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New Law Allows California Employers More Flexibility For Implementing Alternative Work Schedules

by Matthew A. Goodin

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As part of the recent budget compromise in California, on February 20, 2009, Governor Schwarzenegger signed into law Assembly Bill 5. The new law amends Labor Code section 511, which regulates alternative work schedules. The intended effect of the law is to provide employers with more flexibility in adopting alternative work schedules.

California law generally requires employers to pay non-exempt employees overtime for all time worked in excess of eight hours per day and 40 hours per week. However, section 511 allows employers to adopt alternative work schedules under which employees may work more than eight hours in a day without payment of daily overtime, provided the employer follows a special election procedure. An alternative work schedule can be implemented if a two-thirds majority of employees in the affected work unit vote in favor of it.

Although the new law retains the same election process for adopting an alternative work-week, it now allows employers to offer employees a "menu of options" for alternative work-week schedules, which may include a regular schedule of five eight-hour shifts per week among the options. Under the former law, the Division of Labor Standards Enforcement ("DLSE") took the position that a regular eight-hour-per-day/five-day-per-week schedule could not be among the menu of options for an alternative work-week. Allowing a standard work-week schedule to be on the menu of options should increase the likelihood that a sufficient number of employees will vote to adopt an alternative work-week schedule. Under the old law, if an employer had a department of ten employees, two of whom wanted to work four ten-hour shifts per week while the remaining employees wanted to work a standard work-week schedule, it would be unlikely that the employer could implement the alternative schedule for those two employees who desired it. Under the new law, the employer could offer employees the option of working a standard work-week or a work-week of four ten-hour shifts. If all ten employees voted for the alternative work schedule, those

employees who wished to work a regular schedule could still do so. It will be important for employers to explain this change to employees before the election so they understand that voting for an alternative work schedule does not necessarily mean they have to work that alternative schedule themselves.

Another significant change is that the new law provides that employees can move from one schedule option to another from week to week, provided the employer consents. The DLSE had previously taken the position that the alternative work schedule would be invalidated if employees moved from one schedule to another, week to week. Under the new law, employees could work a standard schedule one week and work four ten-hour shifts another week, so long as the employer consented and both schedules were among the menu of options adopted by employees.

The new law also defines the term "work unit" to mean a division, department, job classification, shift, separate physical location, or a recognized subdivision thereof. A "work unit" may also consist of an individual employee, as long as these criteria are met.

The new law is certainly a step in the right direction, allowing employers more flexibility in adopting work schedules to fit their business needs while minimizing costly overtime payments. Because the election and voting requirements are rather technical and burdensome, employers wishing to adopt alternative work schedules are advised to contact their employment counsel.

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