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One Option for Reducing Overtime Liability: The Adoption of Alternative Workweek Schedules

by Jennifer Brown Shaw

Ever since the California Legislature implemented the “daily overtime” law several years ago, which generally requires the payment of overtime if an employee works more than eight hours in a workday, employers have looked for ways to reduce their overtime liability. Some employers have adopted alternative workweek schedules (e.g., four ten-hour days per week, etc.) as part of this effort. Unfortunately, however, these schedules are not always implemented according to the strict requirements of California law.

In short, alternative workweek schedules permit many employers to avoid paying daily overtime to employees who do not work more than 40 hours a week. Obviously, both employers and employees can benefit from such arrangements. For example, employers may reduce energy costs by having their businesses closed for additional days per week, or may enjoy other benefits unique to their operations. Employees may benefit by reducing their commuting costs and enjoying more flexibility in their work schedule than is available under a traditional eight-hour/five-day workweek.

The maximum number of daily hours that may be regularly scheduled as part of an alternative workweek is currently the subject of debate. For most employers, the Division of Labor Standards Enforcement (“DLSE”) has taken the position that the maximum number of daily hours regularly scheduled in an alternative workweek is 10. (An excep-

tion to the 10-hour requirement is expressly set forth in the wage orders for the health-care industry, which permits the adoption of alternative schedules which include regular 12-hour workdays.)

In contrast, an appellate division of the Los Angeles Superior Court, in *Mitchell v. Yoplait*, concluded last year that non-healthcare employers are permitted to adopt alternative workweek schedules which include regularly scheduled 12-hour days. This ruling obviously contradicts the DLSE’s current interpretation, although it is was not a published decision.

A review of the historical development of the daily overtime requirement, the language of the applicable wage orders and statutes, and the reasoning of the *Mitchell* decision is helpful in understanding this controversy, and in evaluating what alternative schedules may be permissible.

Historical Overview of Daily Overtime and Alternative Workweeks

California has a long history of requiring daily overtime pay, first imposing the requirement for women 1911. Daily overtime for men was not mandated until 1980. In 1998, the Industrial Welfare Commission (“IWC”) removed the daily overtime requirement from most of California’s wage orders. Soon thereafter, the California Legislature returned California to daily overtime, passing the “Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999”

(the “Act”). The Act not only restored the requirement of payment of overtime for any work performed in excess of eight hours in a day for most employees, but also established procedures for the adoption of alternative workweeks.

Overview of Procedures for Adoption of an Alternative Workweek

Employers may propose alternative workweek schedules to “work units” within the employer’s business. A “work unit” is defined in the wage orders to include all employees in a readily identifiable work unit, such as a division, a department, a job classification, a shift, a separate physical location, or a recognized subdivision of any such work unit. A work unit may consist of one employee as long as the requirements for an identifiable work unit are met.

The employer’s proposed alternative schedule must be approved by a two-thirds vote of the affected employees in the work unit. The vote must be conducted by secret ballot at the workplace. At least 14 days prior to the vote, the employer must disclose in writing and hold a meeting regarding effects of the alternative workweek on the employees’ wages, hours and benefits. The employer must mail the written disclosure to all employees who do not attend the meeting.

Employees may repeal a duly-adopted alternative workweek schedule by a two-thirds vote of the affected employees. An employer must conduct a new secret ballot election

to repeal the alternative schedule upon the petition of one-third of the affected employees. Also, an election must be held within 30 days of the petition except where the alternative workweek has been in place for less than a year. An interval of at least 12 months is required between adoption and repeal elections except in special circumstances. An employer can unilaterally rescind an alternative workweek schedule without an election so long as proper notice is provided to the affected work units.

Although an employer is not permitted to intimidate or coerce employees regarding their vote, employers are permitted to state their opinions regarding the alternative workweek schedule. Similarly, employees may not be discharged or discriminated against for expressing opinions for or against the adoption or repeal of an alternative workweek schedule.

Employers must report the results of secret ballot elections to the Division of Labor Statistics and Research in San Francisco within 30 days after the results are final. Employers cannot force employees to work the new schedule immediately. The new schedule can be implemented within 30 days of the announcement of the final result of the vote.

Although an employer can implement an alternative workweek schedule for all employees in work unit upon a two-thirds vote of the affected employees in that work unit, the employer must make a reasonable effort to provide employees who cannot work the alternative schedule with a schedule consisting of not more than eight hours per day. In addition, an employer who implements an alternative workweek schedule must explore reasonable alternatives when the religious beliefs of the employee conflict with the alternative schedule.

Different Interpretations: Rigidity vs. Flexibility

The DSLE has taken a rigid approach in interpreting the alternative workweek statutes and regulations, limiting the maximum daily hours in an alternative schedule to 10, except for healthcare employees. The DLSE bases its interpretation on the language of Labor Code section 511, focusing on subdivision (a), which states: “[u]pon 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 of . . . overtime”

In contrast, the court in *Mitchell v. Yoplait* took a different approach, deciding that non-healthcare employers could adopt alternative schedules with 12-hour workdays. Relying on the principal that a statute must be read in context, giving effect to all its provisions, the court concluded that subdivision (b) of Labor Code section 511 evidenced a legislative intent to permit alternative schedules which include 12-hour workdays. Subdivision (b) provides: “[a]n affected employee working longer than eight hours but not more than 12-hours in a day pursuant to an alternative workweek schedule . . . shall be paid an overtime rate of compensation of no less than one and one-half times the regular rate of pay of the employee for any work in excess of the regularly scheduled hours established by the alternative workweek agreement and for any work in excess of 40 hours per week. An overtime rate of compensation of no less than double the regular rate of pay . . . shall be paid for any work in excess of 12 hours per day and for any work in excess of eight hours on those days worked beyond the regularly scheduled workdays established by the alternative workweek”

Reading subdivisions (a) and (b) together, the court concluded the Legislature intended to permit alternative workweek schedules which included 12-hour days, as long as hours worked over 10 hours in a day was compensated at the overtime rate. The court noted its reading of the statute was consistent with the legislative history. An analysis of Assembly Bill 60 stated that the purpose of the bill was not to limit the overall number of hours in an alternative workweek shift, but rather to “limit . . . alternative schedules to not more than 10 hours a day without triggering daily overtime.” In addition, the drafters of the analysis noted the purpose of the statute was to allow “a menu of alternative workweek options rather than a single choice such as a 4/10 (four ten hour day) schedule.”

Based on its reading of the statute, the court concluded Yoplait’s alternative schedule of three 12-hour days and one six-hour day each week was compatible with the statutory scheme. Yoplait paid its employees overtime for the last two hours of every 12-hour workday, satisfying the requirements of both subdivisions (a) and (b) of Labor Code section 511. Recommendations

Employers should proceed with caution before implementing an alternative workweek schedule which includes 12-hour days. First, the court’s decision in the Yoplait case is not binding precedent because it was issued by the appellate division of a superior court. In addition, the DLSE continues to take the position that non-healthcare employers may not avoid the daily overtime requirement by adopting alternative workweek schedules with regularly scheduled 12-hour days. Until these different readings of the alternative workweek statute are resolved through legislative or judicial action, an employer who adopts an alternative workweek schedule which includes regularly scheduled 12-hour days could be the subject of an enforcement action by the DLSE or an action brought by

employees for daily overtime for any hours worked over eight hours in a day.

An employer that chooses to proceed with implementing an alternative workweek schedule should take appropriate steps to ensure compliance with the requirements discussed above, including holding the pre-election meeting and preparing appropriate disclosures. The applicable wage orders for each industry/profession describe the requirements in detail. A copy of the wage orders can be obtained from the Department of Industrial Relations' website at www.dir.ca.gov/iwc.

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