

Employment Law Advisory for 6/15/11

The Workweek and Seventh Day Premiums: What Discretion Does an Employer Have?

Based on guidance from the California Department of Industrial Relations (“DLSE”), many employers have long believed that an employer has absolute discretion to designate the “workweek” that will be used to determine overtime compensation, particularly seventh day premiums. Labor Code Section 500 defines a “workweek” and “week” as any seven consecutive days starting with the same calendar day each week and clarifies that a “workweek” is a “fixed and regularly recurring” period of 168 hours, seven consecutive 24-hour periods. The DLSE guidance has long advised that an employer has discretion to designate the “workweek” but that absent designation by the employer the DLSE will treat each workweek as starting at midnight on Sunday so that Sunday is the first day of the workweek and Saturday is the last.

A recent California appeals court decision in *Seymore v. Metson Marine, Inc.* clarifies the limits that apply to an employer’s discretion to designate a workweek. Metson Marine provides crew and vessel operations for emergency clean up of oil spills and other environmentally hazardous materials along the California coast. The nature of the work requires the vessels to be at sea for a period of time and consequently Metson crews work a 14-day rotation on board a ship, alternating with a 14-day rest period. Metson starts the 14-day work rotation at noon on Tuesday and ends the rotation at noon on Tuesday two weeks later. During the 14-day hitch, crew members work 12-hour daily shifts, except on the crew change day, when they work only six hours. Crew members sleep on board the ship and Metson designates 12 hours of every 24 hour shift as “off-duty” with 8 hours designated as “sleep time,” three hours as meal times and one hour as free time.

Against this unusual backdrop, Metson designated the “workweek” as beginning at 12:00 am on Monday and ending at 11:59 pm the following Sunday. Using this workweek designation, Metson calculated that the crew members worked six days in the first workweek, seven days in the second workweek and two days in the third workweek. As a result, crew members were paid only a single seventh day premium at the end of the second workweek.

The plaintiff crew members argued that premium pay must be based on a “fixed and regular” schedule actually worked and that Metson should not be allowed to subvert the Labor Code Section 510 seventh day premium by designating an artificial workweek that did not correspond with the period actually worked. Under this theory, the crew members argued they were entitled to seventh day premiums on the seventh and fourteenth day of each 14-day rotation.

The court readily agreed with the plaintiff crew members and held that the plain intent of Labor Code Sections 500 and 510 was to provide premium pay for employees who are required to work a seventh consecutive day in a “fixed and regularly” occurring workweek. While the court conceded that an employer may “designate any workweek it wishes,” the court concluded that the workweek the employer “selects and requires its employees to observe is the workweek [the employer] must use for the purpose of calculating employee compensation.” The court specifically rejected Metson’s reliance on any contrary DLSE guidance reasoning that the DLSE did not intend to condone an employer



workweek designation that was different from its employees' actual workweek schedule and, in any event, DLSE guidance should be given no weight if it conflicts with the clear intent of the Labor Code.

Workweek and workday designations are a basic but important task for all employers. The court's opinion is a reminder to all employers that these designations should not be manipulated to avoid overtime requirements. While an employer has absolute discretion to establish its workweek, the workweek the employer requires its employees to observe is the same workweek the employer must use for purpose of calculating employee compensation. If you have any questions regarding the proper designation of the workweek or the workday, or any other employment law issues, please contact one of our attorneys.