



# Employment Law Alert

## Legal developments affecting human resource management

A publication of Nixon Peabody LLP

MAY 15, 2009

## California adds modest flexibility to alternative workweek schedules

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Responding to employers' concerns about the inflexibility of California's alternative workweek schedule provisions, the California legislature and governor have enacted modest changes to add flexibility to those schedules. The changes will allow employers to offer a regular schedule of five eight-hour days in a workweek as an option. They also will allow more frequent switches between various menu options under an alternative workweek schedule, if multiple options were approved. The changes are effective on May 21, 2009.

### **California's alternative workweek schedule restrictions**

In 1999, California reinstated daily overtime requirements that most non-exempt employees be paid overtime after eight hours in a workday. The "Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999" became effective on January 1, 2000. The "flexibility" in the legislation allowed implementation of alternative workweek schedules in very limited situations.

Under the Labor Code and the later-amended Industrial Welfare Commission wage orders, an alternative workweek schedule can be implemented only in an entire "work unit," following two-thirds approval in a secret ballot election. The election involves a labyrinth of procedures. The alternative workweek schedule could authorize employees to work up to 10 hours per day without daily overtime, with the 40-hour weekly overtime rule still applicable. (Some employees in the healthcare industry and retail pharmacies may vote to work up to 12 hours in a workday without daily overtime.) For example, a schedule of four 10-hour days in a workweek has been a common alternative workweek option.

The wage orders allowed employers to offer, in the election, "a single work schedule that would become the standard work schedule for workers in the work unit," or a "menu of work schedule options, from which each employee in the work unit would be entitled to choose." Among its inflexible features, an alternative workweek schedule essentially has been a group proposition, with all employees in a work unit having to follow the alternative schedule, or one of the menu options, approved. The only exceptions have been for religious accommodation or to accommodate an employee "unable to work" the alternative schedule.

## **Modest reforms add clarity and flexibility**

The rigid procedural requirements and limitations have discouraged employers from using alternative workweek schedules in California. However, after nearly a decade, California's legislature has revised the requirements. As part of the recent extraordinary legislative session to address California's budget crisis, the legislature and governor enacted Assembly Bill 25 (second extraordinary session). While the secret ballot and other election processes remain unchanged, this bill adds some clarity and modest flexibility to California's alternative workweek schedule requirements.

First, the legislature codified the definition of "work unit" found in the wage orders. Thus, Labor Code section 511(i) now defines a "work unit" as "a division, a department, a job classification, a shift, a separate physical location, or a recognized subdivision thereof." This provision makes clear that a work unit should have a common thread along these specified lines. The "work unit" requirement, effective in 2000, eliminated in most cases the previous ability of an employer and employee to agree to an alternative workweek schedule for a single employee. However, like the wage orders, the new legislation provides that a single employee can qualify as a work unit "as long as the criteria for an identifiable work unit in this section is met." Still, however, the same election process must be followed for a single-employee work unit.

Second, the legislature clarified that the menu options offered to employees may include a regular schedule of five eight-hour days in a workweek, with daily overtime due after eight hours under that option. This change rejected the Labor Commissioner's interpretation that a schedule of five eight-hour days could not be offered because it was not an alternative schedule. As a result, employees who do not wish to work an alternative workweek schedule now may choose to work the regular five eight-hour days schedule, if approved in an election, while other employees in the work unit can work an alternative option.

Finally, the legislature addressed how frequently employees may move between particular schedule options offered under a menu of options. Labor Code section 511(a) now provides that employees "who adopt a menu of work schedule options may, with employer consent, move from one schedule option to another on a weekly basis." This change rejected another interpretation by the Labor Commissioner. That agency had taken the position that an employee could move between menu options only once every several months.

## **New provisions effective in May 2009**

AB 25 is effective on May 21, 2009. The unusual effective date stems from the enactment of the bill as part of an extraordinary or special, rather than regular, legislative session. Although passed overwhelmingly, AB 25 did not contain an urgency clause allowing it to become effective immediately upon Governor Schwarzenegger's signature on February 20, 2009. Instead, the California Constitution provides that a special session bill is effective 91 days after adjournment of the special session. The legislature adjourned the second extraordinary session on February 19, meaning that non-urgency bills enacted in that session are effective on May 21.

These reforms are modest. Nonetheless, they add some needed clarity and flexibility. Employers interested in adopting an alternative workweek arrangement should look at whether these changes will allow them to do so in accordance with their needs. In addition, employers with an existing alternative workweek arrangement, who wish to add a schedule of five eight-hour days as a menu option, should explore conducting a new election to do so.

If you would like more information about the topics covered in this *Alert*, please contact your Nixon Peabody attorney or:

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