Case No. S246711

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ZB, N.A. and ZIONS BANCORPORATION,

Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO,

Respondent;

KALETHIA LAWSON,

Real Party in Interest.

After a Decision by the Court of Appeal
Fourth Appellate District, Division One

Case Nos. D071279 & D071376 (Consolidated)

REAL PARTY IN INTEREST KALETHIA LAWSON'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF ANSWERING BRIEF; DECLARATION OF KRISTIN M. GARCÍA; PROPOSED ORDER

*Michael Rubin (SBN 80618)
mrubin@altber.com
Kristin M. García (SBN 302291)
kgarcia@altber.com
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, California 94108
Telephone: (415) 421-7151
Facsimile: (415) 362-8064

Edwin Aiwazian (SBN 232943)
edwin@lfjpc.com
Arby Aiwazian (SBN 269827)
arby@lfjpc.com
Joanna Ghosh (SBN 272479)
joanna@lfjpc.com
LAWYERS *for* JUSTICE PC
410 West Arden Avenue, Suite 203
Glendale, California 91203
Telephone: (818) 265-1020
Facsimile: (818) 265-1021

Attorneys for Plaintiff and Real Party in Interest
KALETHIA LAWSON

REAL PARTY IN INTEREST KALETHIA LAWSON'S REQUEST FOR JUDICIAL NOTICE

Pursuant to Rules 8.520(g) and 8.252(a) of the California Rules of Court and Evidence Code §§ 451, 452, 453, and 459, Real Party in Interest Kalethia Lawson moves for judicial notice of Exhibits 1 through 6 of the accompanying Declaration of Kristin M. García.

Under Evidence Code §459, reviewing courts, including the Supreme Court, have the same power as trial courts to take judicial notice of matters that are properly the subject of judicial notice. (*Aguilar v. Atlantic Ritchfield Co.* (2001) 25 Cal.4th 826, 842 n.3.) Evidence Code §459(a) requires a reviewing court to take judicial notice of any matter that the trial court would have been required to notice under Sections 451 or 453 and permits a reviewing court to take judicial notice of any matter specified in Section 452. Evidence Code §452(c) permits the court to take judicial notice of "[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States." Evidence Code §452(h) permits the court to take judicial notice of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." Evidence Code §453 provides that such judicial notice is mandatory under the circumstances presented here: "The trial court shall take judicial notice of any matter specified in Section 452 if a party requests it and: (a) Gives each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable

such adverse party to prepare to meet the request; and (b) Furnishes the court with sufficient information to enable it to take judicial notice of the matter."

As explained below, Exhibits 1 through 6 to the García Declaration are judicially noticeable under these provisions. Real Party in Interest Lawson respectfully requests this Court to take judicial notice of these documents because they will assist the Court in resolving the issues of statutory interpretation presented in this case. The trial court and the Court of Appeal were not asked to take judicial notice of these materials.

Exhibits 1 and 2 to the García Declaration are true and correct copies of excerpts from the 1999 Regular Session Governor's Chaptered Bill File for Chapter 134 (AB 60) and are "[o]fficial act[s]" under Evidence Code §452(c). The Governor's Chaptered Bill Files are maintained by the Governor's Office for each legislative bill signed into law. (See "Legislative Resources," California Secretary of State, *available at* http://www.sos.ca.gov/archives/collections/-legislative-resources (García Decl. ¶4, Ex. 3).) The Governor's Chaptered Bill File for Chapter 134 (AB 60) comprises a portion of the legislative history of Chapter 134, and, relevant here, Section 558 of the Labor Code.

The Governor's Chaptered Bill Files are routinely the subject of judicial notice. (See, e.g., *Newark Unified Sch. Dist. v. Superior Ct.* (2015) 245 Cal.App.4th 887, 901 & n.5; *In re Ramon A.* (1995) 40 Cal.App.4th 935, 940 & n.1.) These Exhibits will assist the Court in understanding the legislative history

of Section 558 of the Labor Code, and as true and correct copies of Enrolled Bill Reports prepared by the Departments of Finance and the Industrial Relations, these Exhibits are comparable to other legislative history materials that this Court has found instructive regarding legislative purpose and the contemporaneous construction of a statute as it was understood at the time of passage. (See, e.g, *In re Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1218 n.3; *Lolley v. Campbell* (2002) 28 Cal.4th 367, 375-76.)

Exhibit 3 to the García Declaration is a true and correct copy of the "Legislative Resources" page of the California Secretary of State's website, available at http://www.sos.ca.gov/archives/collections/legislative-resources/. The publication of that document is both an "[o]fficial act" under Evidence Code §452(c) and a "[f]act[] and proposition[] that [is] not reasonably subject to dispute and [is] capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy" under Evidence Code §452(h). (See, e.g., *Hunt-Wesson Foods, Inc. v. County of Alameda* (1974) 41 Cal.App.3d 163, 180 [judicial notice properly taken of assessor's handbook, published by county assessor's office]; *White v. State of California* (1971) 21 Cal.App.3d 738, 742-43 & n.1 [judicial notice properly taken of U.S. Army Corps of Engineers publication entitled, "Water Resources Development in California"]; see also *Ampex Corp. v. Cargle* (2005) 128 Cal.App.4th 1569, 1573 n.2 [taking judicial notice of documents from website]; *Gentry v. eBay, Inc.* (2002) 99 Cal.App.4th 816, 821

n.1 [taking judicial notice of information posted on website]; *Smith v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 117, 122 n.3 [taking judicial notice of records of administrative agency].) Exhibit 3 will assist the Court in resolving the issues presented in this case because it provides basic information about the resources available to research the legislative history of California Labor Code §558, whose interpretation is a central question in this case. Real Party in Interest Lawson requests the Court to take judicial notice of the publication of Exhibit 3 and of the facts set forth therein.

Exhibits 4 through 6 to the García Declaration are true and correct copies of manuals and a memorandum produced by state agencies: excerpts of a 2002 manual of the California Division of Labor Standards Enforcement (DLSE), a memorandum written by the State Labor Commissioner to DLSE employees after passage of AB 60, and an excerpt from the California Department of Finance Manual of State Funds. These publications are "[o]fficial act[s]" of California administrative departments under Evidence Code §452(c), and the DLSE manual and other such documents have previously been subjects of judicial notice. (See, e.g., *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949, 956 n.1 [taking judicial notice of "DLSE's Interpretation and Enforcement Manual"]; *Rodriguez v. E.M.E., Inc.* (2016) 246 Cal.App.4th 1027, 1044 n.9 [taking judicial notice of an IWC Manual and opinion letter].) Exhibits 4 and 5 will assist the Court in resolving the issues presented in this case by providing further

understanding of the legislative history and purpose behind Section 558 as well as the procedures applied to the Labor Commissioner's enforcement actions under Section 558. (See *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1388 ["The contemporaneous construction of a new enactment by the administrative agency charged with its enforcement, although not controlling, is entitled to great weight."].) Exhibit 6 provides similar information about the California Department of Finance's interpretation of Labor Code §96.7, which governs the State's recovery of unpaid wages and is also relevant to this case. (See *Prof'l Eng'rs in Calif. Gov't v. Brown* (2014) 229 Cal.App.4th 861, 867 n.3 [taking judicial notice of publications by California's Department of Finance].)

For these reasons, Real Party in Interest respectfully requests that the Court take judicial notice of the documents discussed above.

Dated: July 9, 2018

Respectfully submitted,

Edwin Aiwazian
Arby Aiwazian
Joanna Ghosh
LAWYERS *for* JUSTICE PC

Michael Rubin
Kristin M. Garcia
ALTSHULER BERZON LLP

Michael Rubin

Attorneys for Plaintiff and Real Party in Interest
KALETHIA LAWSON

DECLARATION OF KRISTIN M. GARCÍA

I, Kristin M. García, declare as follows:

1. I am a member in good standing of the California State Bar and the bar of this Court, and am co-counsel for Plaintiff and Real Party in Interest Kalethia Lawson. I make this declaration based upon my personal knowledge.

2. Attached as Exhibit 1 is a true and correct copy of excerpts of the Regular Session Governor's Chaptered Bill File for Chapter 134 (AB 60), which include the cover page for the Chaptered Bill File and the California Department of Finance bill analysis of AB 60.

   a. This copy of the Governor's Chaptered Bill File was accessed at the University of California Hastings Law Library on June 6, 2018. The file is stored on microfilm that corresponds to the 1999 Regular Session and the particular file for Chapter 134. Exhibits 1 and 2 are excerpts of the portions of the Governor's Chaptered Bill File for Chapter 134.

3. Attached as Exhibit 2 is a true and correct copy of excerpts of the Regular Session Governor's Chaptered Bill File for Chapter 134 (AB 60), which include the cover page for the Chaptered Bill File and the California Department of Industrial Relations bill analysis of AB 60.

4. Attached hereto as Exhibit 3 is a true and correct copy of the "Legislative Resources" page of the California Secretary of State's website.

Exhibit 3 contains the California Secretary of State's description of the contents of the Governor's Chaptered Bill File. The California Secretary of State's website is publicly available and can be accessed at <http://www.sos.ca.gov/archives/ collections/legislative-resources/>. I accessed this website on July 6, 2018.

5. Attached as Exhibit 4 is a true and correct copy of a December 23, 1999, memorandum from Miles E. Locker, Chief Counsel for the Labor Commissioner, and Marcy V. Saunders, State Labor Commissioner, to staff of the Division of Labor Standards Enforcement with the subject line: "Understanding AB 60: An In Depth Look at the Provisions of the "Eight Hour Day Restoration and Workplace Flexibility Act of 1999.'"

a. This document is publicly available on the website of the California Department of Industrial Relations at the following address: https://www.dir.ca.gov/dlse/AB60update.htm. I accessed this document on June 4, 2018.

6. Attached as Exhibit 5 is a true and correct copy of excerpts of a DLSE document entitled "The 2002 Update of The DLSE Enforcement Policies and Interpretations Manual (Revised)." Portions of the Manual, including §9.1.12, were updated in December 2017.

a. This document is publicly available on the website of the

State of California Department of Industrial Relations at the following address: https://www.dir.ca.gov/dlse/dlsemanual/DLSE_EnfcManual.pdf. I accessed this document on July 6, 2018.

7. Attached as Exhibit 6 is a true and correct copy of an excerpt of the California Department of Finance Manual of State Funds regarding the Industrial Relations Unpaid Wage Fund.

a. This document is publicly available on the website of the State of California Department of Finance at the following address: http://www.dof.ca.gov/budget/Manual_State_Funds/Find_a_Fund/documents/0913.pdf. I accessed this document by going to the Department of Finance Manual of State Funds website at http://www.dof.ca.gov/budget/Manual_State_Funds/, clicking "Find a Fund" and choosing "0913 Industrial Relations Unpaid Wage Fund." I accessed this document on July 6, 2018.

I declare under penalty of perjury that the foregoing is true and correct. Executed this July 9, 2018, at San Francisco, California.

Kristin M. Garcia

[PROPOSED] ORDER GRANTING REQUEST FOR JUDICIAL NOTICE

Pursuant to Rule 8.252(a) of the California Rules of Court and Evidence Code 459, Petitioner's Request for Judicial Notice in Support of Answering Brief filed on July 9, 2018 is GRANTED. The Court will take judicial notice of the matters designated in Petitioner's request and attached to the Declaration of Kristin M. García.

Date: _____ _____ J.

PROOF OF SERVICE

Case: LAWSON v. ZB, N.A.
Fourth Appellate District, Division One, Case Nos. D071279 & D071376 (Consolidated)
San Diego County Superior Court; 37-2016-00005578-CU-OE-CTL

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within action; my business address is 177 Post Street, Suite 300, San Francisco, California 94108. On July 9, 2018, I served the following document(s):

REAL PARTY IN INTEREST KALETHIA LAWSON'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF ANSWERING BRIEF; DECLARATION OF KRISTIN M. GARCÍA; PROPOSED ORDER

on the parties, through their attorneys of record, by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

By First Class Mail: I am readily familiar with the practice of Altshuler Berzon LLP for the collection and processing of correspondence for mailing with the United States Postal Service. I placed the envelope, sealed and with first-class postage fully prepaid, for collection and mailing following our ordinary business practices. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Mail Postal Service in San Francisco, California, for collection and mailing to the office of the addressee on the date shown herein.

ADDRESSEE
James L. Morris Brian C. Sinclair Gerard M. Mooney 611 Anton Boulevard, Suite 1400 Costa Mesa, California 92626-1931 *Attorneys* for Petitioners and Defendants ZB, N.A. and ZIONSBANCORPORATION
Office of the Attorney General, State of California 600 West Broadway, Suite 1800 San Diego, California 92101-3702
Clerk of the Court California Court of Appeal, Fourth Appellate District, Division 1 750 B Street, Suite 300 San Diego, California 92101

Office of the Clerk
San Diego County Superior Court
330 West Broadway
San Diego, California 92101

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this July 9, 2018, at San Francisco, California.

Jean Perley

EXHIBIT 1

Assembly Bill No. 60 **Chapter** 134

Year 1999 **Regular Session**

Author Knox

Date Received July 9, 99

Last Day to Act July 21, 99

Action of Governor July 20, 99

DEPARTMENT OF FINANCE ENROLLED BILL REPORT

AMENDMENT DATE: July 1, 1999
RECOMMENDATION: Sign

BILL NUMBER: AB 60
AUTHOR: W. Knox, et al.

ASSEMBLY: 47/28
SENATE: 23/15

BILL SUMMARY: Employment: overtime

This bill would enact the "Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999" and would make numerous changes to the laws regarding the payment of overtime compensation. The bill would also provide for the adoption, implementation, and repeal of alternative workweek schedules, as defined. AB 60 would further provide various specified exemptions from its provisions.

FISCAL SUMMARY

The Department of Industrial Relations has indicated that no information is available at this time to estimate the potential statewide fiscal impacts of AB 60. In light of the various issues discussed below, Finance notes that while unknown, any fiscal impacts of AB 60 could be widespread and significant. The 1999 Budget Act includes the Administration's proposal to add $656,000 and four positions to reestablish funding for the Industrial Welfare Commission (IWC), intended to enable the IWC to address this issue through the public hearing and wage board process currently authorized by the California Labor Code. If AB 60 is enacted, the need for any additional resources at the state level would be determined through the State's annual budget process.

COMMENTS

Finance believes that enactment of AB 60 would result no significant direct costs to the State, because working conditions and the payment of wages for state employees is generally governed by collective bargaining agreements and the civil service system. We would note that the 1999 Budget Act (Chapter 50 of the Statutes of 1999) provides $656,000 General Fund intended to enable the IWC to address these issues of working conditions and employee compensation, as currently authorized by the California Labor Code. Additionally, this bill appears to be consistent with the Administration's stated intent to reintroduce a workweek standard based on the concept of an eight-hour workday. Based on this, Finance recommends signature of this bill.

(Continued)

Analyst/Principal	Date	Program Budget Manager	Date
(0212) J. Foreman	7/12/99	S. Calvin Smith	
Todd Jerue for		J. W. Miller	7-12-99
Department Deputy Director			Date
R. J. Mast		7/12/99	

COMMENTS (continued)

Opponents of this bill have raised concerns that it would limit the availability of alternative workweek schedules, limit the ability of employers to control production schedules and address unique industry work patterns, impose large labor costs on businesses in California, and by making California one of only four states in the U.S. to use the eight-hour day standard, would make California less attractive to business.

Supporters of AB 60 have indicated that the elimination of the eight-hour day has severely cut the incomes of part-time and contingent workers by as much as $1 billion annually. They note that under this bill, employees would have the right to approve or disapprove an alternative workweek schedule, while under existing IWC wage orders, this authority is vested in employers. The bill's supporters further note that numerous studies have linked long work hours with increased rates of accident and injury, and that family life can suffer when employees are working away from home for extended periods each day.

ANALYSIS

A. Programmatic Analysis

AB 60 would do the following:

- Require time worked in excess of eight hours in one workday, any work in excess of forty hours in any one workweek, and the first eight hours worked on the seventh day of work in any one workweek to be compensated at a rate of no less than one and half times the employee's regular rate of pay.
- Time worked in excess of twelve hours in one workday or in excess of eight hours on any seventh day of a workweek would be compensated at a rate of no less than twice the employee's regular rate of pay.
- Provide that hours of work for the makeup of lost time (e.g., time off for personal obligations) would not be counted towards the total hours worked in a workday for the purposes of overtime compensation, except as specified.
- Provide a specified process for the adoption, implementation, contest, and repeal of an alternative workweek schedule, as defined, and would specify overtime compensation for employees working pursuant to such a schedule, with certain exceptions.
- Require the IWC to study the extent to which alternative workweek schedules are used in California, their costs and benefits to employees and employers, and would require the IWC to report its findings and recommendations to the Legislature not later than July 1, 2001.

(Continued)

ANALYSIS (continued)

A. Programmatic Analysis (continued)

- Provide that certain provisions of this bill would not apply to registered nurses, as specified, to an employer or employee when the total hours of employment do not exceed 30 hours in any week or six hours in any one day thereof, and to other specified persons. AB 60 would also authorize the IWC to establish additional exemptions from overtime requirements for executive, administrative, professional, and other employees, as specified and in compliance with certain conditions.
- Provide or eliminate, and require the IWC to review, certain exceptions to various labor laws for workers in the seasonal ski industry, licensed pharmacists, employers operating or providing personnel for the operation of a hospital, specified racehorse-stable employees, specified persons holding a commercial fishing license, outside salespersons, and workers in the health care industry.
- Require an employer to provide an employee with meal breaks, as specified, and would authorize the IWC to adopt or amend working condition orders with respect to break periods, meal periods, and days of rest, as specified.
- Require the IWC, at a public hearing before July 1, 2000, to adopt wage, hours, and working condition orders consistent with this measure, without convening wage boards, and would authorize the IWC to adopt other regulations, as specified.
- Provide specified civil penalties for violations of the bill's provisions, and for violations of any provision regulating hours and days of work in any order of the IWC.
- Declare Wage Orders 1, 4, 5, 7, and 9, as effective January 1, 1998, to be null and void. These orders cover the manufacturing, professional, technical, clerical, mechanical, public housekeeping, mercantile, and transportation industries.
- Declare the effective dates of other specified wage orders.
- Provide an exemption from the bill's provisions for emergencies, work performed in the protection of life or property, common carriers engaged in or connected with the movement of trains, and agricultural labor pursuant to Wage Order #14-80.
- Make other minor technical or clarifying changes.

B. Fiscal Analysis

As previously noted, the Department of Industrial Relations has indicated that no information is available to estimate the potential statewide fiscal impacts of AB 60. The 1999 Budget Act includes the Administration's proposal to add $656,000 and four positions to reestablish funding for the IWC, intended to address these issues through the public hearing and wage board process currently authorized under the California Labor Code. Any additional resources required at the state level under the provisions of this bill would need to be justified through the State's annual budget process.

BILL ANALYSIS/ENROLLED BILL REPORT--(CONTINUED) **Form DF-43**

AUTHOR	AMENDMENT DATE	BILL NUMBER
W. Knox, et al.	July 1, 1999	AB 60

	SO	(Fiscal Impact by Fiscal Year)						
Code/Department	LA	(Dollars in Thousands)						
Agency or Revenue	CO	PROP						Fund
Type	RV	98	FC	1999-2000	FC	2000-2001	FC	2001-2002	Code
8350/DIR	SO	No	---------- See Fiscal Analysis ----------						0001

EXHIBIT 2

Assembly Bill No. 60 **Chapter** 134

Year 1999 **Regular Session**

Author Knox

Date Received July 9, 99

Last Day to Act July 21, 99

Action of Governor July 20, 99

ENROLLED BILL REPORT

DEPARTMENT OF INDUSTRIAL RELATIONS	AUTHOR Assemblymember Knox	BILL NUMBER AB 60
SPONSOR California Labor Federation	RELATED BILLS SB 651, SB 1000	DATE AMENDED: July 1, 1999

SUBJECT: Employment: overtime

SUMMARY

This bill provides that any hours worked by an employee in excess of eight hours in a day must be compensated at the rate of one and one half times the employee's regular pay rate. It also requires compensation at twice the regular pay rate for any hours worked by an employee in excess of twelve in one day, or in excess of eight on the seventh day in a workweek. Exceptions to these requirements are also to be provided for employees working under an alternative workweek schedule. This bill requires the Industrial Welfare Commission to adopt orders that are consistent with its overtime provisions and to adopt regulations covering alternative workweek elections.

ANALYSIS

Existing law authorizes parties to a contract to stipulate to a day's work as consisting of an increment other than the eight-hour day. Existing law also requires that an employee be paid a premium rate for all hours worked beyond forty in a workweek. This bill declares that eight hours constitutes a day's work and deletes the authority of parties to stipulate otherwise. This bill legislatively establishes daily overtime and requires the compensation of all hours worked by an employee, in excess of eight in a day, be compensated at the rate of one and one half times the employee's regular pay rate. It also provides for the imposition of civil penalties to be assessed by the Labor Commissioner against employers who would violate these provisions.

VOTE ASSEMBLY 47-28 SENATE 23-15

RECOMMENDATION SIGN X VETO DEFER TO

Prepared by: Tom Grogan (415) 703-4810

DIVISION CHIEF	DATE
Mary Saunders	7/12/99
DEPARTMENT DIRECTOR	**DATE**
Stephen J. Smith	7/12/99

GOVERNOR'S OFFICE USE

Position Noted ☐

Position Approved ☐

Position Disapproved ☐

BY: _____

DATE: _____

This bill also:

- Requires compensation at twice the regular pay rate for any hours worked by an employee in excess of twelve in one day, or in excess of eight on the seventh day in a workweek;
- Exempts an employer for combining more than one rate of overtime to calculate the amount due an employee for any hour of overtime work;
- Establishes a sunset date of July 1, 2000 for any alternative workweek schedules in the health care industry that were duly adopted and made effective prior to 1998, in accordance with Industrial Welfare Commission (IWC) Wage Orders 4 or 5;
- Stipulate that an employee submit a written request to his or her employer to make up time lost due to absence for personal reasons during the work week;
- Impose an eleven-hour maximum on the number of hours in a workday that an employee may work while making up time missed for personal reasons during the workweek; and,
- Reduce the salary qualification for an executive, administrative, professional overtime exemption from three times the minimum wage, as previously proposed, to two times the minimum wage.

This bill further:

- Establishes additional exemptions to the hours of work to benefit the health or welfare of employees in any occupation, trade, or industry (provision would sunset January 1, 2004);
- Adopts wage orders, without convening wage boards, that are consistent with the bill's provisions;
- Requires the review of wages, hours, and working conditions of employees in industries or occupations that are specifically exempted by the Labor Code from the forty-hour workweek (ski establishment workers, commercial fishermen or employees on commercial passenger fishing boats, horseracing stable employees), and to adopt regulations in accordance with the findings of that review by July 1, 2000;
- Requires the review of wages, hours, and working conditions of employees in the health care industry and in the occupations of licensed pharmacist[1] and outside salesperson, and to adopt regulations in accordance with the findings of that review by July 1, 2000;
- Adopts or amends orders to address break periods and days of rest;

[1] Note: This bill is associated with SB 651, which would prohibit the exemption of pharmacists from IWC orders unless an individual employee satisfies the exemption criteria for executive or administrative employee. If SB 651 is enacted, the provisions of this bill applicable to pharmacists would become inoperative on January 1, 2000.

- Requires the IWC to study the extent to which alternative workweek schedules are used in California with a cost benefits analysis and to report the results to the Legislature by July 1, 2001; and

- Exempts persons employed in an agricultural occupation from specific regulations contained in the Labor Code.

This bill requires the IWC to adopt regulations, without convening wage boards and following public hearings, to ensure the fair conduct of employee elections, to establish procedures for repealing an alternative workweek schedule, providing employee disclosures, designating work units, to convene public hearings to determine exemptions under the duty test of the IWC Orders, and any other necessary regulations.

FISCAL IMPACT:

Amendment of this bill on May 27, 1999 required the IWC to hold a public hearing on the adoption of regulations which would conform the Wage Orders to the bill's requirements regarding the payment of overtime, establish procedures for alternative workweek elections, and provide for the amendment or adoption of regulations covering specified industries and occupations. It is not possible to predict the content of future regulations that the IWC may adopt. In addition, the regulatory process requires the IWC to accept and respond to input from the public, a process that could significantly affect the final content of any regulation. DLSE would also be able to submit recommendations and comments to the IWC on any proposed regulations. The adoption and amendment of new regulations, depending upon their content, could result in costs for DLSE. Should that occur, DLSE would address any new and unabsorbable costs by submitting a budget change proposal (BCP) to request additional funding.

The FY 1999 Budget bill restores $429,000 funding for the IWC for 4 positions including one (1) Executive Officer, two (2) Staff Services Analysts, and one (1) Office Assistant. A one-time cost of $227,000 for FY 1999-00 to augment the IWC budget was also approved to review the current overtime policy to fund expenditures for the conduct of public hearings, wage board meetings, and producing wage notices as required by the Labor Code.

The authorized positions and operating expenses could be used to address the initial additional workload generated by AB 60 until it is determined what the actual workload and costs for the proposed legislation are determined to be. This includes increased costs, if any, on the review of wages, hours and working conditions of industries and occupations exempted from the 40-hour workweek: ski industry, commercial fishing, healthcare, pharmaceutical and horseracing industries. The July 1, 1999 amendment requiring the IWC to produce a study on how alternative workweek schedules are used in California may also require additional funding. We would expect the need to conduct a statewide survey, which would have to cover a representative sample of key industries and occupations in California. The costs of producing a report of this nature appears to require a one-time cost that could be substantial, depending on its scope and complexity, and considering that IWC or DLSE has no existing research staff to conduct this study. As in the case of DLSE, any unabsorbable costs to the IWC budget would have to be addressed through the normal budget process.

ECONOMIC IMPACT:

Since the elimination of daily overtime in 1998, some employees have stated that they have lost wages without daily overtime. Other workers have reported benefits from more flexible work hours. Some companies have profited from being able to schedule longer hours, as dictated by business needs, without incurring overtime liability. Others have made no changes in their operations. The overall impact of the changes proposed by this bill cannot predicted, particularly since many outcomes would be dependent upon actions, as yet unspecified, that the IWC would be mandated to complete between January 1 and July 1, 2000.

PRO:

Proponents would claim that this bill is necessary for the health and welfare of employees. They would assert that without the eight-hour daily limitation, many employers would lengthen the workday to twelve hours, or more, resulting in extreme fatigue and stress for workers. They would add that many studies have linked long work hours to increased rates of on the job injuries and accidents. Additionally, family life suffers when one or both parents have to work long hours away from the family.

Proponents would also argue that the end of daily overtime provisions in the IWC orders in 1998 resulted in a pay cut for workers who had formerly received overtime pay after performing eight hours work in a day.

CON:

Opponents would argue that the IWC was authorized by the Legislature to make the necessary rules governing the payment of overtime. After extensive public hearings, the IWC found that it was necessary to amend the overtime rules to allow for greater flexibility in scheduling overtime hours. Opponents of this bill would maintain that the changes made by the IWC supported that flexibility, to the advantage of both employees and employers. They would consider the enactment of this bill a step backward.

Opponents would also claim that conforming California's overtime rules to the forty-hour standard allowed California to follow the lead of the federal government and the majority of other states across the nation that adhere to this standard.

Finally, opponents would argue that the majority of workers did not receive pay cuts as a result of the end of daily overtime. Rather, they claim, most overtime is worked by full-time employees who would see no difference between overtime after eight hours in one day, or after forty hours in a workweek.

APPOINTMENTS:

While the bill does not mandate appointments, it should be noted that there is currently not a full complement to the IWC. The chairperson and members of this commission will need to be appointed in order for the IWC to meet the requirements of this bill.

LEGAL IMPACT:

There could be an increased number of lawsuits filed by employers over the imposition of civil penalties for violations of the proposed law.

LEGISLATIVE HISTORY:

AB 1979 (Knox) died in the Assembly Labor Committee in 1995. That bill would have allowed an employee to makeup as much as four hours work time, without overtime being due, in exchange for personal time off when approved by the employer.

AB 15 (Knox) and SB 680 (Solis), both introduced in 1997, contained many provisions similar to AB 60. After passing through various committees, AB 15 was placed on inactive status in August 1997. All provisions of that bill related to overtime and alternative scheduling were deleted and replaced with measures related to sick leave usage in 1998. SB 680 was passed by the Assembly and the Senate, but vetoed by former Governor Pete Wilson on September 9, 1997.

SB 1000 (Burton), introduced on February 26, 1999, was assigned to the Senate Committee on Industrial Relations. It did not receive a vote by that Committee.

SB 651 (Burton) would provide that a pharmacist is not exempt from coverage of the IWC orders, unless he or she individually satisfies the criteria for exemption as an executive or administrative employee. SB 651 is currently before the governor for consideration.

RECOMMENDED POSITION:

Sign. This bill returns daily overtime protection to 8 million workers in this state. Daily overtime pay protects workers from extremely long shifts that are exhausting and unsafe. It helps working parents who cannot leave their children unsupervised during long shifts and commutes. It spurs job creation because employers facing increased labor costs after eight hours substitute additional hires at straight time wages for longer hours at premium pay. California's return to the daily overtime law will reduce the amount of overtime worked with no reduction in earnings.

EXHIBIT 3

Legislative Resources

"In the construction of a statute the intention of the Legislature is to be pursued, if possible" - California Code of Civil Procedure, section 1859.

Since 1872 when the above statute was enacted, California's courts have increasingly relied on legislative intent when interpreting the state's laws. Also well established is the key role that legislative records play in determining the intent of the State Legislature.

By far the richest and most extensive collection of legislative records are held by the California State Archives. The State Archives is the only repository to which legislative committee records may lawfully be transferred. Although state law does not require individual legislators to deposit their records in the State Archives, more than 300 have chosen to do so.

Lawyers, legal scholars, the Legislature, state government agencies, commercial research services and the courts themselves routinely use the State Archives legislative resources which include:

Legislative Committee Records

Bill Files, c.1960 - date

The most significant source of information on specific measures are bill files which may contain analyses prepared by committee staff, the Legislative Analyst, and state agencies; written testimony; Legislative Counsel's opinions; letters in support and opposition; the text of the bill and amendments; press releases and newspaper clippings; background information; and, occasionally audio tapes of hearings.

Hearing Files, c.1940 - date

Typically, legislative hearings focus on a particular subject although discussion concerning specific legislative bills may also be included. The State Archives has transcripts of hearings as well as background materials.

Legislator Records

Author Bill Files, c.1950 - date

In addition to containing records similar to those found in committee bill files, legislator's bill files may also include correspondence and background material from the bill's original sponsor (state agency, outside organization, or individual), letters in support and opposition to the bill, author's floor and committee statements, and press releases.

Governor's Records

Governor's Chaptered Bill Files, 1943-2010

The Governor's Office maintains files for each legislative bill signed into law (chaptered) or vetoed. These files typically contain analyses prepared by the Legislative Counsel, Attorney General, other constitutional officers, state agencies and the Governor's staff. Also available is correspondence from the bill's author as well as affected organizations and individuals. Vetoed bill files include the text of the Governor's veto message.

Other Records

Caucus Bill Files, 1973 - date

Democratic and Republican Caucuses in both the Senate and Assembly prepare analyses which reflect their political party's views.

Senate Floor Analyses Bill Files, 1993 - date

This office prepares nonpartisan analyses of bills which come to the Senate Floor for a vote.

Senate and Assembly Videotapes, 1988 - date

The State Archives also houses videotapes of selected floor session and committee hearings: Senate (1992 - date) and Assembly (1988-1998).

State Agency Records, various dates

Each legislative session state agencies draft new legislation and prepare analyses of bills which affect their programs.

Published Resources

Statutes of California (1850 - date), Deering's California Codes Annotated, Journals of the Legislature (1850 - date), Final Calendars of Legislative Business/Final Histories (1877 - date), and various subject indexes to laws are also available to assist the legislative researcher.

Research Services

The Archives Research Room is open to the public from 9:30 a.m. to 4:00 p.m., Monday through Friday and is closed on state holidays. Archives staff are on duty during these hours to assist those doing legislative research.

The Archives also provides research service for those located outside the Sacramento area who are seeking legislative history information. If a researcher can specify a particular chapter or bill (for a total of up to six), Archives staff will identify and photocopy materials in our collection relating to the bill(s) at a cost of $0.25/page. The service usually requires at least 3 to 4 working days for research with additional time required for photocopying depending on the size of the order.

Contact the **Reference Desk (mailto:archivesweb@sos.ca.gov)** for more information.

EXHIBIT 4

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.

> Example: A secret ballot election results in the adoption of an alternative workweek schedule under which the affected workers are to work four ten hour days (Monday-Thursday), for a total of 40 hours work each workweek. No overtime compensation is required when the employees work the hours that are authorized by this alternative workweek schedule. On occasion, the employer assigns extra work to these employees. This extra work is not assigned on a regular or recurring basis. One workweek, an employee working under this alternative workweek schedule works the following hours: Monday-10 hours, Tuesday-12 hours, Wednesday-14 hours, Thursday-10 hours, Friday-10 hours, Saturday-off, Sunday-off. There is no overtime for Monday or Thursday (since the employee did not work any extra hours, outside his or her regularly scheduled hours, on those days); the extra two hours worked on Tuesday must be paid at time and a half; the extra four hours worked on Wednesday are paid at time and a half for the first two hours and at double time for the next two hours (since those final two hours were beyond 12 hours in a day); the extra 10 hours worked on Friday must be paid at time and a half for the first eight hours (since those hours were not regularly scheduled, as Friday is not a regularly scheduled workday) and at double time for the final two hours (since these two hours exceeded eight hours on a non-regularly scheduled workday).

We have been asked whether AB 60 permits alternative workweek schedules of less than 40 hours per week. Section 511(a) permits the adoption of 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.*" The word "within" means any workweek of no more than 40 hours, and would include workweeks of less than 40 hours. However, paragraph 3(B) of Order 1-89 (manufacturing) contains a unique provision, not found in any other wage order, that requires an alternative work schedule to provide for "not more than ten hours per day within a workweek of *not less than* 40 hours." Thus, employers covered by Order 1-89 are prohibited from establishing an alternative schedule of less than 40 hours per workweek. All other employers, under AB 60, can establish alternative schedules that provide for up to 40 hours in a workweek. The IWC, of course, may consider amending the language in Order 1 to conform to the more liberal provisions of the statute.

We have received many inquiries as to whether AB 60 prohibits the adoption or retention of a so-called "9/80" alternative work schedule that does not provide for the payment of overtime. Under a 9/80 schedule, employees will work 9 hours a day from Monday through Thursday, 8 hours on Friday, followed by a week of 9 hours worked each day on Monday through Thursday, and no hours worked on Friday. If the employer has not pre-designated a workday and workweek, the standard midnight to midnight workday (based on the calendar day) used by DLSE for enforcement purposes will result in 44 hours worked the first workweek of this schedule, followed by 36 hours worked the second workweek. And since a regularly scheduled alternative workweek adopted by a secret ballot election cannot provide for more than 40 hours regularly scheduled within a workweek, the fact that every other workweek is regularly scheduled to exceed 40 hours would defeat the alternative workweek, and mandate payment of overtime for all hours worked in excess of 8 in a day or 40 in a week. But by predesignating the workday to run from noon to noon, and by predesignating the workweek to run from Friday noon to next Friday at noon, the employer can establish a 9/80 schedule that does not exceed 40 hours in a workweek, in that the eight hours worked every other Friday are split in half, with the 4 hours worked before noon falling into the first workweek, and the 4 Friday hours worked after noon falling into the second workweek.

Of course, as with any other alternative workweek schedule under section 511, the 9/80 schedule cannot be unilaterally imposed by the employer but must be (or have been) adopted by the requisite two-thirds vote in a secret ballot election to allow for this schedule without the payment of daily overtime.

Prohibited Reduction of Regular Rate of Pay: Subsection (c) of section 511 provides that "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." This is a new protection, that never before existed in the Labor Code or any IWC order. This prohibition only applies to reductions in the regular rate of pay that are implemented on or after

January 1, 2000; it does not apply to any reduction implemented prior to January 1, 2000. The prohibition applies to repeals resulting either from an election or from an employer's unilateral decision, and to the nullification of any alternative workweek schedule by operation of AB 60. The prohibition would be enforceable by filing an individual wage claim or a civil action to recover unpaid wages owed to a worker or group of workers based on the wage rates that were in effect prior to the unlawful reduction, and through injunctive relief.

Reasonable Accommodation: Under subsection (d), an employer must make a reasonable effort to find a work schedule of no more than eight hours in a workday to accommodate any employee who was eligible to vote in the election that established the alternative workweek schedule, if such employee is unable to work the hours established by the election. Employers do not have a duty to make such an effort on behalf of any employee who is hired after the election was held, except for a duty to explore any available alternative means of accommodating the religious beliefs of those employees whose religious observances conflict with an adopted alternative workweek schedule. However, the statute permits the employer to provide a work schedule of no more than eight hours in a workday to any employee who is hired after the adoption of an alternative workweek schedule if that employee is unable to work the alternative schedule.

Reporting the Results of the Election: Subsection (e) requires the employer to report the results of any such election (regardless of the outcome of the election) to the Division of Labor Statistics and Research (DLSR) within 30 days after the results are final. AB 60 does not indicate whether the failure to comply with this reporting requirement could invalidate the result of the election. We would expect the IWC to address this issue in its post-AB 60 regulations. Any employer covered by reinstated Order 1-89 (manufacturing industry) is subject to an additional requirement, unique to that Order, that no agreement for an alternative workweek shall be valid until it is filed with DLSE. Thus, employers under Order 1 must report election results to both DLSR and DLSE, and such employers cannot implement an alternative workweek schedule without first reporting the election results to DLSE.

Presently Existing Non-Collectively Bargained Alternative Work Schedules: Subsection (f) of section 511 provides that any presently existing alternative workweek schedule that was adopted pursuant to IWC Wage Orders 1, 4, 5, 7, or 9 shall be null and void, *except for an alternative workweek that meets all of the following conditions:*

1. it provides for no more than 10 hours of work in a workday (except for 12 hour workdays that are allowed in the health care industry, as specified in subsection (g), discussed below).

2. it was adopted by a two-thirds vote of the affected employees in a secret ballot election.

3. the election was held "pursuant to wage orders of the Industrial Welfare Commission in effect prior to 1998.

AB 60 thus puts an end to any alternative workweek schedules that were unilaterally established by employers pursuant to the 1998 wage orders, except for certain voluntary arrangements as specified in subsection (h) of section 511, discussed below. Alternative workweek schedules that were adopted under wage orders that were not amended in 1998 (those that left daily overtime undisturbed) should meet the 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 do 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).

EXHIBIT 5

The 2002 Update Of

The DLSE

Enforcement Policies and Interpretations

Manual

(Revised)

The Division of Labor Standards Enforcement (DLSE) Enforcement Policies and Interpretations Manual summarizes the policies and interpretations which DLSE has followed and continues to follow in discharging its duty to administer and enforce the labor statutes and regulations of the State of California.

Julie A. Su, State Labor Commissioner

APRIL, 2017

DIVISION OF LABOR STANDARDS ENFORCEMENT
POLICIES AND INTERPRETATIONS MANUAL

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9 METHOD OF PAYMENT OF WAGES.

9.1 § 212 – Payment By Non-Sufficient Funds Instrument Illegal:

(a) No person, or agent or officer thereof, shall issue in payment of wages due, or to become due, or as an advance on wages to be earned:

(1) Any order, check, daft, note, memorandum, or other acknowledgment of indebtedness, unless it is negotiable and payable in cash, on demand, without discount, at some established place of business in the state, the name and address of which must appear on the instrument, and at the time of its issuance and for a reasonable time thereafter, which must be at least 30 days, the maker or drawer has sufficient funds in, or credit, arrangement, or understanding with the drawee for its payment.

(2) Any scrip, coupon, cards, or other thing redeemable, in merchandise or purporting to be payable or redeemable otherwise than in money.

(b) Where an instrument mentioned in subdivision (a) is protested or dishonored, the notice or memorandum of protest or dishonor is admissible as proof of presentation, nonpayment and protest and is presumptive evidence of knowledge of insufficiency of funds or credit with the drawee.

(c) Notwithstanding paragraph (1) of subdivision (a), if the drawee is a bank, the bank's address need not appear on the instrument and, in that case, the instrument shall be negotiable and payable in cash, on demand, without discount, at any place of business of the drawee chosen by the person entitled to enforce the instrument.

9.1.1 **Wages Must Be Paid In Cash Or Instrument Negotiable In Cash.** The wages of workers in California must be paid in cash or other acknowledgment that is payable in cash without discount, upon demand.

9.1.2 **The requirements placed on the employer regarding the payment of wages are:**

1. Wages must be paid in cash or by an instrument payable in cash money without discount. (See limited exceptions in Labor Code Sections 213(a) and (c).) (See Section 9.1.8 of this Manual)
2. The instrument must show on its face the name and address of some established business within the State of California where it can be cashed, even if the instrument is drawn on an out-of-state financial institution.
3. At the time of issuance, and for 30 days thereafter, the maker must maintain sufficient funds to redeem the instrument or have a credit arrangement with the drawee that provides for its redemption.
4. If the instrument is presented within 30 days and is refused redemption, this constitutes sufficient evidence for a charge of the violation of Section 212. This is not a specific intent criminal statute.
5. It should be noted that in the event the check is drawn on a bank, the address of the bank need not be on the face of the check and the check must be honored at any place of business of the bank in this State.

9.1.2.1 **Payment By Scrip Prohibited.** The DLSE has, on a number of occasions, addressed the issue of payment "in cash" or in an "instrument negotiable in cash". In one such situation, for instance, a "bonus" offered by the employer for meeting financial performance targets and paid by means of scrip which was redeemable for goods offered in a catalog violated both Labor Code § 212 and § 450. (O.L. 1998.09.14)

9.1.3 Effective January 1, 2001, the provision at Labor Code § 203.1 which provides a penalty for payment of any wages by non-sufficient funds instrument is now extended to employees in all industries. The penalty covers not only wages but also "fringe benefits" paid to any employee.

9.1.3.1 **Failure To Pay ERISA Trust.** A penalty for failure to pay fringe benefits to an ERISA trust would not be recoverable since this penalty would add a collection tool to that available for recovery under federal law, and such remedy would be pre-empted. (*Carpenters So. Cal. Admin. Corp. v. El Capitan* (1991) 53 Cal.3d 1041. Deputies are encouraged to check with the assigned attorney regarding fringe benefit collections.

9.1.4 **Constitutionality.** Labor Code § 212(a) has been found to be constitutional by the courts.

9.1.5 **Criminal Proceedings.** The case of *People v. Turner* (1957) 154 Cal.App.2d Supp. 883, gives a broad interpretation to the applicability of Section 212 and makes it clear that the section applies to all instruments when issued in lieu of cash for the payment of wages, and that a violation exists when any one of the elements contained in the section is present. The *Turner* case holds that knowledge of insufficiency of funds is not essential to the establishment of a violation under this section. It further holds that even though knowledge is not required, the section is constitutional in that it does not purport to inflict punishment for failure to pay wages, but for undertaking to pay wages by the issuance of an instrument which does not conform to Section 212.

9.1.6 In the case of *People v. Hampton* (1965) 236 Cal.App.2d 795, the court held that the prosecution need only establish a prima facie case by introducing evidence of the issuance of a check for wages which check, when presented for payment, was dishonored by reason of insufficient funds and that there was no credit arrangement with the depositing bank. The defendant must make some showing that the non- negotiable instrument resulted from circumstances "neither foreseeable nor preventable by reasonably prudent investigation or action ."

9.1.7 Prosecutions under Section 212(a) are conducted by the appropriate city or district attorney. The Division personnel perform the investigation and prepare the statement of case for the prosecutor.

9.1.8 **§ 213 – Not All Payments Subject To Section 212:**

Nothing contained in Section 212 shall:

(a) Prohibit an employer from guaranteeing the payment of bills incurred by an employee for the necessaries of life or for the tools and implements used by the employee in the performance of his or her duties.

(b) Apply to counties, municipal corporations, quasi-municipal corporations or school districts.

(c) Apply to students of nonprofit schools, colleges, universities, and other nonprofit educational institutions.

(d) Prohibit an employer from depositing wages due or to become due or an advance on wages to be earned in an account in any bank, savings and loan association or credit union of the employee's choice with a place of business located in this state, provided that the employee has voluntarily authorized the deposit. If an employer discharges an employee or the employee quits the employer may pay the wages earned and unpaid at the time the employee is discharged or quits by making a deposit authorized pursuant to this subdivision, provided that the employer complies with the provisions of this article relating to the payment of wages upon termination or quitting of employment.

9.1.9 **Exceptions To Payment Directly To Employee In Cash Or Negotiable Instrument.** Labor Code § 213 provides some exceptions to the requirements of Labor Code § 212 and DLSE has addressed some of these exceptions. (O.L. 1996.11.12 and O.L. 1994.02.03-1).

9.1.9.1 An employer may guarantee the payment of bills incurred by an employee for the necessities of life or for the tools and implements used by the employee in the performance of his duties.

9.1.9.2 The provisions of Section 212 do not apply to counties, municipal corporations, quasi-municipal corporations, school districts or to students of nonprofit schools, colleges, universities, and other nonprofit educational institutions.

9.1.9.3 An employer may deposit wages due or to become due or an advance on wages to be earned in an account in any bank, savings and loan association or credit union of the employee's choice which is located in the State of California if the employee has authorized such deposit. (See discussion on this issue in O.L. 1994-02.03-1).

9.1.9.4 Note: If an employer discharges an employee or the employee quits, the employer may pay the wages earned and unpaid at the time the employee is discharged or quits by making a deposit authorized pursuant to the provisions of Labor Code section 213(d), provided that the employer complies with the provisions relating to the payment of wages upon termination or quitting of employment.

9.1.10 **Employer Obligation To Pay Wages Earned In Event Recipient Employee Cannot Be Located.** Labor Code § 96.7 provides that the Labor Commissioner is authorized to collect any wages or benefits (vacation wages, severance pay) on behalf of employees in California without assignment, and shall act as trustee of the Industrial Relations Unpaid Wage Fund. The Labor Commissioner is required to make a "diligent effort" to locate the workers and is authorized to remit those wages to: (1) the worker (if found) (2) the worker's lawful representative, or (3) any trust or custodial fund established under a plan to provide benefits. **Note** that there are certain ERISA concerns which arise when payments are made to such trusts.

9.1.11 **Payment of Wages Due Deceased Worker**. DLSE may collect wages due to deceased workers. Such collections are placed in the Unpaid Wage Fund and, as described below, escheat to the State pursuant to law.

9.1.11.1 Probate Code § 13600 provides that in the event of the death of a worker, the surviving spouse or the guardian or conservator of the estate of the surviving spouse may collect salary or other compensation owed by an employer to the deceased worker in an amount not to exceed $15,000.00. Probate Code § 13601(a) sets out the form of affidavit which may be signed by the surviving spouse. DLSE has form affidavits which may be used to notify the employer of the obligation to pay the salary due.

9.1.11.2 Note: Deputies unfamiliar with the Probate forms should contact their assigned attorney through their Senior Deputy.

9.1.12 Escheat To State. In addition, California Code of Civil Procedure also provides that any unclaimed personal property (which would include wages) escheats to the State. Unclaimed wages must be forwarded to the Controller of the State of California within three years after the debt was incurred. (See Code of Civil Procedure §§ 1500 et seq.)

EXHIBIT 6

STATE OF CALIFORNIA
MANUAL OF STATE FUNDS

Legal Title
Industrial Relations Unpaid Wage Fund

Legal Citation/Authority
Chapter 714, Statutes of 1975
Labor Code sections 96.6-96.7

Fund Classification	**Fund Classification**
GAAP Basis Fiduciary/Agency Funds	**Legal Basis** Nongovernmental/Trust and Agency Funds--Non-Federal

Purpose
Created for the deposit of unpaid wages or benefits collected by the Labor Commissioner and to provide state operations support to the Department of Industrial Relations for the Underground Economy Enforcement Program.

All wages or benefits collected under this section shall be remitted to the worker, his lawful representative, or to any trust or custodial fund established under a plan to provide health and welfare, pension, vacation, retirement, or similar benefits from the Industrial Relations Unpaid Wage Fund.

Any unpaid wages or benefits collected by the Labor Commissioner pursuant to this section shall be retained in the Industrial Relations Unpaid Wage Fund until remitted pursuant to above, or until deposited into the General fund.

The Controller shall, at the end of each fiscal year, transfer to the General Fund the unencumbered balance, less six months of expenditures as determined by the Director of Finance, in the Industrial Relations Unpaid Wage Fund.

Administering Agency/Organization Code
Department of Industrial Relations/Org 7350

Major Revenue Source
Unpaid wages and benefits due any worker in the state.

Disposition of Fund (upon abolishment)
Pursuant to Government Code 16346, in the absence of language that identifies a successor fund, any balance remaining in this fund upon abolishment, shall be transferred to the General Fund.

Appropriation Authority
Section 96.6 of the Labor Code provides that the fund is continuously appropriated for the purpose of remitting to an employee unpaid wages due him, collected on his behalf by the Labor Commissioner.

State Appropriations Limit

Always Excluded – Revenues in this fund are not proceeds of taxes and even after transfer, will never become proceeds of taxes because the major revenue source is derived from a Trust and Agency Fund (Non-Federal).

Comments/Historical Information

Budget act of 1992/93, Chapter 55 allowed monies from the fund "notwithstanding any other provision of law, funds appropriated by this item shall be expended by the Department of Industrial Relations Division of Labor Standards Enforcement to administer the Targeted Industries Partnership Program to increase enforcement and compliance I the agricultural and garment industries".

Budget Act of 2005 (SB 77), Chapter 38, added clarifying language to the Governor's Budget Item 7350-001-0913 for state operations support of the Underground Economy Enforcement Program. In addition, it added additional language to authorize Department of Finance to determine annually the amount of "excess" that is to be transferred into the General Fund based on program needs.