

RESOLUTION 10-08-2013

DIGEST

Miscellaneous: Flexible Work Schedule for Non-Exempt Employees

Amends Labor Code section 510 and adds Labor Code section 511.5 to allow employees and employers to contract for flexible work schedules without requiring overtime pay.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

Similar to 04-04-09 which was approved in principle.

Reasons:

This resolution amends Labor Code section 510 and adds Labor Code section 511.5 to allow employees and employers to contract for flexible work schedules without requiring overtime pay. This resolution should be approved in principle because it allows employers and employees the option of contracting for a flexible work schedule that benefits both parties by allowing the employee flexible hours in exchange excusing mandatory overtime pay.

Under current law, if non-exempt employees work more than eight hours in a day, they are entitled to overtime pay. This discourages employers from agreeing to allow an employee to work an alternate schedule that still adds up to 40 hours/week, e.g. four 10 hour days instead of five eight hour days, even though such an alternate schedule would otherwise benefit both parties. This resolution does not require employers to grant a flexible work schedule, but provides the option without the burden of overtime costs.

This resolution is similar to AB 830 (Olsen), which was introduced in 2011, but did not pass the Committee on Labor & Employment. The principal arguments in opposition to AB 830 (Olsen) were that adding a new “flexible work week” alternative, specifically for individual employees, could open the door to abuse by employers who could pressure employees to give up their right to overtime pay, or alternatively use such tailored work weeks to favor individual employees. However, the proposed resolution does not enable employers to pressure employees to “give up” overtime pay. Under the proposed flexible work-week, employees would still work 40 hours per week for regular pay, as they do under current law, but may choose how to allocate those hours during the week. If the employees work more than 40 hours per week, they will receive overtime pay, as they do under current law. Similarly, under current law, employers may show favoritism by allowing, or scheduling, some employees to work overtime and not allowing others. The proposed resolution would not “enable” favoritism any more than current law does. This resolution promotes work-place flexibility that benefits both employers and employees and should not be disapproved simply because a prior bill did not become law.

TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Association recommends that legislation be sponsored to amend to amend Labor Code section 510 and add Labor Code section 511.5, to read as follows:

- 1 § 510
- 2 (a) Eight hours of labor constitutes a day's work. Any work in excess of eight hours in one
- 3 workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the
- 4 seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-
- 5 half times the regular rate of pay for an employee. Any work in excess of 12 hours in one day shall be

6 compensated at the rate of no less than twice the regular rate of pay for an employee. In addition, any
7 work in excess of eight hours on any seventh day of a workweek shall be compensated at the rate of no
8 less than twice the regular rate of pay of an employee. Nothing in this section requires an employer to
9 combine more than one rate of overtime compensation in order to calculate the amount to be paid to an
10 employee for any hour of overtime work. The requirements of this section do not apply to the payment of
11 overtime compensation to an employee working pursuant to any of the following:

12 (1) An alternative workweek schedule adopted pursuant to Section 511.

13 (2) An employee-selected flexible work schedule adopted pursuant to Section 511.5.

14 ~~(2) (3)~~ An alternative workweek schedule adopted pursuant to a collective bargaining agreement
15 pursuant to Section 514.

16 ~~(3) (4)~~ An alternative workweek schedule to which this chapter is inapplicable pursuant to
17 Section 554.

18 (b) Time spent commuting to and from the first place at which an employee's presence is required
19 by the employer shall not be considered to be a part of a day's work, when the
20 employee commutes in a vehicle that is owned, leased, or subsidized by the employer and is
21 used for the purpose of ridesharing, as defined in Section 522 of the Vehicle Code.

22 (c) This section does not affect, change, or limit an employer's liability under the workers'
23 compensation law.

1 § 511.5.

2 (a) Notwithstanding Section 510 or any other law or order of the Industrial Welfare Commission,
3 an individual nonexempt employee may work up to 10 hours per workday and 40 hours per workweek if
4 the employee voluntarily requests this schedule in writing and the employer approves the request. This
5 shall be referred to as an overtime exemption for an employee-selected flexible work schedule.

6 (b) If the employee requests, and an employer approves, an employee-selected flexible work
7 schedule, then the employer and employee must enter a signed agreement that: (1) sets forth the start date
8 of the employee-selected alternative workweek schedule; (2) sets forth the number of days per week and
9 hours per day, not to exceed 10 hours per day and 40 hours per workweek, agreed upon under the
10 employee-selected alternative workweek schedule; (3) states the information set forth in subsections (c)
11 and (d) below; and (4) confirms that the employee voluntarily requested the employee-selected alternative
12 workweek schedule and sets forth the prohibitions listed in section (e) below. The employer shall
13 maintain a copy of the signed written agreement as a record for four years after the termination of the
14 employee-selected alternative workweek.

15 (c) If the employer and employee agree to an employee-selected flexible work schedule, the
16 employer shall pay overtime at one and one-half times the employee's regular rate of pay for all hours
17 worked in excess of (i) 40 hours in a workweek or (ii) the number of hours per workday established by
18 the employee-selected flexible work schedule, up to 12 hours per workday. All work performed in excess
19 of (i) 12 hours per workday or (2) eight hours on those days worked beyond the regular scheduled number
20 of workdays established by the employee-selected flexible work schedule shall be paid at double the
21 employee's regular rate of pay.

22 (d) An employee or employer may discontinue an employee-selected flexible work schedule at
23 any time by giving written notice to the other party. The request will be effective the first day of the next
24 pay period or the fifth day after notice is given if there are fewer than five days before the start of the next
25 pay period, unless otherwise agreed to in writing by the employer and the employee.

26 (e) An employer shall not induce employee's request for employee-selected alternative workweek
27 schedule by promising an employment benefit or threatening an employment detriment, and shall not
28 otherwise encourage or solicit the employee to make the request. An employer shall not discriminate
29 against an employee in any way based on the employee's request, failure to request, modification or
30 termination of an employee-selected alternative workweek schedule.

31 (f) This section does not apply to any employee covered by a valid collective bargaining
32 agreement or employed by the state, a city, county, city and county, district, municipality, or other public,
33 quasi-public, or municipal corporation, or any political subdivision of this state.
34 (g) (1) The Division of Labor Standards Enforcement shall enforce this section and shall adopt
35 or revise regulations in a manner necessary to conform and implement this section.
36 (2) This section shall prevail over any inconsistent provisions in any wage order of the Industrial
37 Welfare Commission.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: The Bar Association of San Francisco

STATEMENT OF REASONS

The Problem: Under existing law, an individual nonexempt employee does not have the freedom to work a flexible work schedule based on his or her own personal needs, even if the employee wants to do so. Existing law establishes 8 hours as a day's work and a 40-hour workweek; requires payment of overtime compensation for additional hours worked; and only authorizes an alternative workweek schedule providing for workdays no longer than 10 hours within a 40-hour workweek if such a schedule is adopted by a secret ballot election by 2/3 of the employees in a work unit. The onerous alternative workweek election process prevents an employee from being able to individually request a flexible work schedule that fits his or her needs.

The Solution: This bill would give employees flexibility in requesting an alternative workweek schedule of up to 10 hours per day within a 40 hour workweek on an individual basis, without having to go through the complicated process of adopting an alternative workweek schedule by a secret ballot election by 2/3 of the employees in a work unit. Under this resolution, an employee may individually request a flexible work schedule (such as 4-days per week, 10-hours per day) in order to accommodate his or her family obligations, personal pursuits, commuting issues and environmental concerns. An employee working a 4-day workweek would gain approximately 50 extra non-work days per year. This would allow an employee to spend an extra day per week spending time with his or her family, engaging in personal matters, such as volunteering at a child's school, and attending to personal and family matters that are often difficult to schedule with a five day per week, eight hours per day schedule. Such a flexible schedule would also lessen traffic congestion and pollution by eliminating one day per week of commuting to and from work.

CURRENT OR PRIOR RELATED LEGISLATION

This bill is similar to AB 830 introduced in 2011 and BASF Resolution 04-04-09.

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