

Alternative Workweek

by D. Gregory Valenza and Matthew J. Norfleet

The eight-hour workday is a founding principle of organized labor in the United States. The famous Haymarket Square riots in Chicago in 1886 resulted in the deaths of seven police officers when one of the attendees threw a bomb at the advancing riot squad. Although there was no evidence that union leaders threw the bomb or even knew of its existence, they were executed for inciting the riot by holding a rally for an eight-hour day.

The California Legislature has declared that the eight-hour workday and 40-hour workweek are the default hours of work as a matter of public policy. To implement this policy, California law requires employers to pay employees overtime premiums more generously than under federal law. For example, California employees earn overtime pay when they work more than eight hours in a day, even if they work fewer than 40 hours in the week; federal law does not have a daily overtime pay requirement.

Yet legislators understand that some employees would prefer to work fewer days per week without sacrificing work hours and that employers liable for daily overtime likely would not accommodate them. California therefore permits certain "alternative workweek" arrangements as a narrow exception to the general overtime rules. Perhaps by design, the rules regarding alternative workweeks are detailed and tricky. Employers that fail to comply with these rules may be liable for unpaid overtime, interest, penalties and attorney fees.

The federal Fair Labor Standards Act of 1938 requires most employers nationwide to pay employees subject to the act overtime (time-

and-a-half) wages after 40 hours worked in one workweek. The act applies to most employers engaged in interstate commerce with sales revenue over \$500,000. Employees who earn certain levels of income and who are engaged in certain duties (such as managers, licensed professionals and others) may be exempt from the overtime pay requirements.

The act does not require overtime pay until the employee exceeds 40 hours of work for the week, no matter how many hours he or she works in a given day. Federal law, for example, would allow employees to work 40 hours consecutively without overtime, as long as they worked only one 40-hour shift per week.

Overtime in California is governed by statute and a system of 17 "industry" and "occupation" wage orders issued by the Industrial Welfare Commission. The Division of Labor Standards Enforcement is the state agency responsible for enforcing minimum wage, overtime and related employment laws in California. Which wage order covers a given employer is not always obvious. Sometimes, all employees are governed by an industry wage order. In other situations, more than one occupation wage order may cover different groups of employees working in a single business.

Like under the Fair Labor Standards Act, some employees are considered exempt from overtime, including executive, administrative and professional employees, as well as outside salespeople and others. For nonexempt employees, the California Labor Code requires overtime pay, in most cases, when an employee has worked more than eight hours

in a day or 40 hours in a week. The rate is $1\frac{1}{2}$ times the "regular" rate of pay, which also applies to the first eight hours worked on the seventh day in a workweek. The rate becomes twice the regular rate for hours worked in excess of 12 in one day and hours worked over eight on the seventh consecutive day. Because the act does not pre-empt more-generous state laws, California employers must follow these provisions.

The Industrial Welfare Commission experimented with relaxing the daily overtime regulations in 1997 and 1998, permitting employees to agree to a weekly overtime requirement like that applied under the act. Although so-called flextime schedules were popular with employers and some employees, others resented the loss of daily overtime pay. In response to the commission's weakening of daily overtime requirements, the California Legislature passed the "Eight-Hour Day Restoration and Workplace Flexibility Act of 1999," known as AB60, which reinstated the requirement that employees receive overtime after eight hours in a day.

AB60 retained the narrow alternative workweek exceptions that existed before the commission's 1997 action weakening daily overtime requirements. The alternative workweek provisions permit employees to approve an alternative workweek schedule by a two-thirds majority in a secret ballot. Under most wage orders (Wage Orders 14 and 15, applying to employees in agricultural and household occupations, do not allow alternative workweek elections), the alternative schedule must be proposed to the employees in a written document that specifies the number of days each week and the number of

hours per day employees will be scheduled to work. The actual days of the week and times of day need not be specified so long as the number of days and number of hours per day are clearly stated.

At least 14 days in advance of the election, the employer must hold a meeting, on company time, to discuss the proposed schedule changes and the effect of the alternative schedule on overtime earnings and benefits. The employer may not reduce hourly base wages in any way because of an alternative workweek schedule. The materials must be presented in a non-English language if more than 5 percent of the work unit speaks primarily another language.

All employees in the affected work unit must be allowed to vote. The work unit can be any readily identifiable category or subcategory of employees, so long as the limitations are logical. For example, all steamfitters could be a work unit, or everyone who works in the warehouse, or everyone who works the swing shift. However, the work unit may not be defined as only those employees who are willing to give up their right to daily overtime. For construction, drilling, mining and logging employees under Wage Order 16, some special rules apply regarding which employees may be included in the work unit.

As stated, the alternative schedule must be approved by two-thirds of the number of employees in the work unit, as opposed to two-thirds of the people who vote. Therefore, an employee's failure or refusal to vote is the same as a "no" vote. If the work unit comprises 60 employees and 39 employees vote unanimously to approve, the alternative schedule fails. The results of the election must be reported to the state Division of Labor Statistics and Research.

Employers have the option of unilaterally implementing any work schedule to meet business needs as long as it pays overtime as required.

Employers should be careful to follow the election procedures. Failure to follow the pre-

election disclosure requirements can result in the election being voided retroactively. This could result in a huge back-pay overtime liability if employees were working under the alternative schedule when the election is deemed void. Failure to pay overtime timely also could result in substantial penalties assessed against the employer, as well as pre-judgment interest.

If an alternative schedule is approved, employees in the work unit can hold a recall election if one-third of the work unit signs a petition to hold another election. Employees may request a repeal election no more than once per year (except under Wage Order 16). If two-thirds of the employees vote to repeal the alternative schedule, the employer has 60 days either to reinstate the traditional eight-hour day schedule or to pay overtime for all hours worked past eight hours per day.

One of the most significant limitations of the alternative workweek schedule is that employees waive their right to daily overtime only up to 10 hours per day. Employees must be paid overtime if they work more than 10 hours in a day or 40 hours in a week. Employees also must receive double-time pay if they work more than 12 hours in a day. In its simplest form, alternative workweek schedules permit employees to work a so-called 4-10 schedule without incurring overtime. Employees under that schedule would work four days per week, 10 hours per day and regularly have three days off.

Although there are exceptions for occasional variations, the number of days must be consistent from week to week. However, the number of days need not be the same. For example, a 9-80 schedule would be acceptable under which employees work nine hours per day and take one additional day off every other week, as long as the pattern is occurring regularly. Under Wage Orders 1, 2, 3, 6, 7, 8, 11, 12 and 13, the proposed alternative schedule must include at least two consecutive days off. Under all wage orders except 16, no scheduled shift can be fewer than four hours.

Further, the employer must make good-faith

efforts to accommodate an employee who was eligible to vote in the election but cannot work the alternative schedule for personal reasons. There is no duty to accommodate new hires who start work under the alternative schedule. However, an employer could choose to accommodate a new employee without invalidating the schedule.

In 2004, Yoplait yogurt employee William Mitchell challenged an alternative workweek schedule that comprised three 12-hour days and one six-hour day. The company paid time-and-a-half overtime for the 11th and 12th hours of each day. Thus, the employees were paid overtime for each hour over 10 for the day and over 40 for the week. Formerly, only the employees working in the health care industry were permitted to work 3-12 schedules without the employer having to pay daily overtime.

The employee attacked the schedule as illegal at a hearing before the labor commissioner, who held that because the employees were regularly scheduled to work more than 10 hours per day, the alternative schedule was invalid and all employees were owed overtime for all hours worked over eight each day. The employer appealed the decision to the Superior Court, which held that the Labor Code permits an alternative workweek schedule of up to 12 hours per day, even though overtime can be waived only up to 10 hours a day. Because Yoplait paid some overtime under its alternative schedule, the court found it was valid.

Yoplait was issued an unusual Superior Court appellate division decision. A Superior Court appellate division is subordinate to the Court of Appeal and the state Supreme Court, making it easily reversed. In addition, the Division of Labor Standards Enforcement had developed a reputation for refusing to accept court decisions that disagreed with its interpretations, and some employers were reluctant to rely on an intermediate court in face of the dogged enforcement tactics of the division. However, in January, the division revised its enforcement manual to incorporate

the Yoplait standards. With the understanding that they may incur overtime beyond 10 hours per day, employers can now consider alternative workweek schedule proposals that include 12-hour shifts. Work over 12 hours per day requires double-time pay.

Because the law and public policy favor eight-hour workdays and the payment of overtime, alternative arrangements are notoriously difficult to implement without running afoul of the requirements. To avoid challenges to alternative workweek schedules, employers should ensure that election procedures and documentation comply with the applicable wage order.

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