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THE ALTERNATIVE-WORKWEEK: OASIS OR MIRAGE?

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California employers are acutely aware of the typical schedule worked by employees: eight hours a day, five days a week. As we have become accustomed to doing, California law generally requires employers to pay employees overtime wages for hours worked in excess of eight hours during any 24-hour period. But in many cases, limiting employees to working only eight hours a day is not the most convenient for either the employee or the Company. End of the story? Not so fast.

California law provides a respite that allows employees to waive ordinary overtime requirements for less restrictive requirements when an employer properly adopts an alternative-workweek schedule. As with most areas of the California Labor Code, success is in the details. Failure to follow those details can result in catastrophic results for your company despite an employee's agreement, or even actual request, to work such an alternative-workweek schedule.

THE BASICS

California Labor Code section 511 allows employers to institute a regularly scheduled alternative-workweek under which employees may work more than eight hours in a 24-hour period, up to 10 or 12 hours per day (in limited cases), without an entitlement to overtime wages. Alternative-workweeks are available to employers whose employees fall within most wage orders, which govern how employers pay nonexempt employees.

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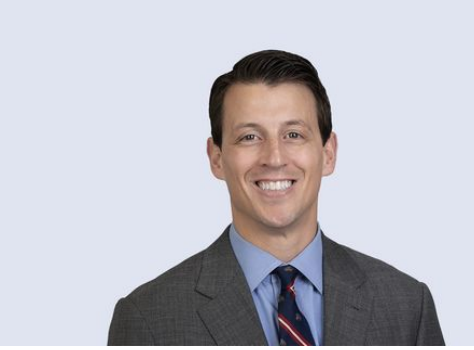

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Wage Orders 15 and 16, which govern, respectively, wages for household occupations related to the care or maintenance of a private household, and wages for occupations related to construction, drilling, logging, and mining, do not provide for the election of an alternative workweek. Before pursuing an alternative-workweek election, it's critical to ensure that your employees are subject to an exemption for an alternative-workweek. Otherwise, you will be required to pay overtime even if employees agree to work the alternative schedule.

So, what exactly do alternative-workweek schedules provide? The most basic understanding of an alternative-workweek is that it is an optional practice that grants employees desirable flexibility, and allows employers some scheduling flexibility with regard to overtime considerations.

For example, under a properly implemented alternative-workweek, nonexempt employees could work four days a week for 10 hours each day, without the employer accruing any overtime liability (generally up to 10 hours per day or 40 hours per week). Another common variation allows employees to work a so-called 9/80, under which employees work a total of 80 hours during nine days of work in a two-week period, again without the employer accruing any overtime liability.

Since an alternative-workweek schedule constitutes a waiver of ordinary overtime obligations, employees can work under such a schedule only after the employer complies with strict procedural requirements. Those who have become accustomed to dealing with California's labor laws will not find this surprising.

If an employer does not follow the right procedures, the Department of Labor Standards and Enforcement (DLSE) may invalidate the schedules, exposing the employer to overtime liability under the ordinary state overtime rules. Failure to properly implement an alternative-workweek can and does expose companies to crippling class-action lawsuits which often result in six-figure verdicts – or worse. Several procedural landmines will invalidate what would otherwise appear to be an acceptable alternative-workweek schedule.

THE DETAILS

All employees who will be affected by an employer's adoption of an alternative-workweek schedule must have an opportunity to vote on whether such a schedule should be adopted. The DLSE will consider whether the employer has adhered to the following four steps.

First, all affected employees must receive written notice of the employer's intent to adopt an alternative-workweek schedule. The notice must sufficiently explain the alternative-workweek schedule to all the affected employees. If 5% of the affected employees primarily speak a language that is not English, the notice must be in that language as well. The notice must disclose to the affected employees how the proposed arrangement will affect their wages, hours, and benefits.

It must also provide sufficiently advanced notification to employees of a meeting, for the sole purpose of discussing the impact of an alternative-workweek schedule, at least 14 days before employees vote. Failure to comply with this "cool-off" period could result in the schedule being invalidated.

Second, acceptable alternative-workweek schedules generally may require no more than 10 hours per day and 40 hours per week from a single employee. The employer may propose a single acceptable alternative-workweek schedule on the notice, or can provide the affected employees a "menu of options," to the defined work unit (which is the voting unit). The work unit is defined as "a division, a department, a job classification, a shift, a separate physical location, or a recognized subdivision thereof." A work unit may consist of an individual employee, as long as the criteria for an identifiable work unit is met.

If you choose to offer a menu of options to the affected employees, each employee is entitled to choose any of the options. If you ultimately adopt an alternative-workweek-schedule arrangement under a "menu of options" with your employees, employees may, with your permission, switch between the schedules (or from one option to another) listed on the menu of options on a weekly basis without conducting another election.

But if employees wish to switch to a schedule not included on the original notice, then you will have to go through the election process again, so it's important to carefully construct the units of employees that you provide notice to.

Third, the employees whose schedules will be changed to one of the schedules on the ballot if adopted, commonly referred to as the affected employees, must be allowed to participate in a secret-ballot election regarding the proposed schedule. Only the affected employees may vote in this election and at least 2/3 of the affected employees must vote in favor of an arrangement in order for it to be implemented. Exempt employees should not be included in this election.

Affected employees who are members of the voting unit who do not cast a vote must be counted as a vote of "no." In addition, the election must be held at the employer's expense, during regular working hours, and at the worksite of the affected employees.

Finally, the election results must be reported to the DLSE within 30 days after finalizing the results. The report will be a public document, and must contain the tally of the vote, the number of employees affected by the vote, and the nature of the employer's business. The report must be sent to the Department of Industrial Relations, and must note that the report pertains to Alternative Workweek Election Results.

If you do not follow the election procedures outlined above, the DLSE may invalidate the election during a wage-hour audit and require the company to comply retroactively with ordinary overtime requirements during the workweeks when employees worked the alternative-work schedule.

Always check with counsel because not all flaws in the election process or reporting requirement will necessarily invalidate an election, and the requirements for implementing such a schedule may vary somewhat among the Wage Orders.

LIMITING THE MENU

Employers who are genuinely interested in accommodating employees with an alternative-workweek schedule may provide employees with a menu of options in the notice, with the intent of allowing employees to pick the schedule that suits them best. This may be a mistake, because the business may not inherently permit employees to freely choose between schedules.

Alternative-workweek schedules typically work best when an employee's schedule is fixed. When employees subject to an alternative-workweek schedule come in to work on days that they are not scheduled to work, they must be paid overtime for up to eight hours worked; after that they must be paid double time.

Since 2009, the menu-of-options procedure has granted employees the flexibility to effectively opt-out of an alternative-workweek schedule without impacting other employees' ability to work on an alternative schedule. Employers can now include a regular eight-hour day, five-day a week schedule on the menu of options, leaving the overtime obligation unchanged as to employees who elect the regular eight-hour day schedule. This lower barrier to entry may make the menu-of-options approach more attractive; however, take care when employing this tool and communicate clearly to manage employee expectations.

REPEALING THE SCHEDULE

If 1/3 of the affected employees petition to repeal any type of alternative-workweek schedule, the employer must hold a new secret-ballot election within 30 days of the petition. An election of this type cannot be held within 12 months of another election to adopt or repeal an alternative-workweek schedule. If 2/3 of the affected employees vote to repeal the alternative-workweek schedule, the ordinary work week schedule must be restored within 60 days. By contrast, an employer may dismantle an alternative-workweek schedule at any time without advance notice, although it is wise to provide some advance notice (at least one pay period).

AT THE END OF THE DAY...

Alternative-workweek schedules provide the opportunity to schedule longer uninterrupted shifts, flexibility in managing a staggered workforce, and increased productivity. Additionally, they provide employees the flexibility of a longer weekend. But it's important for employers to proactively address regulatory requirements before implementing.

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