his or her written request to continue working this sort of alternative workweek schedule, in which case the employer must henceforth pay daily overtime in accordance with the provisions of AB 60.

Individual "Make-Up Time" and the Flexible Workweek: The most significant new aspect of work time flexibility is found at section 7 of AB 60, which adds section 513 to the Labor Code, to provide a mechanism for individual employees to take time off to attend to their personal needs, and to then make up that time within the same workweek, without the payment of overtime compensation except for hours worked in excess of 11 in one workday or 40 in one workweek. The employee benefits by not losing any pay, or incurring any loss of sick or vacation time, for the time off; and the employer benefits by not having to pay daily overtime to the employee who is working more than eight hours (but not more than 11 hours) in a day in order to make up the missed time.

Make-up time will not count in computing the total number of hours worked in a day for the purposes of the overtime requirements specified in section 510 (the basic overtime law) and section 511 (the provisions for regularly scheduled alternative workweeks) only if the make-up hours are worked in the same workweek in which the work time was lost. Also, the employer will not have to pay overtime compensation for the make-up work only to the extent that the employee performing the make-up work does not exceed 11 hours of work in a workday or 40 hours of work in a workweek. In other words, when an employee works more than eight hours in a workday because the employee is performing make-up work that day, any work performed in excess of 11 hours that day must be paid at the appropriate overtime rate. Likewise, any work performed in excess of 40 hours during the workweek must be paid as overtime.

Under section 513, make up time is permitted if the employer approves the employee's *signed written request* to make up time that has been or that will be lost as a result of the employee's *personal needs*. The employer may choose to grant or deny any request to work make up time. A separate written request is needed each time the employee asks to make up work time pursuant to this section. The request need not be made prior to the employee taking off the time, but must be made prior to the performance of the make up work in order to ensure that the employer is not liable for daily overtime for the make up hours. Any daily overtime hours worked prior to a request to perform make up work cannot be credited as make up time, but rather, will constitute time for which overtime compensation must be paid. And most importantly, time that is taken off in one workweek can only be made up during that same workweek; if it is worked in a different workweek than the when it was taken, the daily overtime hours worked must be paid as overtime.

The statute expressly prohibits employers from "encouraging or otherwise soliciting an employee to request an employer's approval to take personal time off and make up the work hours within the same week pursuant to this section." This does not prohibit employers from merely informing workers of the provisions of this statute; however, it clearly does prohibit employers from suggesting, recommending (or certainly, ordering) that workers "request" make up time.

We have been asked whether make-up time can be worked in advance of the date that the time being made up is lost. There is nothing in the statute that would prohibit this, so long as the make-up work is performed during the same workweek in which the time is lost. Thus, if an employee knows that he or she will need to take time off to attend to personal needs on the last day of the workweek, the employee can make-up this time in advance, during the preceding days of that workweek. The question that then follows is: does the employer have any overtime exposure if that worker, after working the make-up time, decides not to take the time off, and works the time that he or she had planned on taking off? The answer to this would depend on whether the employee ended up working more than 40 hours in that workweek. If so, section 513 requires payment of overtime for all hours worked in excess of 40 in a workweek. If the employee did not end up working more than 40 hours that workweek, the employer would not be liable for any daily overtime (provided that the employee did not work more than 11 hours in any workday, and that any hours worked in excess of eight in any one workday were worked as make-up time). The reason the employer would not be liable for any daily overtime under this scenario is because the employer agreed to allow the employee to work these extra daily hours *without payment of daily overtime* in order to make-up time that the employee asserted would be lost later in the workweek due to the employee's personal obligations, and the employer relied on the employee's assertion in granting this request. On the other hand, if an employer revokes its previously granted permission to allow an employee to perform make-up work after the make-up work is performed, but before the time off is taken, the employer will be liable for all daily overtime, and the extra daily hours worked will not be treated as make-up time.

Finally, we have been asked whether these make-up time provisions apply to employees working under regularly scheduled alternative workweeks. The answer is yes, section 513's make-up time provisions expressly apply to workers covered by section 510, the basic overtime law, and to workers covered by section 511, which authorizes alternative workweek schedules. Of course, a worker employed under a valid alternative workweek schedule which provides for 10 hours of work in a workday without payment of overtime will only be able to work one extra hour of make-up time during such a workday before exceeding the 11 hour per day cap that triggers overtime for all subsequent make-up time worked that day. Because make-up time applies to workers employed under an alternative workweek schedule, such workers may perform up to 11 hours of make-up work on a day, *that* they are not regularly scheduled to work without the payment of overtime compensation that would otherwise be required, pursuant to section 511(b), for working on a day other than a regularly scheduled workday.

Examples: An employee scheduled to work an eight hour workday can work an additional three hours that day as make-up time without the payment of daily overtime. An employee scheduled to work a six hour workday can work an additional five hours that day as make-up time without the payment of daily overtime. An employee scheduled to not work at all on a specific day can work up to 11 hours of make-up time that day without the payment of overtime, whether the worker is covered by the basic overtime law or is working under an alternative workweek schedule pursuant to section 511. On the other hand, an employee not covered by a regularly scheduled alternative workweek pursuant to section 511, who is nonetheless scheduled to work nine hours in a workday, can work two hours of make-up time that day without payment of overtime for the make-up time, but must be paid overtime for the one overtime hour of scheduled, non- make-up work. If this same employee works three hours of make-up time, resulting in 12 hours of work that workday, the employee must be paid two hours of overtime at the rate of one and one-half times the regular rate (one hour for the ninth hour of scheduled work, and another hour for the make-up time that exceeded the eleventh hour of work that day). Finally, if this same employee works four hours of make-up time, resulting in 13 hours of work that workday, the employee must be paid 2 hours of overtime at time and a half, and one hour of overtime at twice the regular rate of pay.

The Collective Bargaining Agreement Opt-Out Provision: Section 8 of AB 60 adds section 514 to the Labor Code, which makes AB 60's overtime and meal period provisions inapplicable to employees who are covered by a collective bargaining agreement ("CBA"), if the CBA expressly provides for the wages, hours and working conditions of the employees, and provides a regular hourly wage rate for those employees of not less than 30 percent more than the state minimum wage, and "provides premium wage rates for all overtime hours worked." If a CBA meets these provisions for the opt-out, the workers covered by the CBA are not entitled to statutory overtime; rather, they will receive premium pay for all overtime hours worked, as provided by the CBA. This is somewhat different from prior law, in that the opt-out under the IWC orders had required payment of a regular rate of at least \$1 an hour more than the state minimum wage; and under the new "30 percent above" formula, the required regular rate would now be seven dollars and 47 and a half cents (\$7.475) per hour. And of course, future increases in the state minimum wage will automatically result in increases in the regular rate required for the opt-out. If the opt-out requirements are met, workers are paid for all hours worked in accordance with the provisions of the CBA. It should be remembered, however, that there is no CBA opt out under the Fair Labor Standards Act, which requires payment of overtime at the rate of one and one half the regular rate of pay for all hours worked in excess of 40 in a workweek.

The term "premium wage rates" are not defined in AB 60 or in the IWC orders. The term has always been interpreted to mean any wage rate in excess of the applicable straight time regular hourly rate of pay. There is no indication that the Legislature intended this term to be interpreted in any other manner. Indeed, it would make no sense to interpret the term as synonymous with a statutory overtime rate such as one and a half times the regular rate, since the very purpose of an opt-out provision is to allow for an alternative to the minimum standard that would otherwise be required by statute. The amount by which the premium exceeds the regular rate is left to the parties to negotiate; we will recognize any rate higher than the regular rate as a premium.

We have received several inquiries regarding the meaning, within section 514, of the term "all overtime hours." The one thing it cannot mean is all hours worked in excess of eight in a day without regard to any definition of overtime that might be contained in the CBA, since such a meaning would prohibit unions from collectively bargaining for the very same alternative workweek schedules that non-unionized workers could adopt under AB 60 -- that is, work schedules of up to 10 hours a day (and 12 hours a day in the health care industry) without the payment of daily overtime or premium pay. There is nothing to indicate that the Legislature intended such a peculiar result. The IWC's post-AB 60 regulations may provide further guidance on the parameters of the CBA opt-out.

As with any other wage claims that are filed with DLSE by employees covered by a CBA, any claims for overtime where a

CBA is involved must be reviewed by DLSE Legal in accordance with the consent decree in *Livadas v. Bradshaw*.

Administrative, Executive and Professional Exemption: Section 9 of AB 60 adds section 515 to the Labor Code. This is the section that codifies, with some very significant changes from prior law, the administrative, executive, and professional exemptions from overtime. First, there are two ways in which AB 60 merely codifies pre-existing California law. As was the case under the IWC orders, there is no exemption, no matter how highly the employee may be paid, unless the employee is "primarily engaged" in exempt work, and the term "primarily" is defined as more than one-half the employee's work time. Thus, state law continues to differ from federal law, which is less protective of workers; in that under federal law, the focus is on the employee's "primary duty," and an employee may be found to have a "primary duty" as a manager even if the worker spends most of his or her work time performing non-exempt tasks. In contrast, state law looks to what the worker is "engaged in," that is, what is the worker physically doing.

AB 60 also codifies California's pre-existing fixed workweek method for calculating overtime compensation owed to a non-exempt salaried employee, a method that was approved by the courts 15 years ago in the *Skyline Homes* case. Under this method, the salary paid to a non-exempt salaried employee only covers the 40 non-overtime hours of the workweek; it does not serve to compensate the worker for any overtime hours worked. This weekly salary must be divided by 40 to establish a regular hourly rate of pay, which is then the basis for all overtime calculations. Overtime hours worked are then paid at either one and one half times the regular rate, or double the regular rate, as required. This contrasts with the less protective federal fluctuating workweek method, under which a salary paid to a non-exempt employee is deemed to cover all hours worked (including overtime hours); so the more overtime hours worked, the lower the regular rate of pay, and so that overtime hours worked are only paid at one-half the employee's regular rate of pay. AB 60 does not change the method of computing overtime compensation for employees who are paid on a commission or piece rate basis; which under both state and federal law is based on a fluctuating workweek whereby total weekly commission or piece rate earnings are divided by the total number of hours (including overtime hours) worked in the week to compute the regular rate of pay; and overtime hours are then compensated at one-half this regular rate of pay.

To be sure, AB 60 brings about some very significant changes in the administrative, executive and professional exemptions. Under prior law, there was no minimum remuneration or salary requirement for the professional exemption. Under Labor Code section 515, the professional exemption is subject to the same minimum salary requirement as the administrative and executive exemption. The so-called "remuneration" requirement under prior law is now changed to a requirement of a monthly salary, equivalent to no less than twice the minimum wage for full time work (defined as employment for 40 hours per week), which would now require a salary of at least \$1,993.33 per month. Since the required salary is set as a multiple of the minimum wage, future increases in the state minimum wage will result in corresponding increases in the threshold salary for the exemption. The value of any payments in kind, or other forms of remuneration (such as employer provided meals or lodging) cannot be used as a credit against this required minimum salary. The legislative intent in switching from remuneration to salary was to explicitly adopt the federal salary basis test, to the extent that it is consistent with California wage and hour law. Thus, employees who are paid on the basis of an hourly wage, or commissions, or piece rates, cannot be exempt from payment of overtime under the administrative, executive or professional exemptions.

We have been asked whether a part-time employee working in a bona fide executive, administrative, or professional capacity (that is, one who is "primarily engaged" in such exempt work) can be exempt if he or she is paid a monthly salary that is less than the full-time salary equivalent of twice the minimum wage, but not less than the applicable percentage of the minimum monthly required salary, based on the proportion of time that the part-time employee works in relation to a full time, forty hour week. For example, can an attorney employed by a law firm on a part-time 20 hour per week basis, be exempt if paid a monthly salary of \$1,000? The answer to that question is no; we do not believe that this monthly minimum required salary can be reduced, even if the ostensibly exempt employee is scheduled to work less than 40 hours per week. An exempt employee is expected to exercise discretion and independent judgment in order to decide the number of hours to devote to a particular task, and cannot be expected to confine his or her work hours to a set schedule, as any such employer-imposed limitation on hours worked would be inconsistent with the discretion and independent judgment that is the hallmark of exempt work. Section 515(a)'s requirement of "a monthly salary equivalent to no less than two times the state minimum wage for full-time employment," simply serves to set the amount of the required monthly salary as a multiple of the minimum wage; and not to permit reductions of this monthly threshold salary for employees who work less than 40 hours per workweek.

As was the case under the IWC orders, section 515(f) provides that the professional exemption shall not apply to registered nurses. Another bill that was passed and signed by the Governor this year, AB 651, provides that the professional exemption shall not apply to pharmacists, a category of workers who formerly were expressly exempted, under the IWC orders, as licensed professionals.

AB 60 does not define the duties that characterize exempt work. Section 515(a) gives the IWC the task of "reviewing the duties which meet the test of the exemption," and then, if the IWC chooses, it may convene public hearings to adopt or modify regulations pertaining to these duties. Under the existing IWC orders, the duties are spelled out only in the broadest terms --- "work which is primarily intellectual, managerial or creative, and which requires the exercise of discretion and independent judgment." In enforcing the IWC orders, DLSE has out of necessity come to rely upon the federal regulations, and federal case law, which define the terms "executive", "administrative" and "professional" for purposes of the exemptions, to the extent that these federal definitions are not inconsistent with state law. We do not know yet whether the IWC will decide whether to adopt specific definitions for these terms. Absent the adoption of such definitions, we will continue to follow existing DLSE interpretations, as set out in our opinion letters, of these terms. (See, for example, opinion letters dated 1/7/93 and 10/5/98.)

Meal Period Requirements: Section 6 of AB 60 adds section 512 to the Labor Code, which codifies the requirements for meal periods during the workday. These provisions are somewhat confusing, and there have been many questions as to whether AB 60 puts an end to "on-duty meal periods." That term is used in the IWC orders to describe a meal period during which the employee is not relieved of all duty regardless of the length of time of the meal period, or that is less than 30 minutes long regardless of whether the employee is relieved of all duty. Under the IWC orders, an "on-duty meal period" is permitted only (1) when the nature of the work prevents the employee from being relieved of all duty, and (2) when the employee and employer have entered into a written agreement permitting an on-duty meal period. An employee must be paid for the entire on-duty meal period; that is, it constitutes time worked.

We believe that AB 60 does not prohibit "on-duty meal periods". Had the Legislature intended to accomplish that, the bill would have expressly done so. Instead, the term "on-duty meal period" is not found anywhere in the text of AB 60. Section 512 provides that a meal period of no less than 30 minutes must be provided to any employee who is employed for a work period of more than five hours per day. However, this meal period can be waived by mutual consent of the employee and the employer if the total daily work period does not exceed six hours. A second meal period of no less than 30 minutes must be provided to any employee who is employed for a work period of more than 10 hours in a day, however, this second meal period can be waived by mutual consent if the worker does not work more than 12 hours that day, and if the first meal period was not waived. Of course, since the first meal period cannot be waived if there were more than 6 work hours in a day, it would seem that no employee working more than 10 hours in a day could have waived the first meal period. In any event, whenever a worker is employed for more than 12 hours in a day, the second meal period cannot be waived.

The confusion over whether AB 60 ends "on-duty meal periods" stems from a misunderstanding of the term "meal period" and the meaning of the provisions that limit the ability to mutually agree to a waiver of the meal period. The term "meal period" includes both the on-duty paid and off-duty unpaid variety. If the prerequisites (as defined in the IWC orders) for an on-duty meal period are met, then an on-duty meal period may be established. Even though the employee is required to work during the on-duty meal period, the employee must be given the opportunity, while working if necessary, to eat his or her meal. That is what cannot be waived, if the work period exceeds six hours, and if an on-duty meal period has been properly established. On the other hand, if the prerequisites for an on-duty meal period have not been met, the limits on waiver of the meal period apply to the employee's right to take an off-duty meal period.

The IWC will continue to have an important role in defining meal period requirements, as section 10 of AB 60 adds section 516 to the Labor Code, which provides that notwithstanding any other provision of law, the IWC may adopt or amend regulations regarding meal periods, break periods, and days of rest.

Day of Rest Requirement: AB 60 does not amend existing Labor Code sections 551 and 552, which provide that every employee is entitled to one day's rest in seven, and that no employer shall cause its employees to work more than six days in seven.

Section 12 of AB 60 makes some minor changes to Labor Code §554, which, among other things, permits an accumulation of days of rest when the nature of the employment reasonably requires that the employee work seven or more consecutive days, providing that in each calendar month the employee receives days of rest equivalent to one day's rest in seven. The most significant change to section 554 is that it now specifies that employees covered by IWC Order 14 (agricultural occupations) are not covered by this chapter of the Labor Code (starting with Labor Code §500), except for Labor Code section 558, so that employers of such employees will be subject to civil citations for violations of the overtime provisions of Order 14.

Section 13 of AB 60 makes some minor changes to Labor Code §556, which provides that sections 551 and 552, the sections which mandate one day's rest in seven, shall not apply to any employer or employee when the total hours of employment do not exceed 30 hours in a week or six hours in any one day of that week. We have been asked whether an employee who works such a part-time schedule would be entitled to seventh day premium pay, pursuant to section 510. The answer is yes, seventh day premium pay is required under section 510 if the worker works seven consecutive days in a workweek, regardless of the total number of hours worked during that workweek or during any of the days during that workweek. Section 556 does not exempt part-time workers from the requirements of seventh day premium pay.

Enforcement: As discussed earlier in this memo, section 14 of AB 60 adds section 558 to the Labor Code, which establishes a civil penalty citation system as a mechanism for enforcing the overtime provisions of both AB 60 and the IWC orders. The citation may include: 1) a civil penalty that is payable to the State (set for an initial violation, which we interpret as a first citation, at \$50 per employee per pay period for which the employee was underpaid; and for a subsequent violation, at \$100 per employee per pay period in which the employee was underpaid), and 2) an additional amount representing the unpaid overtime wages owed to the employees, with any such wages that are recovered to be paid by DLSE to the affected employees. By allowing for inclusion of unpaid wages as a component of the amount assessed, overtime citations differ from minimum wage civil penalty citations under Labor Code §1197.1, which do not include an unpaid wage component. This unpaid overtime wage component of the assessment provides DLSE with a significant enforcement mechanism, and a means of expeditiously pursuing the collection of unpaid overtime wages.

Employer Appeal Rights: Section 558(b) provides that the procedures for issuing, contesting and enforcing judgments for civil penalty citations for overtime violations shall be the same as the procedures governing minimum wage citations under Labor Code §1197.1. Thus, an employer will have 15 business days from the date the citation is issued to request an appeal hearing. The hearing must then be held within 30 days of a timely request. The decision of the Labor Commissioner's hearing officer, either affirming, dismissing or modifying the proposed assessment, must be served on the parties within 15 days of the conclusion of the hearing. The employer then has 45 days from the date the decision is served to file a petition for a writ of administrative mandate. If no writ petition is timely filed, then the Labor Commissioner's decision becomes due and payable, and is entered as a clerk's judgement. If a writ petition is filed, the court will review the administrative record to determine whether the evidence presented at the hearing before the Labor Commissioner supports the findings and whether the Labor Commissioner's decision correctly applies the law. Since court review is by way of writ, rather than de novo trial, it is critical to present the necessary evidence at the administrative hearing to establish an adequate administrative record.

Of course, the civil penalty provision of section 558 is not the only means available to DLSE for enforcing a worker's right to overtime compensation. DLSE can still prosecute overtime violations as it has in the past, by filing a civil action pursuant to Labor Code §1193.6. DLSE also can, of course, continue to adjudicate individual employee wage claims through the section 98 Berman hearing process.

We have received several inquiries as to whether "willfulness" is a required element for the issuance of a civil penalty for overtime violations. The answer is no, there is no requirement of "willful" underpayments. The word "willful" or "intentional" does not appear in section 558. Had the Legislature intended to make "willfulness" a requirement, they would have done so expressly, as in Labor Code section 203. It is therefore our conclusion that purported absence of willfulness is not a defense to the imposition of penalties under section 558.

We have also been asked whether meal period violations will be subject to civil penalty citations under section 558. At first blush, the statute authorizes the issuance of a citation for a violation of "a section of this chapter or any provision regulating hours and days of work in any [IWC] order," so that violations of the meal period requirements of section 512 would appear to be subject to civil penalty citations. But the manner in which civil penalties are calculated -- \$50 or \$100 per underpaid employee per pay period in which the employee was underpaid, plus the amount of the underpaid wages -- makes it clear that a violation of meal period requirements will not result in the imposition of a civil penalty under section 558, unless the meal period violation is coupled with a failure to pay the employee for the time worked during the unlawfully deprived meal period. In other words, as long as the employee was paid at the appropriate regular or overtime rate for the time worked during what should have been his or her meal period, the employer is not subject to a penalty. However, if an employee is not given a meal period as required by section 512, and is not paid for such time worked (either at the regular rate or at the overtime rate, whatever may be required), a penalty citation may be issued in accordance with section 558.

We have also received inquiries as to whether penalties will be assessed against an employer's payroll clerk, payroll supervisor, or a payroll processing service for failure to issue checks that contain required overtime compensation. This question is prompted by the expansive language of section 558, which makes "any employer or other person acting on behalf of an employer" subject to a penalty citation. Regardless of the expansive sweep of this language, DLSE does not intend to issue penalty citations to any individual persons who do not formulate policies that lead to non-payment of required overtime compensation. In general, penalties will be issued against the legal entity that is the employer. To the extent that DLSE may, on appropriate occasions, decide to go beyond this legal entity in imposing liability, we would not anticipate going beyond the definition of employer found in each of the IWC orders. That definition includes 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." Thus, in appropriate instances, corporate officers or managers may be included as defendants in a penalty citation pursuant



to section 558.

Labor Code section 553, which was not amended by AB 60, offers another method of enforcing AB 60's provisions. Section 553 provides that "any person who violates this chapter," which now includes the overtime provisions of AB 60, "is guilty of a misdemeanor."

Special Industries: Existing provisions of the Labor Code contain special workday or workweek requirements or exemptions relating to employees of ski establishments (section 1182.2), commercial fishing boats (section 1182.3), licensed hospitals (section 1182.9), and stable employees engaged in the raising, feeding or training of racehorses (section 1182.10). Sections 16 to 19 of AB 60 amends these statutes to provide for their repeal effective July 1, 2000, unless the Legislature enacts a statute prior to that date extending these special provisions. Of course, the IWC may choose to maintain, or modify, the exemptions for these industries pursuant to Labor Code section 515(b).

*cited in Mendoza v. Nordstrom, No. 12-57130 archived on February 11, 2015*