



HOW AN ALTERNATIVE WORKWEEK MAY MAXIMIZE YOUR LABOR COSTS

By Christine H. Long, Esq.

Hotels and restaurants often are faced with the tough dilemma of scheduling employees during "peak" hours. Alternative workweek schedules permit many employers to avoid paying daily overtime to employees who do not work more than 40 hours a week. Both employers and employees can benefit from such arrangements. The most common schedules are 4 – 10-hour days or 4 – 9-hour days and 1 – 4-hour day.

Overview of Procedures for Adoption of an Alternative Workweek

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

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

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

Employers must report the results of secret ballot elections to the Division of Labor Statistics and Research in San Francisco within 30 days after the results are final.

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

In 2009, California Relaxes Rules Regarding Alternative Workweeks

On March 23, 2009, the California Labor Commissioner relaxed the rules on alternative workweeks. Employers can now adopt an alternative workweek schedule for summer months, provided they comply with all regulations otherwise applicable to the adoption of such schedules (i.e., election procedures, notice requirements, etc.). In the facts presented to the Labor Commissioner, it was permissible for a manufacturing employer to adopt a summer schedule of four 9-hour days and one 4-hour day, without incurring overtime for non-exempt employees working this schedule, and to maintain a normal schedule of five 8-hour days for the rest of the year.

The DLSE also now allows for an alternative workweek schedule during only a particular time of year that satisfies the requirement that the schedules be "regularly recurring," or whether employers would have to maintain such schedules for the entire year.

Although the new law retains the same burdensome election process for adoption of an alternative workweek, the law recognizes that if an employer offers employees a “menu of options” for alternative workweek schedules, the options may include a regular 8-hour per day/5-day per week work schedule among the menu of options. Under the former law, the DLSE took the position that a regular 8-hour per day/5-day per week schedule could not be among the menu of options for an alternative workweek. The intended effect of the new law is to increase the likelihood that a sufficient number of employees will vote to adopt an alternative workweek schedule.

The biggest new change is that employees who elect an alternative workweek schedule are now allowed, with their employer’s consent, to switch from one schedule to another on a weekly basis. For example, an employee could work four 10-hour days one week, and then five 8-hour days the next week.

The DLSE also noted that if the alternative workweek schedule remains the same each year after it has been properly adopted by the employer under Labor Code §511, the employer does not need to conduct further elections in following years.

Recommendations

Alternative workweeks can be a useful tool to maximize your labor costs. However, the election process itself is very technical. Couple this with the fact that the California Industrial Welfare Commission recognizes 17 different wage orders that correspond with various industries. If an employer is not using the right wage order or takes a misstep in the election process, the employer may very well lose the benefit of the alternative workweek. Therefore, consulting legal counsel before implementation is strongly advised.

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