



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
1102 Q Street • Suite 3000 • Sacramento, CA 95811
(916) 322-5660 • Fax (916) 322-0886

To: Chair Remke, Commissioners Audero, Cardenas, Hatch, and Hayward

From: Brian Lau, Acting General Counsel
Matthew Christy, Commission Counsel

Subject: Commissioner Compensation

Date: May 7, 2018

Issue Presented

At its February 2018 Commission Meeting, the Commission passed a motion directing staff to start the process to request an opinion from the Office of the Attorney General regarding whether that Office's *Bennett* Opinion¹ on Commissioner compensation, interpreting Section 83106 of the Political Reform Act (the "Act"),² is still applicable in light of Wage Order 4-2001's mandate that the State's minimum wage law applies to State employees.

Summary of Analysis

Wage Order 4-2001 does not affect the applicability of the AG Opinion because it does not meet the conditions for either of the authorized methods for amending the Act set forth in Section 81012. Under Section 83106, Commissioners, other than the chair, shall be compensated at a rate of \$100 for each day engaged in official duties. The AG Opinion interprets this provision to authorize the Commission to adopt a "reasonable proration" of Section 83106's \$100 rate for each day a Commissioner is engaged in official duties. Thus, it appears the Commission could amend its compensation policy to pay the minimum wage for hours engaged in official duties up to the \$100 per day limit.

Process

An opinion request to the Office of the Attorney General should be submitted in writing, and signed by the public official or head of the agency authorized to make the request. The request should set out the question to be answered as clearly as possible, along with enough description of the background and context of the question to allow a precise legal analysis to be prepared. Any request that is made by a department or officer that employs legal counsel must be accompanied by a legal analysis prepared by the department or officer's legal counsel. Accordingly, if the Commission votes to request an opinion, this memo will serve as the required legal analysis.

¹ 60 Ops.Cal.Atty.Gen. 16 (1977) (the "AG Opinion"), Attachment A.

² All statutory references are to the Government Code, unless otherwise indicated.

Background

Wage Order 4-2001³

Section 1 of Article XIV of the California Constitution states that “[t]he Legislature may provide for minimum wages and for general welfare of employees and for those purposes may confer on a commission legislative, executive, and judicial powers.” Pursuant to that provision, wage and hour claims within the State are governed by two complimentary and occasionally overlapping sources of authority: the provisions of the Labor Code, enacted by the Legislature, and a series of 18 wage orders, adopted by the Industrial Welfare Commission. (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1026.)

Industrial Welfare Commission wage orders are entitled to “extraordinary deference, both in upholding their validity and in enforcing their specific terms.” (*Martinez v. Combs* (2010) 49 Cal.4th 35, 61.) They must be “accorded the same dignity as statutes.” (*Brinker Restaurant Corp., supra*, at p. 1027.) They are “presumptively valid” legislative regulations of the employment relationship that must be given “independent effect” separate and apart from any statutory enactments. (*Martinez, supra*, at pp. 65-68.) To the extent a wage order and a statute overlap, a court will seek to harmonize them, as it would with any two statutes. (*Cal. Drive-in Restaurant Assn. v. Clark* (1943) 22 Cal.2d 287, 292-293.)

Wage Order 4-2001 regulates wages, hours, and working conditions of employees in professional, technical, mechanical, and similar occupations, including the minimum wage applicable to those employees. Wage Order 4-2001(1) states that the wage order generally applies to “all persons employed in professional, technical, mechanical, and similar occupations whether paid on a time, piece rate, commission, or other basis.” In *Sheppard v. North Orange Regional Occupational Program* (2010) 191 Cal.App.4th 289, the court of appeal held that Wage Order 4-2001(1)(B), read in tandem with section (4) of the wage order, provides that its minimum wage provisions are applicable to “employees directly employed by the state or any political subdivision of the state.” (*Id.* at pp. 300-301.)

Labor Code Section 1182.12 sets forth the State’s minimum wages and governs Wage Order 4-2001’s minimum wage provisions. Senate Bill 3 (Stats. 2016, ch.4; hereafter “SB 3”), a bill passed by majority vote in each house of the Legislature, amended Labor Code Section 1182.12, set separate minimum wages for employers of greater or less than 26 employees, and provided for annual increases in those minimum wages, as specified, unless the Governor takes certain actions. The Department of Industrial Relations’ Division of Labor Standards and Enforcement amended Wage Order 4-2001(4) to reflect SB 3’s changes to Labor Code Section 1182.12 on January 1, 2017. Accordingly, Wage Order 4-2001(4) currently provides that the minimum wage for an employer employing 26 or more employees is \$11.00 per hour from January 1, 2018 to December 31, 2018.

³ Codified at Cal. Code Regs., tit. 8, §11040, Attachment B.

The AG Opinion

With respect to the authority of opinions of the Office of the Attorney General, the California Supreme Court has stated “Opinions of the Attorney General, while not binding, are entitled to great weight. In the absence of controlling authority, these opinions are persuasive ‘since the Legislature is presumed to be cognizant of that construction of the statute.’” (*California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 17 (citations omitted).)

The AG Opinion was requested by Michael Bennett, a previous Executive Director of the Commission, and issued by the Office of the Attorney General on January 6, 1977. The AG Opinion interprets Section 83106. The following are the AG Opinion’s conclusions relevant to the issue presented:

- A Commissioner is entitled to receive \$100 for each day that the Commissioner attends a meeting or hearing of the Commission, including those of an authorized committee of the Commission, even if the meeting or hearing only lasts part of the day or the Commissioner only attends part of the meeting or hearing. (AG Opinion, p. 2.)
- If the Commission has officially adopted a policy authorizing it, a Commissioner may receive compensation for authorized preparation for Commission meetings or hearings pursuant to Section 83106, and a Commissioner may be compensated based on a “reasonable proration” of Section 83106’s \$100 rate for each day engaged in official duties, depending on the degree to which a day is devoted to the performance of official duties, not to exceed a maximum of \$100 per day. (AG Opinion, p. 2.)

Analysis

A Wage Order Cannot Amend the Act Unless Approved by the Electorate or 2/3 Vote of the Each House of the Legislature.

The California Constitution prohibits the Legislature from amending an initiative measure unless the initiative permits amendment. (Cal. Const. art. II, section 10, subdivision (c).) Voters approved the Act, an initiative statute, at the June 4, 1974 primary election. Section 81012 governs the Act’s amendment or repeal and provides as follows:

“This title may be amended or repealed by the procedures set forth in this section. If any portion of subdivision (a) is declared invalid, then subdivision (b) shall be the exclusive means of amending or repealing this title.

“(a) This title may be amended to further its purposes by statute, passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring and signed by the Governor, if at least 12 days prior to passage in each house the bill in its final form has been delivered to the Commission for distribution to the news media and to every person who has requested the Commission to send copies of such bills to him or her.

“(b) This title may be amended or repealed by a statute that becomes effective only when approved by the electors.”

Thus, “[t]he Political Reform Act may be amended in two ways: (1) ‘to further its purposes’ if the amendment is passed in each house of the Legislature by a two-thirds vote; or (2) by the enactment of a statute that is then approved by the electorate.” (*Howard Jarvis Taxpayers Association v. Bowen* (2011) 192 Cal.App.4th 110, 116.)

To amend Section 83106, Wage Order 4-2001 and Labor Code 1182.12 would have to be approved by the electors or passed by two-thirds of each house of the Legislature. As neither the wage order nor Labor Code 1182.12 meets the express requirements for amending the Act authorized by Section 81012, Wage Order 4-2001 does not supersede Section 83106 or affect the ongoing applicability of the AG Opinion.

Members of Boards and Commissions Receive No Compensation Except as Specifically Provided by Statute.

The Government Code sets forth default provisions governing the compensation of members of State boards and commissions. Section 11009 provides that those members “serve without compensation” other than “necessary expenses incurred in the performance of duty” unless “otherwise expressly provided by law.” Section 11564.5 provides that, for a member of a State board or commission who is authorized to receive a “per diem salary or allowance in excess of expenses,” that per diem salary or allowance is \$100 per day “unless a higher rate is provided by statute.” Consistent with Section 11564.5, Section 83106 of the Act provides that members of the commission, other than the Chair, “shall be compensated at a rate of one hundred dollars (\$100) for each day on which he engages in official duties.”

There are over 300 boards and commissions of the State of California. The Governor makes appointments to at least 222 of those State boards and commissions.⁴ The Legislature makes appointments to at least 173 State boards and commissions.⁵ Other authorities of the State make appointments to 22 more State boards and commissions to which neither the Governor nor the Legislature make appointments.⁶

Members of a majority of the State’s 300-plus boards and commissions receive only expenses for their service. Pursuant to various statutory provisions, members of approximately 112 State boards and commissions are paid \$100 or less per diem or per day spent on official duties. Pursuant to Section 11009, it does not appear that members of State boards and commission receive compensation exceeding the compensation specifically provided for the position, even in cases where the per diem rate is less than the minimum wage specified in Labor Code Section 1182.12. As stated in a report by the Little Hoover Commission:

⁴ Governor’s Appointment List, March 31, 2017. See <https://www.gov.ca.gov/board-commission-appointees> (as of April 23, 2018).

⁵ Legislative Appointment List, October 2017. See URL in ftnt. 4.

⁶ Appointments by Other Appointing Authorities List, December 1, 2017. See URL in ftnt 4.

“Professor Robert C. Fellmeth, executive director of the University of San Diego School of Law’s Center for Public Interest Law, explained in August 2014 testimony to the [Little Hoover] Commission: ‘Most state board and commission appointees are essentially volunteers who are paid a symbolic per diem and meet once every month or two.’”

(Conversations for Workable Government, Little Hoover Commission, Report #227, June 2015, p. 12. <http://www.lhc.ca.gov/sites/lhc.ca.gov/files/Reports/227/Report227.pdf>.)

Similar to members of our Commission, members of at least four State boards and commissions under the authority of the Department of Industrial Relations, which is responsible for issuing wage orders, also receive \$100 for each day of attendance at meetings or hearings or conducting official business. (See Lab. Code, §§ 72, 75(d), 141(b), and 3070.) There is no indication that the Department of Industrial Relations interprets its wage order to apply to those State board or commission members under its authority.

Rules of Statutory Construction Further Establish that the Specific Provisions of Section 83106 Apply Over Wage Order 4-2001 and Labor Code Section 1182.12.

In addition to the express requirements to amend the Act provided in Section 81012, general rules of statutory construction reinforce the conclusion that Section 83106 applies over Wage Order 4-2001 and Labor Code Section 1182.12.

Specific v. General Statute

“It is a well-settled principle of construction that specific terms covering the given subject-matter will prevail over general language of the same or another statute which might otherwise prove controlling.” (*Kepner v. U.S.* (1904) 195 U.S. 100, 125.) “Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.” (*Crawford Fitting Co. v. J.T. Gibbons, Inc.* (1987) 482 U.S. 437.)

Whereas Section 83106 solely governs the compensation of Commissioners, Wage Order 4-2001(4)’s minimum wage provisions apply to “all persons employed in professional, technical, mechanical, and similar occupations whether paid on a time, piece rate, commission, or other basis,” including “employees directly employed by the state or any political subdivision of the state.” Furthermore, Wage Order 4-2001 does not provide a “clear intention” that Section 83106 is controlled or nullified by the wage order’s minimum wage provisions. Thus, this rule of statutory construction favoring a specific statute over a general one indicates that Section 83106 would prevail over Wage Order 4-2001(4), and that the AG Opinion still applies.

Amendments by Implication

“Amendments by implication, like repeals by implication, are not favored.” (*United States v. Welden* (1964) 377 U.S. 95, 102.) “As a rule, courts should not presume an intent to legislate by implication. ... [F]or a consequence to be implied from a statute, there must be

greater justification for its inclusion than consistency or compatibility with the act from which it is implied. “A necessary implication within the meaning of the law is one that is so strong in its probability that the contrary thereof cannot reasonably be supposed.”” (Lubner v. City of L.A. (1996) 45 Cal.App.4th 525, 529 (citations omitted).)

Wage Order 4-2001(4) does not expressly address the Commission, its Commissioners, the Act, Section 83106, any State boards or commissions, or any members of those boards or commissions. Furthermore, it is not a “necessary implication” that the wage order’s minimum wage provisions affect the meaning of Section 83106, as no court has deemed a Commissioner to be an “employee directly employed by the state” for purposes of the wage order to date. Thus, this rule of statutory construction guarding against amendments by implication further supports Section 83106 prevailing over Wage Order 4-2001, and the ongoing application of the AG Opinion.

Protecting the Public Fisc

“It is well settled that fees in compensation of public officers, being of statutory origin, may be collected and retained only when they are specifically provided by law; moreover, the laws granting the same are to be strictly construed in favor of the government, and where ambiguity arises and the enactment admits of two interpretations, the rule of strict construction in favor of the government must be applied.” (Citizen Advocates v. Bd. Of Supervisors (1983) 146 Cal.App.3d 171, 177.)

Because Section 83106 and Wage Order 4-2001(4) both in effect grant compensation to public officials, this rule of statutory construction requires each to be “strictly construed in favor of the government.” Thus, this rule of statutory construction protecting the public fisc from profligacy indicates that Section 83106 should be strictly construed, and that the AG Opinion still applies.

Although Wage Orders are Construed Broadly in Favor of Protecting Employees, as Applied to Members of State Boards and Commissions Wage Orders Do Not Appear to Supersede Compensation Provisions as Provided in Section 11009 and Section 83106.

“‘Statutes governing conditions of employment are construed broadly in favor of protecting employees.’ We construe wage orders, as quasi-legislative regulations, in accordance with the standard rules of statutory interpretation.” (Bearden v. U.S. Borax, Inc. (2006) 138 Cal.App.4th 429, 435.) “[I]n light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection.” (Industrial Welfare Commission v. Superior Court (1980) 27 Cal.3d 690, 701.)

Wage Order 4-2001(4) applies to, among others, “employees directly employed by the state.” However, whether members of State boards and commissions are employees directly employed by the state is not clear and applying the wage order to members of State boards and commission would conflict with the provisions of Section 11009 and Section 86103.

Additionally, the wage order would appear to conflict with the general practices of the more than 100 State boards and commissions that pay members only the statutory per diem rate.

Reasonable Proration May Allow Commission to Amend its Compensation Policy to Pay the Minimum Wage for Hours Engaged in Official Duties up to the \$100 per Day Limit.

The California Supreme Court has stated that “[t]o the extent a wage order and a statute overlap, we will seek to harmonize them, as we would with any two statutes.” (*Brinker Restaurant Corp., supra*, at p. 1027.) As concluded above, neither Wage Order 4-2001 nor Labor Code Section 1182.12 supersedes Section 83106 of the Act or the application of the AG Opinion. However, because the AG Opinion authorizes the Commission to adopt a “reasonable proration” of Section 86103’s \$100 rate (AG Opinion, p. 2), it appears that the Commission could reasonably harmonize its Commissioner Compensation Policy with Wage Order 4-2001 and Labor Code Section 1182.12’s minimum wage provisions. Accordingly, once the minimum wage exceeds the current prorated rate of compensation for Commissioners of \$12.50 per hour, it appears reasonable for the Commission to amend its compensation policy to pay the minimum wage for hours engaged in official duties up to the \$100 per day limit.

Conclusion

Neither Wage Order 4-2001 nor Labor Code Section 1182.12 supersedes the provisions of Section 83106, as interpreted by the AG Opinion, which still applies. Upon direction by the Commission the Legal Division will submit the question to the Attorney General’s Office for further consideration, along with this analysis.

Attachment A

60 Ops. Cal. Atty. Gen. 16 (Cal.A.G.), 1977 WL 24847

Office of the Attorney General

State of California
Opinion No. CV 76-20
January 6, 1977

***1 THE HONORABLE MICHAEL BENNETT
EXECUTIVE DIRECTOR OF THE FAIR POLITICAL PRACTICES COMMISSION**

THE HONORABLE MICHAEL BENNETT, EXECUTIVE DIRECTOR OF THE FAIR POLITICAL PRACTICES COMMISSION, has requested an opinion from this office on the following questions:

1. Is a member of the Fair Political Practices Commission entitled to compensation for attendance at:
 - a. Regular meetings of the commission?
 - b. Special meetings of the commission?
 - c. Committee meetings of the commission?
 - d. Hearings conducted by the commission?

2. If the answer to all or part of question one is affirmative, is a member of the commission entitled to receive the full \$100 daily compensation:
 - a. If the meeting or hearing lasts only part of the day?
 - b. If the member of the commission attends only part of the meeting?

3. Is a member of the commission entitled to compensation:
 - a. For time spent preparing for meetings and hearings described in question one?
 - b. For time spent preparing for and engaging in other activities performed at the request of the chairman or the executive director?

4. If the answer to all or part of question three is affirmative, is it within the power of the commission:
 - a. To impose a maximum monthly amount of compensation which may be paid to a member of the commission for activities described in question three (a)?
 - b. To decline to pay compensation for time spent making public speeches or appearances or giving interviews, notwithstanding that such activities are carried out at the request of the chairman or the executive director?
 - c. To decline to pay compensation for time spent traveling in connection with compensable official duties?
 - d. To pay compensation for activities described in question three on an hourly basis rather than pay \$100 for each day in which any official duties are engaged in?

5. Do the expenses for which a member of the commission is entitled to reimbursement include:

- a. Travel and per diem on the same basis as state employees who travel on official business?
- b. Stamps, supplies and secretarial services they employ in connection with official duties?

The conclusions are:

1. A member of the commission is entitled to compensation for attendance at regular, special or committee meetings and hearings conducted by the commission.
2. A member is entitled to receive one hundred dollars for each day on which he or she attends a commission meeting or hearing although the meeting or hearing may last only part of the day or the member may attend only part of the meeting.
3. (a) If officially adopted policy of the commission authorizes it, a member is entitled to compensation for preparation for meetings and hearings.
(b) If the activity is essential to the decision making process of the commission and the commission has officially authorized such activity, a member may be compensated for engaging in the activity at the request of the chairman or executive director where the commission has delegated such authority.
*2 4. (a) Assuming the commission authorizes preparation activity, it may not impose a maximum monthly amount of compensation for a member's preparation for meetings and hearings. However, it may limit the type of activity which is considered an official duty and it may impose verification procedures.
(b) Unless the commission officially adopts a policy recognizing speech making, public appearances and granting interviews as official duties, a member is not entitled to compensation for engaging in such activities. However, the commission's power to authorize payment for such activities is limited.
(c) A member is entitled to compensation for time spent in necessary travel in connection with compensable official duties and the commission is without authority to deny payment.
(d) The Political Reform Act authorizes payment of compensation for authorized preparation activity on an hourly basis, not to exceed a maximum of \$100 for any single day.
5. (a) A member is entitled to reimbursement for travel expenses on the same basis as state employees who travel on official business.
(b) A member is entitled to reimbursement for costs incurred in emergencies for stamps and supplies required for official business while traveling if approved by the commission or the chief administrative officer of the commission for a purchase over \$10. A member may be reimbursed for secretarial services only in connection with travel expenses and then only if civil service secretarial services is unavailable.

ANALYSIS

The Fair Political Practices Commission was established by the Political Reform Act of 1974 (Gov. Code, tit. 9, § 81000 et seq.¹), which was enacted on June 4, 1974, through the initiative process and except for chapter 8, relating to ballot

pamphlets, became effective on January 7, 1975. The commission consists of five members, including the chairman, and no more than three can be of the same political party. § 83100. The chairman and one other member are appointed by the Governor; the Attorney General, the Secretary of State and the Controller each appoints one of the other members. §§ 83101, 83102.

The commission is charged with primary responsibility for the administration and implementation of the act. § 83111. Generally, the act requires disclosure of campaign contributions and recording of campaign expenditures (ch. 4); limits expenditures in statewide elections (ch. 5); establishes registration and reporting requirements for lobbyists (ch. 6); establishes procedures for defining and detecting conflicts of interest of state and local officials and preventing such from affecting government action (ch. 7); sets specifications for ballot pamphlets (ch. 8); eliminates certain advantages of incumbent elected officials (ch. 9); and establishes enforcement mechanisms (chs. 10 and 11). The commission is required to prescribe forms for reports, statements, notices and other documents required by the act; to prepare and publish manuals and instructions to facilitate compliance with and enforcement of the act; and to provide assistance to agencies and public officials in administering the act (§ 83113). The commission is empowered as requested to issue opinions regarding the duties of persons so requesting (§ 83114), to investigate violations of the act at the state level (§ 83115); and upon probable cause to hold hearings to determine if a violation has occurred and, if so, to require certain actions and impose penalties (§ 83116). The commission is to have a staff whose duties and compensation it controls (§ 83107).

*3 The series of questions posed raises three basic issues concerning the meaning of section 83106, which authorizes compensation for and reimbursement of expenses incurred by the members of the commission. The first issue involves what activities of members can be considered official duties. The second concerns the flexibility of the rate of compensation prescribed. The third pertains to what expenses incurred by members in activities related to commission functions are reimbursable. The conclusions reached regarding the specific questions posed are derived in the course of exploring these issues.

SERVICES FOR WHICH COMMISSION MEMBER IS ENTITLED TO COMPENSATION

Descriptions of a variety of activities in which a member of the commission might be engaged have been presented for an opinion as to which activities would entitle a member other than the chairman to the compensation prescribed by section 83106, which provides:

'The chairman of the Commission shall be compensated at the same rate as the president of the Public Utilities Commission. Each remaining member shall be compensated at the rate of one hundred dollars (\$100) for each day on which he engages in official duties. The members and chairman of the Commission shall be reimbursed for expenses incurred in performance of their official duties.'

Since a member of the commission other than the chairman is entitled to compensation only when he or she engages in official duties, a sense of what are the duties of a member is critical. Except that section 83108 provides that the commission may delegate authority to the chairman and the executive director to act in the name of the commission between meetings, and relevant powers, duties and authority as surveyed, *supra*, are vested in the commission. Keeping in mind the knowledge that it is the commission which is the entity responsible for implementation of the act, it is helpful in analyzing the nature of a member's official duties to consider an abstract concept of official duties formerly used in determining governmental tort liability. In White v. Towers, 37 Cal.2d 727, 733 (1951), the California Supreme Court adopted the following general test for determining whether certain acts of a public officer are within the scope of his authority so as to immunize him from liability for the consequences thereof:

'Duties of public office include those lying squarely within its scope, those essential to accomplishment of the main purposes for which the office was created, and those which, although only incidental and collateral, serve to promote the accomplishment of the principal purposes.' (Nesbitt Fruit Products v. Wallace, 17 F.Supp. 141, 143.)

Although the rule was adopted prior to passage of the Tort Claims Act (§ 810 et seq.; Stats. 1963, chs. 1681 and 1715), it has continuing vitality in the context of the act. See Neal v. Gatlin, 35 Cal App 3d 871, 875 (1973); Meester v. Davies, 11 Cal.App.3d 342, 347-348 (1970). The rule has been utilized as a general guide for determining the duties of a public official in contexts other than the Tort Claims Act. See Ligda v. Superior Court, 5 Cal App 3d 811, 825 (1970). As is apparent from the discussion in Ligda, id., the application of the formula depends on the nature of the office as established by law.

*4 Using the White definition as a guide, the only duty, authority or power lying squarely within the scope of or inherent in the office of a member of the Fair Political Practices Commission is to participate in the decision making process of the commission. As required by the State Public Meetings Act (§ 11120 et seq.) and section 83110, the decision making process must take place in open meetings, except in certain circumstances, after notice to the public. In the course of such proceedings it may be the decision of the commission that the members need more information and analysis before making decisions on certain issues under its consideration. In implementing its decision the commission would have several alternatives open to it.

First, the commission could order the staff to prepare reports including the desired information and analyses. § 83107.

Second, it could form committees of its members to develop the necessary information and report back to the full commission. See 32 Ops Cal. Atty. Gen. 240, 241 (1958); 4 McQuillan, Municipal Corporations (1968 rev. ed.) § 13.51, p. 572.

Third, an extended series of meetings of the commission could be held to develop the information.

Fourth, it could be decided that action on a matter be postponed to or scheduled at a future meeting and that members should prepare themselves to take action at that time possibly in specified ways such as reviewing staff reports or preparing alternative courses of action.

There can be little doubt that when a member attends regular or special meetings of the commission scheduled in accordance with section 11125 he is engaged in the inherent duties of his office.²

In contrast to the expansive concept of an official's scope of authority or employment called for by the judicially recognized policies of the Tort Claims Act (see Neal v. Gatlin, supra, at p. 875; Meester v. Davis, supra, at pp. 347-348) or the Workmen's Compensation Law (see Lundberg v. Workmen's Comp. App. Bd., 69 Cal.2d 436, 439 (1968); Rich v. Industrial Accident Com., 36 Cal App.2d 628, 632 (1940), statutes granting compensation or expenses to public officials are strictly construed in favor of the government and where there is ambiguity the construction must be in favor of the government. County of San Diego v. Milotz, 46 Cal.2d 761, 767 (1956); County of Marin v. Messner, 44 Cal.App.2d 577, 585 (1941); see also Markman v. County of Los Angeles, 35 Cal App.3d 132, 134 (1973); 58 Ops. Cal. Atty. Gen. 183, 186, 223, 224 (1975). The purpose of the rule is to protect the public fisc from unnecessary or excessive claims from public officials. See 7 Ops. Cal. Atty. Gen. 325, 327, 329 (1946).

In applying the foregoing rule it has been determined that where a statute allows a twenty-five dollar per diem 'for attendance upon meetings of the authority' members are entitled to that compensation for days actually and necessarily spent traveling to and from meetings of the authority but are not entitled to it for work in preparation for meetings or any other activity other than actual attendance upon meetings. 2 Ops. Cal. Atty. Gen. 2, 3 (1943). It was recognized, however, that there were statutes granting compensation and expenses to other public officials in broader language which might include additional activities but even those would be strictly construed. Id.

*5 A later opinion, 7 Ops. Cal. Atty. Gen. 325, *supra*, concludes that the following statutory language entitled members of the Youth Services Advisory Committee to the specified allowances for attendance at subcommittee meetings called by the Governor or an appropriate designee and for travel to and from:

'... when called into conference or session by the Governor or a department head designated by him shall be reimbursed for their actual and necessary expenses incurred in connection with such conferences or sessions, or in lieu thereof shall receive mileage and ten dollars (\$10) per day of actual service.'

In reaching this conclusion it was reasoned that the rule of strict construction did not require an inference that the concepts 'conference' and 'sessions' applied only to meetings of the full committee because any meetings had to be authorized by the Governor or his designee rather than the chairman on his own authority, thereby establishing a sufficient restriction against ad hoc events related to committee affairs providing the basis for unnecessary or excessive claims on the public fisc. 7 Ops. Cal. Atty. Gen. 325, 327, *supra*.

Applying the rule of strict construction as previously applied, it is clear that a member of the Fair Political Practices Commission is engaging in 'official duties' within the meaning of section 83106 when he or she attends a regular meeting or a properly called special meeting of the commission or hearing conducted by the commission or is traveling to and from one of those events. Diligent and faithful performance of those functions is the limit of the inherent duties of a member of the commission. As indicated in 7 Ops. Cal. Atty. Gen. *id.*, a statute which provides compensation for public officials may be given an expansive interpretation only where there is some mechanism external to the individual official's judgment which tends to restrain excessive and unnecessary claims. Therefore, if the concept 'official duties' found in section 83106 is to be expanded beyond its inherent core of meaning, there must be a mechanism external to the judgment of an individual official of the commission capable of restraining excessive and unnecessary claims.

Returning to the *White v. Towers* rule, it is certainly reasonable to conclude that a member's preparation for meetings of and hearings conducted by the commission, although incidental and collateral to the performance of his inherent duty to participate in the decision making process of the commission, would serve to promote the accomplishment of that duty. Where these same activities are engaged in by the members in the course of the commission's deliberations during a meeting, it is fair to conclude that such activities are essential to the decision making process. Presumably, the commission as a whole has at least tacitly resolved that a decision on an issue is not possible without developing more information. In terms of the *White v. Towers* stratified concept of official duties, there is no doubt that preparation-type activity can be essential to accomplishment of the main purposes of the office.

*6 It is apparent that an activity which in one context is merely incidental or collateral to a member's function can become essential in another. In the first instance, as demonstrated by the hypothetical regarding 'preparation activity' during actual meetings, it is for the commission as a whole to decide what activity on the part of the members in what context is essential to its function as a body within the constraints of its statutory duties and powers.

As noted previously, the purpose of the rule of strict construction is to check excessive and unnecessary compensation for and expense claims of public officials. Control of such expenditures through policies formally adopted by the commission itself as to what are essential activities would be a check on the possibility of an individual member's being uncritical and self indulgent regarding claims which he submits. Policies which are more than merely *ipse dixit* and demonstrate an essential connection between the activity being authorized and the role of participant in the commission decision making process would promote the policy reflected in the rule of strict construction. In accordance with the rule of strict construction, it is concluded that within the meaning of section 83106, the phrase 'official duties' does not include activities of a member other than attendance at and travel to and from meetings and hearings conducted by the commission itself unless there is a clearly articulated policy adopted by the commission authorizing such activity. Thus, members of the commission may receive compensation only for attendance at and travel to and from meetings and hearings of the commission unless other activities are authorized by the commission within the scope of its authority.³

If the commission were to establish committees of its members to study an issue or problem related to its powers, duties or authority and to report back with information and findings thereon,⁴ such an action could not be considered arbitrary and members would be entitled to the compensation and reimbursement allowed by section 83106 for participation in the work of a committee. Similarly, if the commission's workload were such that its decision making process required some preparation prior to meetings or hearings to be effective, a formal policy, for example, of providing a meeting agenda and materials to members for their study in advance of meetings, thereby entitling them to compensation, would not be arbitrary, especially if some informal time toleration were indicated.⁵

However, the connection between making public speeches or appearances or giving interviews and participation in commission decision making processes is tenuous at best. Recent experience has educated and enhanced the public consciousness of the difference between 'junketing,' as well as other more mischievous forms of self aggrandizement, and public service. A fairminded appraisal of a member's speechmaking, public appearances or being interviewed at times other than in the course of performing official duties would be that such activities would rarely, if ever, be more than incidental or collateral to the inherent function of a member of the commission.

*7 Against this background it is suggested that there would be a bona fide issue of arbitrariness regarding any commission policy authorizing such activities which did not specifically articulate the essential relationship between a particular incident of this type and the decision making process of the board. However, the commission has been assigned the duty of assisting other public agencies and officials charged with responsibility in administering the Political Reform Act of 1974. § 83113, subd. (c). From time to time joint meetings of representatives of the Attorney General, the Secretary of State and the Franchise Tax Board are held to facilitate and coordinate administration of the act. The commission clearly may authorize its members to attend such meetings.

Where the commission authorizes it pursuant to section 83108,⁶ the executive director or the chairman may arrange for a member or members to perform authorized activities.

COMPENSATION TO WHICH A COMMISSIONER IS ENTITLED

The settled rule regarding compensation of public officials is:

' . . . that compensation for official services depends entirely upon the law; that statutes relating to such compensation are strictly construed in favor of the government; that a public officer may only collect and retain such compensation as is specifically provided by law, . . . ' County of San Diego v. Milotz, 46 Cal.2d 761, 767 (1956).

Members of the commission are to be compensated in accordance with section 83106, which, as noted above, provides for compensation of members ' . . . at the rate of one hundred dollars (\$100) for each day on which he engages in official duties' plus reimbursement of expenses.

When a commissioner devotes less than the normal eight-hour workday to his or her official duties on a given day, the question arises as to whether that member is entitled pursuant to section 83106 to a full \$100 for that day or whether a prorated amount should be paid. Section 83106 does not provide a direct answer to that question, due to the phrase 'at the rate of one hundred dollars (\$100) for each day on which he engages in official duties.' Generally the quoted phrase might be understood as a statement of the concept known as 'per diem compensation.' Many courts faced with the issue have decided that where compensation of a public official is set by statute at a certain sum per day, performance of any substantial service on a particular day entitles such official to the full amount even though such service does not require a full day. State ex rel. Greb v. Hurn, 102 Wash. 328, 172 P. 1147 (1918), 1 A.L.R. 274; 63 Am Jur.2d 859, Public Officers

and Employees § 377; 58 Ops. Cal. Atty. Gen. 396 (1975); 41 Ops. Cal. Atty. Gen. 47 (1963); and cf. Robinson v. Dunn, 77 Cal. 473, 475 (1888). The statute construed in State ex rel. Greb v. Hurn, *supra*, 172 P. 1148, provided that: 'Each official reporter so appointed shall be paid a compensation at the rate of ten dollars (\$10) per diem for every day that he is actually in attendance upon said court pursuant to the direction of the court.'

*8 However, insofar as can be determined, no California court has ruled that per diem compensation may not be prorated where duties occupy less than a normal workday; although it has been decided that no more than the per diem amount may be paid for a day on which more than the normal hours are required. See Robinson v. Dunn, *supra*.

If section 83106 were intended to be merely a restatement of the per diem concept, the phrase 'rate of' is just surplus verbiage. In California construction of a statute which makes some words surplusage is to be avoided. People v. Gilbert, 1 Cal.3d 475, 480 (1969); Select Base Materials v. Board of Equal., 51 Cal.2d 640, 645, 646-647 (1959); Van Nuis v. Los Angeles Soap Co., 36 Cal.App.3d 222, 228-229 (1973). If 'rate of' means that \$100 for each day is merely a frame of reference for computing a member's entitlement, there is room for administrative interpretation and for adjustment for pro rata compensation. The dictionary definition of 'rate' suggests that the word can be understood to have such a meaning in the context of section 83106. Webster's Third New International Dictionary, Unabridged, page 1884, states one definition of 'rate' as:

'a charge, payment, or price fixed according to a ratio, scale or standard . . .'

As noted in County of San Diego v. Milotz, *supra*, a construction of a statute providing compensation for a public officer which fairly favors the public treasury over the benefit of the officer is preferred. In providing pro rata compensation by breaking the daily rate into an hourly rate based on the regular eight-hour day, i.e., \$12.50 per hour, the official is fairly compensated in terms of section 83106 and the potential siphon of the public treasury for minimal effort is avoided.⁷ Thus, in accordance with familiar legal maxim that 'the greater includes the less' (Civ. Code § 3536; cf. Jud Whitehead Heater Co. v. Obler, 111 Cal.App.2d 861, 868 (1952); Goldsmith v. Board of Education, 66 Cal.App. 157, 164 (1924)), section 83106 permits pro rata compensation of members of the commission where the service rendered on a given day requires less than a normal workday.

Moreover, we are informed that ever since it began functioning in January 1975, the commission has established a policy of allowing members the full per diem compensation for attendance at meetings while limiting compensation to an hourly rate for activity in preparation for meetings. Unless clearly erroneous, construction of statutes applied by agencies charged with responsibility for administering them are given great weight by courts. Los Angeles City etc. Employees Union v. Los Angeles City Bd. of Education, 12 Cal.3d 851, 854 (1974); Ralphs Grocery Co. v. Reimel, 69 Cal.2d 172, 176 (1968). Since the commission's policy is not an unreasonable construction of section 83106, it is concluded that the use of an hourly rate derived from the basic per diem compensation is authorized.

*9 However, just as a member is entitled to compensation for days on which he or she must travel in order to perform official duties, 2 Ops. Cal. Atty. Gen., *supra*, at p. 3, although a full workday might not be entailed, duties which may themselves occupy less than a full workday will in effect require a member to devote an entire workday in being available. For example, dead time after a meeting or hearing which required but a few hours may leave insufficient time for a return trip home or for any other gainful activity. Thus, there would be no inconsistency with the authority to prorate for minimal preparation activity, which does not interfere with the remainder of a workday, in granting the full compensation for attendance at meetings and hearings, sessioning of which may not entail a full eight-hour day.

It is concluded, therefore, that section 83106 contemplates compensation at the stated rate or some reasonable proration based thereon, depending upon the degree to which a day is directly or by necessity indirectly devoted to the performance of official duties.⁸

REIMBURSEMENT FOR EXPENSES

Travel Expenses

Several questions have been posed regarding expenses allowable pursuant to section 83106. The first is whether members are entitled to travel and per diem on the same basis as state employees who travel on official business. It is concluded that members of the commission are entitled to reimbursement for official travel expenses pursuant to Board of Control rules applicable to state employees.

A previous opinion of this office concluded that statutory language entitling statutory officers to reimbursement for expenses in connection with official duties does so in the context of Board of Control rules unless the statute specifies otherwise. 7 Ops.Cal.Atty.Gen., *supra*, 326-327. The Board of Control is empowered to limit travel expenses of state officers pursuant to section 13920, paragraph (a), which provides in pertinent part:

'By a majority vote, the board shall adopt general rules and regulations:

'(a) Limiting the amount, time, and place of expenses and allowances to be paid to officers, agents, and employees of the state while traveling on official state business. The rules and regulations shall provide for reasonable reimbursement to an officer, agent or employee of the state for expenses incurred by him to repair a privately owned vehicle which was damaged through no fault of said officer, agent or employee; provided that the damage occurred while the vehicle was used on official state business with the permission or authorization of an employing agency.'

The Board of Control has established regulations (Cal. Admin. Code, tit. 2, § 700 et seq.) governing travel expenses which are applicable to both employees and statutory officers. There being nothing in section 83106 which merely requires that members 'be reimbursed for expenses incurred in performance of their duties,' specifying anything to the contrary regarding travel expenses, the Board of Control rules determine a member's right to be reimbursed for travel expenses.

Supplies and Secretarial Services

*10 The second question concerns whether a member is entitled to reimbursement for expenses incurred in the employment of secretarial services and purchase of supplies⁴ in connection with official duties. It is concluded that a member may be reimbursed for purchase of supplies only if the purchase is authorized by the Department of General Services or for a purchase necessarily incurred in an emergency while traveling on official business. Emergency purchases in excess of \$10 must be approved by the executive director of the commission.

With regard to the purchase of supplies, section 14793 provides:

'No state agency may purchase equipment, supplies, or materials in the open market, unless permission has been given by the department [of General Services], upon a showing of the necessity therefor.'

Considering the fact that the commission has supplies routinely available to it pursuant to the procedures of State Administrative Manual (SAM) section 3500 et seq., a showing of necessity for expenses of individual members for business supplies would appear to be a difficult endeavor.

Such expenses might arguably be incurred because members may perform official business far from the principal office of the commission in Sacramento or other offices which the commission may establish (§ 83110). In these circumstances the expenses are related to travel on official business and will be governed by the rules of the State Board of Control

in accordance with section 13920, paragraph (a), [California Administrative Code, title 2, section 701, subdivision \(c\), paragraph 2](#), promulgated by the Board of Control, defines travel expenses to include:

'(2) Business Expenses. Business expenses consist of the charges for business phone calls and telegrams; emergency clothing, equipment or supply purchases; and all other charges necessary to the completion of official business. Any emergency purchase shall be explained, and if over \$10 must be approved by the department head, deputy, or chief administrative officer.'

Except for the cost of phone calls and telegrams paid by a member, purchase of supplies must be occasioned by an 'emergency' and a purchase in excess of ten dollars must be approved by the chief administrative officer of the agency involved,¹⁰ in this case the executive director.

Reimbursement for costs incurred for secretarial services presents additional considerations. Section 83107 provides in part:

'The Commission shall appoint and discharge officers, counsel and employees, consistent with applicable civil service laws, and shall fix the compensation of employees and prescribe their duties.'

Article XXIV of the California Constitution establishes the state civil service. Section 1, subdivision (a), of this article provides that:

'(a) The civil service includes every officer and employee of the state except as otherwise provided in this Constitution.'

[Section 4 of article XXIV](#) exempts members of boards and commissions and a deputy or employee of each board or commission from the civil service system but in subdivision (g) specifically denies exemption for any deputy or employee of a member of a board or commission.

*11 In the absence of a showing that a function cannot be performed by persons selected pursuant to the provisions of the civil service system, [article XXIV](#) requires that the work be done by civil service employees. 17 Ops.Cal.Atty.Gen. 152, 154 (1951). As stated in 56 Ops.Cal.Atty.Gen. 353, 356 (1973):

'Interpretations of [article XXIV](#), both by the courts and in the opinions of this office, have tended to support the proposition that an individual who is performing services for the state and is being paid with state funds, unless either specifically exempted or in a unique factual setting, should be selected and retained pursuant to the civil service system. Cf. [Stockburger v. Riley](#), 21 Cal.App.2d 165, 169-170 (1937) (petition for hearing before the California Supreme Court denied July 22, 1937); [Evans v. Superior Court](#), 14 Cal.2d 563, 578-589 (1939); [Burum v. State Compensation Insurance Fund](#), 30 Cal.2d 575, 580 (1947); 24 Ops.Cal.Atty.Gen. 173 (1954); 30 Ops.Cal.Atty.Gen. 75 (1957); [California State Employees Association v. Trustees of California State Colleges](#), 237 Cal App.2d 530, 534 (1965); [California State Employees Association v. Trustees of California State Colleges](#), 237 Cal App.2d 541, 543 (1965).'

[Section 5 of article XXIV](#) specifically recognizes an exception to the foregoing general rule for temporary appointments for which there is no employment list. Furthermore, [Government Code section 19120](#) provides:

'The appointing power, to prevent the stoppage of public business when an actual emergency arises, or because the work will be completed within 30 working days, may make emergency appointments for a period not to exceed 30 working days without utilizing persons on employment lists and, if necessary, without regard to existing classes. The method of selection and the qualification standards for an emergency employee shall be determined by the appointing power. The frequency of appointment and length of employment of an individual under emergency appointments shall be restricted by the board by rule so as to prevent the use of emergency appointments to circumvent employment lists.'

'Service under emergency appointment shall be credited for purposes of layoff, vacation, sick leave and salary adjustment only if and as provided by board rule.'

The following regulations of the State Personnel Board found in [California Administrative Code, title 2, sections 301-303](#), provide:

'When emergency appointments are made under [Section 19120](#) of the act, the appointing power shall immediately notify the executive officer of the name of the appointee, the duties of the position, the reason for the appointment either by stating the nature of the actual emergency or by stating the nature of the work that is of short duration, and such further data as may be required by the executive officer. No authority exists in the appointing power to make an emergency appointment continuous.' [Cal. Admin. Code tit. 2, § 301](#).

*12 'Emergency appointments for reasons other than actual emergency shall be subject to review by the executive officer to assure that the work is appropriate for emergency appointments and that such appointments are not for the purpose of circumventing employment lists.' [Cal. Admin. Code, tit. 2, § 302](#).

'No person may serve under emergency appointment for more than 30 working days in any four consecutive calendar months except that in case of fire, flood or other extreme emergency an extension may be approved by the executive officer.' [Cal. Admin. Code, tit. 2, § 303](#).

Since secretarial services are available to the commission within the civil service, obligations incurred by members for secretarial services cannot generally be assumed by the state without a special justification recognized by established commission policy which complies with [section 19120](#) and [California Administrative Code, title 2, sections 301-303](#). As provided by sections 83107 and 18524,¹¹ the commission is the appointing power and as such must, pursuant to [section 19120](#), establish the policy for determining whether emergency appointments are justified. A factor to be weighed in determining whether an emergency exists within the meaning of [section 19120](#) might be the availability of clerical help pursuant to sections 18730-18732, which permit the State Personnel Board to establish clerical pools in any locality where appointing powers may need temporary help. A further factor is that modern technology makes possible utilization of secretarial services through such conveniences as telephonic dictation or instruction, mailing of cassette tapes, use of telecopying, etc.

Where an emergency appointment is made the state incurs an obligation to pay the appointee and that obligation is met through the regular payroll procedures prescribed in section 8520 of the State Administrative Manual.

A member could claim his expenses for secretarial services only in connection with a travel claim pursuant to [California Administrative Code, title 2, section 700 et seq.](#) However, the foregoing considerations regarding the availability of civil service secretarial assistance will be relevant in determining whether such claims are allowable.

EVELLE J. YOUNGER

Attorney General

GEOFFREY L. GRAYBILL

Deputy Attorney General

Footnotes

¹ All section references are to the Government Code unless otherwise stated.

² Section 83116 provides that the commission may hold hearings to determine whether a violation of the act has occurred. A member's attendance at such a hearing conducted by the commission itself is clearly performance of an official duty.

- 1 Rules or standards of general application interpreting or implementing section 83106, a law involving an important public interest, are not such that relate only to the internal management of the commission and therefore must be promulgated in accordance with the Administrative Procedure Act (§ 11371 et seq.) Cf. *Poschman v Dumke*, 31 Cal App 3d 932, 942-943 (1973); see also § 83112.
- 4 It should be noted that the commission may not delegate its decision making authority to a committee. 32 Ops. Cal. Atty. Gen., *supra*, 241.
- 5 See discussion of compensation rate, *infra*. The commission also has some discretion to deny or adjust claims which are not made in 'good faith.' In reviewing a public official's claim for per diem compensation a court has observed (*Smith v. County of Jefferson*, 10 Colo. 17, 13 P. 917, 920 (1887)):
'The superintendent, as a witness on the trial below, testified to his good faith in rendering these services, and in charging his per diem therefor; that the whole business thus transacted justified the aggregate per diem charges included in the account rendered; that he never tried to make the work cover more time than was necessary for its transaction; that the average number of letters necessary to be written per day was from three to four, and his practice was to make no per diem charge for official correspondence unless it occupied at least one hour of his time. No separate charge was made for these services when there were other duties to perform.
'In this connection counsel for the appellee asks for an opinion 'as to what length of time will constitute a day's service for the superintendent.' We answer, the law does not recognize fractions of days; and, when it provides a per diem compensation for the time necessarily devoted to the duties of an office, the officer is entitled to this daily compensation for each day on which it becomes necessary for him to perform any substantial official service, if he does perform the same, regardless of the time occupied in its performance. An effort to stretch out the officer's official work from day to day, in order to charge for a greater number of days than was necessary, appears from the testimony not to have been done in any instance in the present case.' Accordingly, the commission would be justified in adjusting a commissioner's claim where work has been 'stretched out' to maximize per diem salary or where only an insignificant amount of work is performed in a day.
- 6 Section 83108 provides:
'The Commission may delegate authority to the chairman or the executive director to act in the name of the Commission between meetings of the Commission.'
- 7 The Legislature has recently demonstrated in establishing the California Coastal Commission that it recognizes the efficacy of a proration approach for certain activities. *Public Resources Code* section 30314, to be effective January 2, 1977 (Stats. 1976, ch. 1330), provides in pertinent part
'Except as provided in this section, members or alternates of the commission or any regional commission shall serve without compensation but shall be reimbursed for actual and necessary expenses incurred in the performance of their duties to the extent that reimbursement for such expenses is not otherwise provided or payable by another public agency or agencies, and shall receive fifty dollars (\$50) for each full day of attending meetings of the commission or of any regional commission. In addition, members or alternates of the commission shall receive twelve dollars and fifty cents (\$12.50) for each hour actually spent in preparation for a commission meeting, provided, however, that for each meeting no more than eight hours of preparation time shall be compensated as provided herein.'
- 8 It should be noted that statutes providing for compensation for members of the various boards and commissions are stated in different ways. Some are compensated for attendance at meetings only (e.g. *Gov. Code* § 10302); others for meetings and specified other duties (e.g. *Health & Saf. Code* § 6489); others at a per diem for discharge of official duties (e.g. *Bus & Prof. Code* § 103); and other variations. Given these differences, nothing in this opinion necessarily implies that authority to prorate compensation can be derived in each case.
- 9 For the purposes of this discussion 'supplies' include postage. Section 1224 allows refunds for postage costs incurred by state officers for official business in accordance with lawful claims procedures.
- 10 A recent ruling indicates that officials who without exercising due care authorize illegal expenditures of state funds are personally liable therefor. *Stanson v Mott*, 17 Cal 3d 206 (1976).
- 11 Section 18524 provides:
"Appointing power' means a person or group having authority to make appointments to positions in the State civil service."

60 Ops. Cal. Atty. Gen. 16 (Cal.A.G.), 1977 WL 24847

Attachment B



OFFICIAL NOTICE

INDUSTRIAL WELFARE COMMISSION

ORDER NO. 4-2001

REGULATING

WAGES, HOURS AND WORKING CONDITIONS IN THE

PROFESSIONAL, TECHNICAL, CLERICAL, MECHANICAL AND SIMILAR OCCUPATIONS

Effective January 1, 2002 as amended

Sections 4(A) and 10(C) amended and republished by the Department of Industrial Relations, effective January 1, 2017, pursuant to SB 13, Chapter 4, Statutes of 2016 and section 1182.13 of the Labor Code

This Order Must Be Posted Where Employees Can Read It Easily

Please Post With This Side Showing

OFFICIAL NOTICE

Effective January 1, 2001 as amended

Sections 4(A) and 10(C) amended and republished by the Department of Industrial Relations, effective January 1, 2017, pursuant to SB 3, Chapter 4, Statutes of 2016 and section 1182.13 of the Labor Code



INDUSTRIAL WELFARE COMMISSION ORDER NO. 4-2001 REGULATING WAGES, HOURS AND WORKING CONDITIONS IN THE PROFESSIONAL, TECHNICAL, CLERICAL, MECHANICAL AND SIMILAR OCCUPATIONS

TAKE NOTICE: To employers and representatives of persons working in industries and occupations in the State of California: The Department of Industrial Relations amends and republishes the minimum wage and meals and lodging credits in the Industrial Welfare Commission's Orders as a result of legislation enacted (SB 3, Ch. 4, Stats of 2016, amending section 1182.12 of the California Labor Code), and pursuant to section 1182.13 of the California Labor Code. The amendments and republishing make no other changes to the IWC's Orders.

1. APPLICABILITY OF ORDER

This order shall apply to all persons employed in professional, technical, clerical, mechanical, and similar occupations whether paid on a time, piece rate, commission, or other basis, except that:

(A) Provisions of Sections 3 through 12 shall not apply to persons employed in administrative, executive, or professional capacities. The following requirements shall apply in determining whether an employee's duties meet the test to qualify for an exemption from those sections:

(1) **Executive Exemption.** A person employed in an executive capacity means any employee:

(a) Whose duties and responsibilities involve the management of the enterprise in which he/she is employed or of a customarily recognized department or subdivision thereof; and

(b) Who customarily and regularly directs the work of two or more other employees therein; and

(c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

(d) Who customarily and regularly exercises discretion and independent judgment; and

(e) Who is primarily engaged in duties which meet the test of the exemption. The activities constituting exempt work and non-exempt work shall be construed in the same manner as such items are construed in the following regulations under the Fair Labor Standards Act effective as of the date of this order: 29 C.F.R. Sections 541.102, 541.104-111, and 541.115-116. Exempt work shall include, for example, all work that is directly and closely related to exempt work and work which is properly viewed as a means for carrying out exempt functions. The work actually performed by the employee during the course of the workweek must, first and foremost, be examined and the amount of time the employee spends on such work, together with the employer's realistic expectations and the realistic requirements of the job, shall be considered in determining whether the employee satisfies this requirement.

(f) Such an employee must also earn a monthly salary equivalent to no less than two (2) times the state minimum wage for full-time employment. Full-time employment is defined in Labor Code Section 515(c) as 40 hours per week.

(2) **Administrative Exemption.** A person employed in an administrative capacity means any employee:

(a) Whose duties and responsibilities involve either:

(i) The performance of office or non-manual work directly related to management policies or general business operations of his/her employer or his/her employer's customers; or

(ii) The performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein; and

(b) Who customarily and regularly exercises discretion and independent judgment; and

(c) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined for purposes of this section); or

(d) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge; or

(e) Who executes under only general supervision special assignments and tasks; and

(f) Who is primarily engaged in duties that meet the test of the exemption. The activities constituting exempt work and non-exempt work shall be construed in the same manner as such terms are construed in the following regulations under the Fair Labor Standards Act effective as of the date of this order: 29 C.F.R. Sections 541.201-205, 541.207-208, 541.210, and 541.215. Exempt work shall include, for example, all work that is directly and closely related to exempt work and work which is properly viewed as a means for carrying out exempt functions. The work actually performed by the employee during the course of the workweek must, first and foremost, be examined and the amount of time the employee spends on such work, together with the employer's realistic expectations and the realistic requirements of the job, shall be considered in determining whether the employee satisfies this requirement.

(g) Such employee must also earn a monthly salary equivalent to no less than two (2) times the state minimum wage for full-time employment. Full-time employment is defined in Labor Code Section 515(c) as 40 hours per week.

(3) **Professional Exemption.** A person employed in a professional capacity means any employee who meets all of the following requirements:

(a) Who is licensed or certified by the State of California and is primarily engaged in the practice of one of the following recognized professions: law, medicine, dentistry, optometry, architecture, engineering, teaching, or accounting; or

(b) Who is primarily engaged in an occupation commonly recognized as a learned or artistic profession. For the purposes of this subsection, "learned or artistic profession" means an employee who is primarily engaged in the performance of:

(i) Work requiring knowledge of an advanced type in a field or science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or work that is an essential part of or necessarily incident to any of the above work; or

(ii) Work that is original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee or work that is an essential part of or necessarily incident to any of the above work; and

(iii) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.

(c) Who customarily and regularly exercises discretion and independent judgment in the performance of duties set forth in subparagraphs (a) and (b).

(d) Who earns a monthly salary equivalent to no less than two (2) times the state minimum wage for full-time employment. Full-time employment is defined in Labor Code Section 515 (c) as 40 hours per week.

(e) Subparagraph (b) above is intended to be construed in accordance with the following provisions of federal law as they existed as of the date of this wage order: 29 C.F.R. Sections 541.207, 541.301(a)-(d), 541.302, 541.306, 541.307, 541.308, and 541.310.

(f) Notwithstanding the provisions of this subparagraph, pharmacists employed to engage in the practice of pharmacy, and registered nurses employed to engage in the practice of nursing, shall not be considered exempt professional employees, nor shall they be considered exempt from coverage for the purposes of this subparagraph unless they individually meet the criteria established for exemption as executive or administrative employees.

(g) Subparagraph (f) above shall not apply to the following advanced practice nurses:

(i) Certified nurse midwives who are primarily engaged in performing duties for which certification is required pursuant to Article 2.5 (commencing with Section 2746) of Chapter 6 of Division 2 of the Business and Professions Code.

(ii) Certified nurse anesthetists who are primarily engaged in performing duties for which certification is required pursuant to Article 7 (commencing with Section 2825) of Chapter 6 of Division 2 of the Business and Professions Code.

(iii) Certified nurse practitioners who are primarily engaged in performing duties for which certification is required pursuant to Article 8 (commencing with Section 2834) of Chapter 6 of Division 2 of the Business and Professions Code.

(iv) Nothing in this subparagraph shall exempt the occupations set forth in clauses (i), (ii), and (iii) from meeting the requirements of subsection 1(A)(3)(a)-(d) above.

(h) Except, as provided in subparagraph (i), an employee in the computer software field who is paid on an hourly basis shall be exempt, if *all* of the following apply:

(i) The employee is primarily engaged in work that is intellectual or creative and that requires the exercise of discretion and independent judgment.

(ii) The employee is primarily engaged in duties that consist of one or more of the following:

—The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications.

—The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications.

—The documentation, testing, creation, or modification of computer programs related to the design of software or hardware for computer operating systems.

(iii) The employee is highly skilled and is proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, and software engineering. A job title shall not be determinative of the applicability of this exemption.

(iv) The employee's hourly rate of pay is not less than forty-one dollars (\$41.00). The Office of Policy, Research and Legislation shall adjust this pay rate on October 1 of each year to be effective on January 1 of the following year by an amount equal to the percentage increase in the California Consumer Price Index for Urban Wage Earners and Clerical Workers.*

(i) The exemption provided in subparagraph (h) does not apply to an employee if *any* of the following apply:

(i) The employee is a trainee or employee in an entry-level position who is learning to become proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, and software engineering.

(ii) The employee is in a computer-related occupation but has not attained the level of skill and expertise necessary to work independently and without close supervision.

(iii) The employee is engaged in the operation of computers or in the manufacture, repair, or maintenance of computer hardware and related equipment.

(iv) The employee is an engineer, drafter, machinist, or other professional whose work is highly dependent upon or facilitated by the use of computers and computer software programs and who is skilled in computer-aided design software, including CAD/CAM, but who is not in a computer systems analysis or programming occupation.

* Pursuant to Labor Code section 515.5, subdivision (a)(4), the Office of Policy, Research and Legislation, Department of Industrial Relations, has adjusted the minimum hourly rate of pay specified in this subdivision to be \$49.77, effective January 1, 2007. This hourly rate of pay is adjusted on October 1 of each year to be effective on January 1, of the following year, and may be obtained at www.dir.ca.gov/IWC or by mail from the Department of Industrial Relations.

(v) The employee is a writer engaged in writing material, including box labels, product descriptions, documentation, promotional material, setup and installation instructions, and other similar written information, either for print or for on screen media or who writes or provides content material intended to be read by customers, subscribers, or visitors to computer-related media such as the World Wide Web or CD-ROMs.

(vi) The employee is engaged in any of the activities set forth in subparagraph (h) for the purpose of creating imagery for effects used in the motion picture, television, or theatrical industry.

(B) Except as provided in Sections 1, 2, 4, 10, and 20, the provisions of this order shall not apply to any employees directly employed by the State or any political subdivision thereof, including any city, county, or special district.

(C) The provisions of this order shall not apply to outside salespersons.

(D) The provisions of this order shall not apply to any individual who is the parent, spouse, child, or legally adopted child of the employer.

(E) The provisions of this order shall not apply to any individual participating in a national service program, such as AmeriCorps, carried out using assistance provided under Section 12571 of Title 42 of the United States Code. (See Stats. 2000, ch. 365, amending Labor Code Section 1171.)

2. DEFINITIONS

(A) An "alternative workweek schedule" means any regularly scheduled workweek requiring an employee to work more than eight (8) hours in a 24-hour period.

(B) "Commission" means the Industrial Welfare Commission of the State of California.

(C) "Division" means the Division of Labor Standards Enforcement of the State of California.

(D) "Emergency" means an unpredictable or unavoidable occurrence at unscheduled intervals requiring immediate action.

(E) "Employ" means to engage, suffer, or permit to work.

(F) "Employee" means any person employed by an employer.

(G) "Employees in the health care industry" means any of the following:

(1) Employees in the health care industry providing patient care; or

(2) Employees in the health care industry working in a clinical or medical department, including pharmacists dispensing prescriptions in any practice setting; or

(3) Employees in the health care industry working primarily or regularly as a member of a patient care delivery team; or

(4) Licensed veterinarians, registered veterinary technicians and unregistered animal health technicians providing patient care.

(H) "Employer" means any person as defined in Section 18 of the Labor Code, 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.

(I) "Health care emergency" consists of an unpredictable or unavoidable occurrence at unscheduled intervals relating to health care delivery, requiring immediate action.

(J) "Health care industry" is defined as hospitals, skilled nursing facilities, intermediate care and residential care facilities, convalescent care institutions, home health agencies, clinics operating 24 hours per day, and clinics performing surgery, urgent care, radiology, anesthesiology, pathology, neurology or dialysis.

(K) "Hours worked" means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so. Within the health care industry, the term "hours worked" means the time during which an employee is suffered or permitted to work for the employer, whether or not required to do so, as interpreted in accordance with the provisions of the Fair Labor Standards Act.

(L) "Minor" means, for the purpose of this order, any person under the age of 18 years.

(M) "Outside salesperson" means any person, 18 years of age or over, who customarily and regularly works more than half the working time away from the employer's place of business selling tangible or intangible items or obtaining orders or contracts for products, services or use of facilities.

(N) "Primarily" as used in Section 1, Applicability, means more than one-half the employee's work time.

(O) "Professional, Technical, Clerical, Mechanical, and Similar Occupations" includes professional, semiprofessional, managerial, supervisory, laboratory, research, technical, clerical, office work, and mechanical occupations. Said occupations shall include, but not be limited to, the following: accountants; agents; appraisers; artists; attendants; audio-visual technicians; bookkeepers; bundlers; billposters; canvassers; carriers; cashiers; checkers; clerks; collectors; communications and sound technicians; compilers; copy holders; copy readers; copy writers; computer programmers and operators; demonstrators and display representatives; dispatchers; distributors; door-keepers; drafters; elevator operators; estimators; editors; graphic arts technicians; guards; guides; hosts; inspectors; installers; instructors; interviewers; investigators; librarians; laboratory workers; machine operators; mechanics; mailers; messengers; medical and dental technicians and technologists; models; nurses; packagers; photographers; porters and cleaners; process servers; printers; proof readers; salespersons and sales agents; secretaries; sign erectors; sign painters; social workers; solicitors; statisticians; stenographers; teachers; telephone, radio-telephone, telegraph and call-out operators; tellers; ticket agents; tracers; typists; vehicle operators; x-ray technicians; their assistants and other related occupations listed as professional, semiprofessional, technical, clerical, mechanical, and kindred occupations.

(P) "Shift" means designated hours of work by an employee, with a designated beginning time and quitting time.

(Q) "Split shift" means a work schedule, which is interrupted by non-paid non-working periods established by the employer, other than bona fide rest or meal periods.

(R) "Teaching" means, for the purpose of Section 1 of this order, the profession of teaching under a certificate from the Commission for Teacher Preparation and Licensing or teaching in an accredited college or university.

(S) "Wages" includes all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation.

(T) "Workday" and "day" mean any consecutive 24-hour period beginning at the same time each calendar day.

(U) "Workweek" and "week" mean any seven (7) consecutive days, starting with the same calendar day each week. "Workweek" is a fixed and regularly recurring period of 168 hours, seven (7) consecutive 24-hour periods.

3. HOURS AND DAYS OF WORK

(A) Daily Overtime - General Provisions

(1) The following overtime provisions are applicable to employees 18 years of age or over and to employees 16 or 17 years of age who are not required by law to attend school and are not otherwise prohibited by law from engaging in the subject work. Such employees shall not be employed more than eight (8) hours in any workday or more than 40 hours in any workweek unless the employee receives one and one-half (1½) times such employee's regular rate of pay for all hours worked over 40 hours in the workweek. Eight (8) hours of labor constitutes a day's work. Employment beyond eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime at not less than:

(a) One and one-half (1½) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours up to and including 12 hours in any workday, and for the first eight (8) hours worked on the seventh (7th) consecutive day of work in a workweek; and

(b) Double the employee's regular rate of pay for all hours worked in excess of 12 hours in any workday and for all hours worked in excess of eight (8) hours on the seventh (7th) consecutive day of work in a workweek.

(c) The overtime rate of compensation required to be paid to a nonexempt full-time salaried employee shall be computed by using the employee's regular hourly salary as one-fortieth (1/40) of the employee's weekly salary.

(B) Alternative Workweek Schedules

(1) No employer shall be deemed to have violated the daily overtime provisions by instituting, pursuant to the election procedures set forth in this wage order, a regularly scheduled alternative workweek schedule of not more than ten (10) hours per day within a 40 hour workweek without the payment of an overtime rate of compensation. All work performed in any workday beyond the schedule established by the agreement up to 12 hours a day or beyond 40 hours per week shall be paid at one and one-half (1½) times the employee's regular rate of pay. All work performed in excess of 12 hours per day and any work in excess of eight (8) hours on those days worked beyond the regularly scheduled number of workdays established by the alternative workweek agreement shall be paid at double the employee's regular rate of pay. Any alternative workweek agreement adopted pursuant to this section shall provide for not less than four (4) hours of work in any shift. Nothing in this section shall prohibit an employer, at the request of the employee, to substitute one day of work for another day of the same length in the shift provided by the alternative workweek agreement on an occasional basis to meet the personal needs of the employee without the payment of overtime. No hours paid at either one and one-half (1½) or double the regular rate of pay shall be included in determining when 40 hours have been worked for the purpose of computing overtime compensation.

(2) If an employer whose employees have adopted an alternative workweek agreement permitted by this order requires an employee to work fewer hours than those that are regularly scheduled by the agreement, the employer shall pay the employee overtime compensation at a rate of one and one-half (1½) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours, and double the employee's regular rate of pay for all hours worked in excess of 12 hours for the day the employee is required to work the reduced hours.

(3) 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.

(4) An employer shall explore any available reasonable alternative means of accommodating the religious belief or observance of an affected employee that conflicts with an adopted alternative workweek schedule, in the manner provided by subdivision (j) of Section 12940 of the Government Code.

(5) An employer shall make a reasonable effort to find a work schedule not to exceed eight (8) hours in a workday, in order to accommodate any affected employee who was eligible to vote in an election authorized by this section and who is unable to work the alternative workweek schedule established as the result of that election.

(6) An employer shall be permitted, but not required, to provide a work schedule not to exceed eight (8) hours in a workday to accommodate any employee who is hired after the date of the election and who is unable to work the alternative workweek schedule established by the election.

(7) Arrangements adopted in a secret ballot election held pursuant to this order prior to 1998, or under the rules in effect prior to 1998, and before the performance of the work, shall remain valid after July 1, 2000 provided that the results of the election are reported by the employer to the Office of Policy, Research and Legislation by January 1, 2001, in accordance with the requirements of subsection (C) below (Election Procedures). If an employee was voluntarily working an alternative workweek schedule of not more than ten (10) hours a day as of July 1, 1999, that alternative workweek schedule was based on an individual agreement made after January 1, 1998 between the employee and employer, and the employee submitted, and the employer approved, a written request on or before May 30, 2000 to continue the agreement, the employee may continue to work that alternative workweek schedule without payment of an overtime rate of compensation for the hours provided in the agreement. The employee may revoke his/her voluntary authorization to continue such a schedule with 30 days written notice to the employer. New arrangements can only be entered into pursuant to the provisions of this section. Notwithstanding the foregoing, if a health care industry employer implemented a reduced rate for 12-hour shift employees in the last quarter of 1999 and desires to reimplement a flexible work arrangement that includes 12-hour shifts at straight time for the same work unit, the employer must pay a base rate to each affected employee in the work unit that is no less than that employee's base rate in 1999 immediately prior to the date of the rate reduction.

(8) Notwithstanding the above provisions regarding alternative workweek schedules, no employer of employees in the health care industry shall be deemed to have violated the daily overtime provisions by instituting, pursuant to the election procedures set forth in this wage order a regularly scheduled alternative workweek schedule that includes workdays exceeding ten (10) hours but not more than 12 hours within a 40 hour workweek without the payment of overtime compensation, provided that:

(a) An employee who works beyond 12 hours in a workday shall be compensated at double the employee's regular rate of pay for all hours in excess of 12;

(b) An employee who works in excess of 40 hours in a workweek shall be compensated at one and one-half (1½) times the employee's regular rate of pay for all hours over 40 hours in the workweek;

(c) Any alternative workweek agreement adopted pursuant to this section shall provide for not less than four (4) hours of work in any shift;

(d) The same overtime standards shall apply to employees who are temporarily assigned to a work unit covered by this subsection;

(e) Any employer who instituted an alternative workweek schedule pursuant to this subsection shall make a reasonable effort to find another work assignment for any employee who participated in a valid election prior to 1998 pursuant to the provisions of Wage

Orders 4 and 5 and who is unable to work the alternative workweek schedule established;

(f) An employer engaged in the operation of a licensed hospital or in providing personnel for the operation of a licensed hospital who institutes, pursuant to a valid order of the Commission, a regularly scheduled alternative workweek that includes no more than three (3) 12-hour workdays, shall make a reasonable effort to find another work assignment for any employee who participated in the vote which authorized the schedule and is unable to work the 12-hour shifts. An employer shall not be required to offer a different work assignment to an employee if such a work assignment is not available or if the employee was hired after the adoption of the 12 hour, three (3) day alternative workweek schedule.

(9) No employee assigned to work a 12-hour shift established pursuant to this order shall be required to work more than 12 hours in any 24-hour period unless the chief nursing officer or authorized executive declares that:

(a) A "health care emergency", as defined above, exists in this order; and

(b) All reasonable steps have been taken to provide required staffing; and

(c) Considering overall operational status needs, continued overtime is necessary to provide required staffing.

(10) Provided further that no employee shall be required to work more than 16 hours in a 24-hour period unless by voluntary mutual agreement of the employee and the employer, and no employee shall work more than 24 consecutive hours until said employee receives not less than eight (8) consecutive hours off duty immediately following the 24 consecutive hours of work.

(11) Notwithstanding subsection (B)(9) above, an employee may be required to work up to 13 hours in any 24-hour period if the employee scheduled to relieve the subject employee does not report for duty as scheduled and does not inform the employer more than two (2) hours in advance of that scheduled shift that he/she will not be appearing for duty as scheduled.

(C) Election Procedures

Election procedures for the adoption and repeal of alternative workweek schedules require the following:

(1) Each proposal for an alternative workweek schedule shall be in the form of a written agreement proposed by the employer. The proposed agreement must designate a regularly scheduled alternative workweek in which the specified number of work days and work hours are regularly recurring. The actual days worked within that alternative workweek schedule need not be specified. The employer may propose a single work schedule that would become the standard schedule for workers in the work unit, or a menu of work schedule options, from which each employee in the unit would be entitled to choose. If the employer proposes a menu of work schedule options, the employee may, with the approval of the employer, move from one menu option to another.

(2) In order to be valid, the proposed alternative workweek schedule must be adopted in a secret ballot election, before the performance of work, by at least a two-thirds (2/3) vote of the affected employees in the work unit. The election shall be held during regular working hours at the employees' work site. For purposes of this subsection, "affected employees in the work unit" may 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 an individual employee as long as the criteria for an identifiable work unit in this subsection are met.

(3) Prior to the secret ballot vote, any employer who proposed to institute an alternative workweek schedule shall have made a disclosure in writing to the affected employees, including the effects of the proposed arrangement on the employees' wages, hours, and benefits. Such a disclosure shall include meeting(s), duly noticed, held at least 14 days prior to voting, for the specific purpose of discussing the effects of the alternative workweek schedule. An employer shall provide that disclosure in a non-English language, as well as in English, if at least five (5) percent of the affected employees primarily speak that non-English language. The employer shall mail the written disclosure to employees who do not attend the meeting. Failure to comply with this paragraph shall make the election null and void.

(4) Any election to establish or repeal an alternative workweek schedule shall be held at the work site of the affected employees. The employer shall bear the costs of conducting any election held pursuant to this section. Upon a complaint by an affected employee, and after an investigation by the labor commissioner, the labor commissioner may require the employer to select a neutral third party to conduct the election.

(5) Any type of alternative workweek schedule that is authorized by the Labor Code may be repealed by the affected employees. Upon a petition of one-third (1/3) of the affected employees, a new secret ballot election shall be held and a two-thirds (2/3) vote of the affected employees shall be required to reverse the alternative workweek schedule. The election to repeal the alternative workweek schedule shall be held not more than 30 days after the petition is submitted to the employer, except that the election shall be held not less than 12 months after the date that the same group of employees voted in an election held to adopt or repeal an alternative workweek schedule. However, where an alternative workweek schedule was adopted between October 1, 1999 and October 1, 2000, a new secret ballot election to repeal the alternative workweek schedule shall not be subject to the 12-month interval between elections. The election shall take place during regular working hours at the employees' work site. If the alternative workweek schedule is revoked, the employer shall comply within 60 days. Upon proper showing of undue hardship, the Division of Labor Standards Enforcement may grant an extension of time for compliance.

(6) Only secret ballots may be cast by affected employees in the work unit at any election held pursuant to this section. The results of any election conducted pursuant to this section shall be reported by the employer to the Office of Policy, Research and Legislation within 30 days after the results are final, and the report of election results shall be a public document. The report shall include the final tally of the vote, the size of the unit, and the nature of the business of the employer.

(7) Employees affected by a change in the work hours resulting from the adoption of an alternative workweek schedule may not be required to work those new work hours for at least 30 days after the announcement of the final results of the election.

(8) Employers shall not intimidate or coerce employees to vote either in support of or in opposition to a proposed alternative workweek. No employees shall be discharged or discriminated against for expressing opinions concerning the alternative workweek election or for opposing or supporting its adoption or repeal. However, nothing in this section shall prohibit an employer from expressing his/her position concerning that alternative workweek to the affected employees. A violation of this paragraph shall be subject to Labor Code Section 98 et seq.

(D) The provisions of subsections (A), (B) and (C) above shall not apply to any employee whose earnings exceed one and one-half (1½) times the minimum wage if more than half of that employee's compensation represents commissions.

(E) One and one-half (1½) times a minor's regular rate of pay shall be paid for all work over 40 hours in any workweek except minors 16 or 17 years old who are not required by law to attend school and may therefore be employed for the same hours as an adult are subject to subsection (A) or (B) and (C) above.

(VIOLATIONS OF CHILD LABOR LAWS are subject to civil penalties of from \$500 to \$10,000 as well as to criminal penalties. Refer to California Labor Code Sections 1285 to 1312 and 1390 to 1399 for additional restrictions on the employment of minors and for descriptions of criminal and civil penalties for violation of the child labor laws. Employers should ask school districts about any required work permits.)

(F) An employee may be employed on seven (7) workdays in one workweek when the total hours of employment during such workweek do not exceed 30 and the total hours of employment in any one workday thereof do not exceed six (6).

(G) If a meal period occurs on a shift beginning or ending at or between the hours of 10 p.m. and 6 a.m., facilities shall be available for securing hot food and drink or for heating food or drink, and a suitable sheltered place shall be provided in which to consume such food or drink.

(H) The provisions of Labor Code Sections 551 and 552 regarding one (1) day's rest in seven (7) shall not be construed to prevent an accumulation of days of rest when the nature of the employment reasonably requires the employee to work seven (7) or more consecutive days; provided, however, that in each calendar month, the employee shall receive the equivalent of one (1) day's rest in seven (7).

(I) Except as provided in subsections (E), (H) and (L), this section shall not apply to any employee covered by a valid collective bargaining agreement if the agreement expressly provides for the wages, hours of work, and working conditions of the employees, and if the agreement provides premium wage rates for all overtime hours worked and a regular hourly rate of pay for those employees of not less than 30 percent more than the state minimum wage.

(J) Notwithstanding subsection (I) above, where the employer and a labor organization representing employees of the employer have entered into a valid collective bargaining agreement pertaining to the hours of work of the employees, the requirement regarding the equivalent of one (1) day's rest in seven (7) (see subsection (H) above) shall apply, unless the agreement expressly provides otherwise.

(K) The provisions of this section are not applicable to employees whose hours of service are regulated by:

(1) The United States Department of Transportation Code of Federal Regulations, Title 49, Sections 395.1 to 395.13, Hours of Service of Drivers; or

(2) Title 13 of the California Code of Regulations, subchapter 6.5, Section 1200 and following sections, regulating hours of drivers.

(L) No employee shall be terminated or otherwise disciplined for refusing to work more than 72 hours in any workweek, except in an emergency as defined in Section 2(D).

(M) If an employer approves a written request of an employee to make up work time that is or would be lost as a result of a personal obligation of the employee, the hours of that makeup work time, if performed in the same workweek in which the work time was lost, may not be counted toward computing the total number of hours worked in a day for purposes of the overtime requirements, except for hours in excess of 11 hours of work in one (1) day or 40 hours of work in one (1) workweek. If an employee knows in advance that he/she will be requesting makeup time for a personal obligation that will recur at a fixed time over a succession of weeks, the employee may request to make up work time for up to four (4) weeks in advance; provided, however, that the makeup work must be performed in the same week that the work time was lost. An employee shall provide a signed written request for each occasion that the employee makes a request to make up work time pursuant to this subsection. While an employer may inform an employee of this makeup time option, the employer is prohibited from encouraging or otherwise soliciting an employee to request the employer's approval to take personal time off and make up the work hours within the same workweek pursuant to this subsection.

4. MINIMUM WAGES

(A) Every employer shall pay to each employee wages not less than the following:

(1) Any employer who employs 26 or more employees shall pay to each employee wages not less than the following:

(a) Ten dollars and fifty cents (\$10.50) per hour for all hours worked, effective January 1, 2017; and

(b) Eleven dollars (\$11.00) per hour for all hours worked, effective January 1, 2018;

(2) Any employer who employs 25 or fewer employees shall pay to each employee wages not less than the following:

(a) Ten dollars (\$10.00) per hour for all hours worked, effective January 1, 2016 through December 31, 2017; and

(b) Ten dollars and fifty cents (\$10.50) per hour for all hours worked, effective January 1, 2018.

Employees treated as employed by a single qualified taxpayer pursuant to Revenue and Taxation Code section 23626 are treated as employees of that single taxpayer. **LEARNERS.** Employees during their first 160 hours of employment in occupations in which they have no previous similar or related experience, may be paid not less than 85 percent of the minimum wage rounded to the nearest nickel.

(B) Every employer shall pay to each employee, on the established payday for the period involved, not less than the applicable minimum wage for all hours worked in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise.

(C) When an employee works a split shift, one (1) hour's pay at the minimum wage shall be paid in addition to the minimum wage for that workday, except when the employee resides at the place of employment.

(D) The provisions of this section shall not apply to apprentices regularly indentured under the State Division of Apprenticeship Standards.

5. REPORTING TIME PAY

(A) Each workday an employee is required to report for work and does report, but is not put to work or is furnished less than half said employee's usual or scheduled day's work, the employee shall be paid for half the usual or scheduled day's work, but in no event for less than two (2) hours nor more than four (4) hours, at the employee's regular rate of pay, which shall not be less than the minimum wage.

(B) If an employee is required to report for work a second time in any one workday and is furnished less than two (2) hours of work on the second reporting, said employee shall be paid for two (2) hours at the employee's regular rate of pay, which shall not be less than the minimum wage.

(C) The foregoing reporting time pay provisions are not applicable when:

(1) Operations cannot commence or continue due to threats to employees or property; or when recommended by civil authorities;

or

(2) Public utilities fail to supply electricity, water, or gas, or there is a failure in the public utilities, or sewer system; or

(3) The interruption of work is caused by an Act of God or other cause not within the employer's control.

(D) This section shall not apply to an employee on paid standby status who is called to perform assigned work at a time other than the employee's scheduled reporting time.

6. LICENSES FOR DISABLED WORKERS

(A) A license may be issued by the Division authorizing employment of a person whose earning capacity is impaired by physical disability or mental deficiency at less than the minimum wage. Such licenses shall be granted only upon joint application of employer and employee and employee's representative if any.

(B) A special license may be issued to a nonprofit organization such as a sheltered workshop or rehabilitation facility fixing special minimum rates to enable the employment of such persons without requiring individual licenses of such employees.

(C) All such licenses and special licenses shall be renewed on a yearly basis or more frequently at the discretion of the Division. (See California Labor Code, Sections 1191 and 1191.5)

7. RECORDS

- (A) Every employer shall keep accurate information with respect to each employee including the following:
- (1) Full name, home address, occupation and social security number.
 - (2) Birth date, if under 18 years, and designation as a minor.
 - (3) Time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be recorded. Meal periods during which operations cease and authorized rest periods need not be recorded.
 - (4) Total wages paid each payroll period, including value of board, lodging, or other compensation actually furnished to the employee.
 - (5) Total hours worked in the payroll period and applicable rates of pay. This information shall be made readily available to the employee upon reasonable request.
 - (6) When a piece rate or incentive plan is in operation, piece rates or an explanation of the incentive plan formula shall be provided to employees. An accurate production record shall be maintained by the employer.
- (B) Every employer shall semimonthly or at the time of each payment of wages furnish each employee, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately, an itemized statement in writing showing: (1) all deductions; (2) the inclusive dates of the period for which the employee is paid; (3) the name of the employee or the employee's social security number; and (4) the name of the employer, provided all deductions made on written orders of the employee may be aggregated and shown as one item.
- (C) All required records shall be in the English language and in ink or other indelible form, properly dated, showing month, day and year, and shall be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California. An employee's records shall be available for inspection by the employee upon reasonable request.
- (D) Clocks shall be provided in all major work areas or within reasonable distance thereto insofar as practicable.

8. CASH SHORTAGE AND BREAKAGE

No employer shall make any deduction from the wage or require any reimbursement from an employee for any cash shortage, breakage, or loss of equipment, unless it can be shown that the shortage, breakage, or loss is caused by a dishonest or willful act, or by the gross negligence of the employee.

9. UNIFORMS AND EQUIPMENT

(A) When uniforms are required by the employer to be worn by the employee as a condition of employment, such uniforms shall be provided and maintained by the employer. The term "uniform" includes wearing apparel and accessories of distinctive design or color.

NOTE: This section shall not apply to protective apparel regulated by the Occupational Safety and Health Standards Board.

(B) When tools or equipment are required by the employer or are necessary to the performance of a job, such tools and equipment shall be provided and maintained by the employer, except that an employee whose wages are at least two (2) times the minimum wage provided herein may be required to provide and maintain hand tools and equipment customarily required by the trade or craft. This subsection (B) shall not apply to apprentices regularly indentured under the State Division of Apprenticeship Standards.

NOTE: This section shall not apply to protective equipment and safety devices on tools regulated by the Occupational Safety and Health Standards Board.

(C) A reasonable deposit may be required as security for the return of the items furnished by the employer under provisions of subsections (A) and (B) of this section upon issuance of a receipt to the employee for such deposit. Such deposits shall be made pursuant to Section 400 and following of the Labor Code or an employer with the prior written authorization of the employee may deduct from the employee's last check the cost of an item furnished pursuant to (A) and (B) above in the event said item is not returned. No deduction shall be made at any time for normal wear and tear. All items furnished by the employer shall be returned by the employee upon completion of the job.

10. MEALS AND LODGING

(A) "Meal" means an adequate, well-balanced serving of a variety of wholesome, nutritious foods.

(B) "Lodging" means living accommodations available to the employee for full-time occupancy which are adequate, decent, and sanitary according to usual and customary standards. Employees shall not be required to share a bed.

(C) Meals or lodging may not be credited against the minimum wage without a voluntary written agreement between the employer and the employee. When credit for meals or lodging is used to meet part of the employer's minimum wage obligation, the amounts so credited may not be more than the following:

For an employer who employs:	Effective January 1, 2017		Effective January 1, 2018	
	26 or More Employees	25 or Fewer Employees	26 or More Employees	25 or Fewer Employees
Lodging:				
Room occupied alone	\$49.38/week	\$47.03/week	\$51.73/week	\$49.38/week
Room shared	\$40.76/week	\$38.82/week	\$42.70/week	\$40.76/week
Apartment—two-thirds (2/3) of the ordinary rental value, and in no event more than	\$593.05/month	\$564.81/month	\$621.29/month	\$593.05/month
Where a couple are both employed by the employer, two-thirds (2/3) of the ordinary rental value, and in no event more than	\$877.27/month	\$835.49/month	\$919.04/month	\$877.26/month
Meals:				
Breakfast	\$3.80	\$3.62	\$3.98	\$3.80
Lunch.....	\$5.22	\$4.97	\$5.47	\$5.22
Dinner.....	\$7.01	\$6.68	\$7.35	\$7.01

(D) Meals evaluated as part of the minimum wage must be bona fide meals consistent with the employee's work shift. Deductions shall not be made for meals not received or lodging not used.

(E) If, as a condition of employment, the employee must live at the place of employment or occupy quarters owned or under the control of the employer, then the employer may not charge rent in excess of the values listed herein.

11. MEAL PERIODS

(A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee. Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.

(B) If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the meal period is not provided.

(C) In all places of employment where employees are required to eat on the premises, a suitable place for that purpose shall be designated.

(D) Notwithstanding any other provision of this order, employees in the health care industry who work shifts in excess of eight (8) total hours in a workday may voluntarily waive their right to one of their two meal periods. In order to be valid, any such waiver must be documented in a written agreement that is voluntarily signed by both the employee and the employer. The employee may revoke the waiver at any time by providing the employer at least one (1) day's written notice. The employee shall be fully compensated for all working time, including any on-the-job meal period, while such a waiver is in effect.

12. REST PERIODS

(A) Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.

(B) If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the rest period is not provided.

13. CHANGE ROOMS AND RESTING FACILITIES

(A) Employers shall provide suitable lockers, closets, or equivalent for the safekeeping of employees' outer clothing during working hours, and when required, for their work clothing during non-working hours. When the occupation requires a change of clothing, change rooms or equivalent space shall be provided in order that employees may change their clothing in reasonable privacy and comfort. These rooms or spaces may be adjacent to but shall be separate from toilet rooms and shall be kept clean.

NOTE: This section shall not apply to change rooms and storage facilities regulated by the Occupational Safety and Health Standards Board.

(B) Suitable resting facilities shall be provided in an area separate from the toilet rooms and shall be available to employees during work hours.

14. SEATS

(A) All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats.

(B) When employees are not engaged in the active duties of their employment and the nature of the work requires standing, an adequate number of suitable seats shall be placed in reasonable proximity to the work area and employees shall be permitted to use such seats when it does not interfere with the performance of their duties.

15. TEMPERATURE

(A) The temperature maintained in each work area shall provide reasonable comfort consistent with industry-wide standards for the nature of the process and the work performed.

(B) If excessive heat or humidity is created by the work process, the employer shall take all feasible means to reduce such excessive heat or humidity to a degree providing reasonable comfort. Where the nature of the employment requires a temperature of less than 60° F., a heated room shall be provided to which employees may retire for warmth, and such room shall be maintained at not less than 68°.

(C) A temperature of not less than 68° shall be maintained in the toilet rooms, resting rooms, and change rooms during hours of use.

(D) Federal and State energy guidelines shall prevail over any conflicting provision of this section.

16. ELEVATORS

Adequate elevator, escalator or similar service consistent with industry-wide standards for the nature of the process and the work performed shall be provided when employees are employed four floors or more above or below ground level.

17. EXEMPTIONS

If, in the opinion of the Division after due investigation, it is found that the enforcement of any provision contained in Section 7, Records; Section 12, Rest Periods; Section 13, Change Rooms and Resting Facilities; Section 14, Seats; Section 15, Temperature; or Section 16, Elevators, would not materially affect the welfare or comfort of employees and would work an undue hardship on the employer, exemption may be made at the discretion of the Division. Such exemptions shall be in writing to be effective and may be revoked after reasonable

notice is given in writing. Application for exemption shall be made by the employer or by the employee and/or the employee's representative to the Division in writing. A copy of the application shall be posted at the place of employment at the time the application is filed with the Division.

18. FILING REPORTS

(See California Labor Code, Section 1174(a))

19. INSPECTION

(See California Labor Code, Section 1174)

20. PENALTIES

(See California Labor Code, Section 1199)

(A) In addition to any other civil penalties provided by law, any employer or any other person acting on behalf of the employer who violates, or causes to be violated, the provisions of this order, shall be subject to the civil penalty of:

(1) Initial Violation — \$50.00 for each underpaid employee for each pay period during which the employee was underpaid in addition to the amount which is sufficient to recover unpaid wages.

(2) Subsequent Violations — \$100.00 for each underpaid employee for each pay period during which the employee was underpaid in addition to an amount which is sufficient to recover unpaid wages.

(3) The affected employee shall receive payment of all wages recovered.

(B) The labor commissioner may also issue citations pursuant to California Labor Code Section 1197.1 for non-payment of wages for overtime work in violation of this order.

21. SEPARABILITY

If the application of any provision of this order, or any section, subsection, subdivision, sentence, clause, phrase, word, or portion of this order should be held invalid or unconstitutional or unauthorized or prohibited by statute, the remaining provisions thereof shall not be affected thereby, but shall continue to be given full force and effect as if the part so held invalid or unconstitutional had not been included herein.

22. POSTING OF ORDER

Every employer shall keep a copy of this order posted in an area frequented by employees where it may be easily read during the workday. Where the location of work or other conditions make this impractical, every employer shall keep a copy of this order and make it available to every employee upon request.

QUESTIONS ABOUT ENFORCEMENT of the Industrial Welfare Commission orders and reports of violations should be directed to the Labor Commissioner's Office. A listing of offices is on the back of this wage order. For the address and telephone number of the office nearest you, information can be found on the internet at <http://www.dir.ca.gov/DLSE/dlse.html> or under a search for "California Labor Commissioner's Office" on the internet or any other directory. The Labor Commissioner has offices in the following cities: Bakersfield, El Centro, Fresno, Long Beach, Los Angeles, Oakland, Redding, Sacramento, Salinas, San Bernardino, San Diego, San Francisco, San Jose, Santa Ana, Santa Barbara, Santa Rosa, Stockton, Van Nuys.

SUMMARIES IN OTHER LANGUAGES

The Department of Industrial Relations will make summaries of wage and hour requirements in this Order available in Spanish, Chinese and certain other languages when it is feasible to do so. Mail your request for such summaries to the Department at:
P.O. Box 420603, San Francisco, CA 94142-0603.

RESUMEN EN OTROS IDIOMAS

El Departamento de Relaciones Industriales confeccionará un resumen sobre los requisitos de salario y horario de esta Disposición en español, chino y algunos otros idiomas cuando sea posible hacerlo. Envíe por correo su pedido por dichos resúmenes al Departamento a: P.O. Box 420603, San Francisco, CA 94142-0603.

其他文字的摘要

工業關係處將提供本規則中有關工資和小時的規定，用西班牙文、中文印刷。其他文字如有需要，也將同樣辦理。如果您有需要，

請寫信索取。請寄到： Department of Industrial Relations
P.O. Box 420603
San Francisco, CA 94142-0603

All complaints are handled confidentially. For further information or to file your complaints, contact the State of California at the following department offices:

California Labor Commissioner's Office, also known as, Division of Labor Standards Enforcement (DLSE)

BAKERSFIELD

Labor Commissioner's Office/DLSE
7718 Meany Ave.
Bakersfield, CA 93308
661-587-3060

REDDING

Labor Commissioner's Office/DLSE
250 Hemsted Drive, 2nd Floor, Suite A
Redding, CA 96002
530-225-2655

SAN JOSE

Labor Commissioner's Office/DLSE
100 Paseo De San Antonio, Room 120
San Jose, CA 95113
408-277-1266

EL CENTRO

Labor Commissioner's Office/DLSE
1550 W. Main St.
El Centro, CA 92643
760-353-0607

SACRAMENTO

Labor Commissioner's Office/DLSE
2031 Howe Ave, Suite 100
Sacramento, CA 95825
916-263-1811

SANTA ANA

Labor Commissioner's Office/DLSE
605 West Santa Ana Blvd., Bldg. 28, Room 625
Santa Ana, CA 92701
714-558-4910

FRESNO

Labor Commissioner's Office/DLSE
770 E. Shaw Ave., Suite 222
Fresno, CA 93710
559-244-5340

SALINAS

Labor Commissioner's Office/DLSE
950 E. Blanco Rd., Suite 204
Salinas, CA 93901
831-443-3041

SANTA BARBARA

Labor Commissioner's Office/DLSE
411 E. Canon Perdido, Room 3
Santa Barbara, CA 93101
805-568-1222

LONG BEACH

Labor Commissioner's Office/DLSE
300 OceanGate, 3rd Floor
Long Beach, CA 90802
562-590-5048

SAN BERNARDINO

Labor Commissioner's Office/DLSE
464 West 4th Street, Room 348
San Bernardino, CA 92401
909-383-4334

SANTA ROSA

Labor Commissioner's Office/DLSE
50 "D" Street, Suite 360
Santa Rosa, CA 95404
707-576-2362

LOS ANGELES

Labor Commissioner's Office/DLSE
320 W. Fourth St., Suite 450
Los Angeles, CA 90013
213-620-6330

SAN DIEGO

Labor Commissioner's Office/DLSE
7575 Metropolitan, Room 210
San Diego, CA 92108
619-220-5451

STOCKTON

Labor Commissioner's Office/DLSE
31 E. Channel Street, Room 317
Stockton, CA 95202
209-948-7771

OAKLAND

Labor Commissioner's Office/DLSE
1515 Clay Street, Room 801
Oakland, CA 94612
510-622-3273

SAN FRANCISCO

Labor Commissioner's Office/DLSE
455 Golden Gate Ave. 10th Floor
San Francisco, CA 94102
415-703-5300

VAN NUYS

Labor Commissioner's Office/DLSE
6150 Van Nuys Boulevard, Room 206
Van Nuys, CA 91401
818-901-5315

OAKLAND – HEADQUARTERS

Labor Commissioner's Office/DLSE
1515 Clay Street, Room 401
Oakland, CA 94612
510-285-2118
DLSE2@dir.ca.gov

EMPLOYERS: Do not send copies of your alternative workweek election ballots or election procedures.

Only the results of the alternative workweek election shall be mailed to:

Prevailing Wage Hotline (415) 703-4774

Department of Industrial Relations
Office of Policy, Research and Legislation
P.O. Box 420603
San Francisco, CA 94142-0603
(415) 703-4780