

Overtime Issues? What's a Good Alternative?

by Stephen Marmaduke, Esq.

Veterinary practices are open long hours, often requiring staffing on a 24/7 basis. As a result, scheduling is complex and maintaining coverage can be difficult. California wage laws, which require payment of overtime for time worked over eight hours a day and 40 hours a week, can make staffing expensive as well as difficult. The increasing minimum wage and resultant increases in overtime pay will compound these financial pressures. Yet, staff members are often willing to work longer hours without overtime in exchange for an extra day off. Is there a good alternative?

California law permits alternative workweek arrangements that provide for regularly scheduled workdays requiring an employee to work more than eight hours in a 24-hour period. Employees working under a duly adopted alternate workweek registered with the California Department of Labor Standards Enforcement (DLSE) may work up to 10 hours a day (12 hours in limited circumstances) before overtime compensation is earned. Further, an employer may offer more than one alternative schedule in an effort to accommodate

different classes of employees and scheduling needs. Does this sound appealing?

Alternative workweeks should not be confused with the concepts of flextime or flexibility in general. Rigidity is built in from inception to execution. Alternative workweeks are derived from a statute; must comply with the guidelines of regulations and work orders promulgated by the Department of Industrial Relations; and are subject to audit and enforcement by the DLSE. The failure to properly adopt, implement, and manage an alternative workweek schedule can result in economic hardship, including back pay of the overtime the employer thought he or she was avoiding.

In spite of the hurdles in adopting and administering alternative workweek schedules, they may be a viable option for both employers and employees. There is an exacting adoption and registration process that must be followed. Care must be taken to administer the schedules in compliance with the regulations and guidelines. Certainly care and attention to the processes are required, but the processes are straightforward and manageable. Although this "cookbook" process generally will be discussed, the intent of this article is not to dwell on the details but to highlight concepts that may assist employers in determining if an alternative workweek would be a viable option for them and their employees.

WAGE ORDERS

The Department of Industrial Relations of the State of California promulgates wage orders to regulate wages, hours, and working conditions in various industries. Generally, veterinary practices fall within Wage Order 5, which can be found at dir.ca.gov/iwc/wageorderindustries.htm. Section 3(B) of Wage Order 5 authorizes alternative workweeks and contains detailed procedures to be followed to adopt and implement an alternative workweek (this is the cookbook process referred to above).

"WORK UNIT"

Alternative workweeks apply to a "work unit." A work unit may include all employees in a readily identifiable group or class, such as a division, department, or job classification. A work unit may also be a shift or all the employees in a recognizable location. In some instances,



a work unit could be a single employee with skills or tasks unique from other employees. However, a receptionist or night shift tender is likely not in the same work unit as a veterinary technician. Thus, a receptionist could not be included in the alternative work schedule established for technicians without the payment of overtime.

An alternative workweek must be formally adopted to provide protection from overtime.

If an alternative workweek is not properly adopted AND registered with the DLSE, the employer is not protected from overtime requirements. Veterinarians have justified their use of unregistered alternative workweeks because they "were in place when the practice was purchased," or "we have always done it this way," or "this is what the employees prefer." If there is any doubt of the existence of a lawful alternative workweek, employers and employees may visit the DLSE website (dir.ca.gov/databases/opri/SearchInstr.html) to determine if a business is registered as an alternative workweek provider. If not listed, it is likely not, and it is vulnerable to overtime claims.

An alternative workweek must be proposed by the employer and endorsed by the employees.

An alternative workweek may not be unilaterally imposed by the employer. In summary, the employer is to propose the alternative workweek(s) to a work unit. The employer's proposal shall be accompanied by a disclosure of how the alternative workweek would impact vacations, holidays, etc. If five percent of the employees in the work unit primarily speak a non-English language, that language must be accommodated. The employees composing the work unit must approve an alternative workweek by a two-thirds vote, conducted by secret ballot. If requested by the employees, a neutral third party may be appointed to supervise the election process. Once approved, the alternative workweek must be registered with the DLSE.

Future employees will be hired subject to the alternative workweek. There need not be a subsequent vote, unless requested by one-third of the work unit, at which time a two-thirds vote, by secret ballot, will be required to reverse the alternative schedule.

Alternative workweek must be regularly scheduled.

Again, there may be one or more alternative workweeks scheduled. The alternative workweek could be in addition to a standard eight-hour, five days a week schedule. Logically, the schedule would be limited to 10-hour days to avoid overtime, and no shift may be less than four hours. Although the specified number of work days and hours must be regularly occurring, it is not necessary to specify the exact days. If there are multiple schedules, an employee can move from one option to another with the permission of the employer. But, the alternative must be regularly scheduled. Hybrids or flexible schedules are not permitted.

If an employer is failing to pay overtime after eight hours and does not have an approved and registered alternative workweek, action should be taken immediately. The DLSE is actively auditing employers. With a three-year statute of limitations and possibly multiple employees, it is not difficult for a claim for unpaid overtime to become significant. In these circumstances, legal guidance is recommended.

If an alternative workweek is a viable option for the employer in order to avoid overtime and is appealing to employees, consideration should be given to adopting a schedule. The employer should carefully follow the adoption and registration process set forth in Wage Order 5. If assistance is necessary, the employer should enlist the aid of a human resources specialist or legal counsel. Once adopted and implemented, an alternative workweek should be easy to manage. It may, indeed, be a good alternative to overtime for both the employer and the employee. ■



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