State of California

MEMORANDUM

Date: February 11, 1994
Reference Code: 94-08

To: Personnel Management Liaisons

THIS MEMORANDUM SHOULD BE DISTRIBUTED TO:

Personnel Officers
Labor Relations Officers

From: Department of Personnel Administration
Office of the Director

Subject: Restructure of State Work Week Group (WWG) System

Over the past several months the Department of Personnel Administration (DPA) in cooperation with representatives from a number of departments has reviewed the effectiveness and continued viability of the State's Work Week Group (WWG) system. The review was prompted by the changing needs of the operating departments, the potential impact of Federal court findings regarding the Fair Labor Standards Act (FLSA), and the growing complexity in determining the appropriate overtime rate under the FLSA and the State's collective bargaining contracts.

The review group concluded that both State management and State employees would be better served by simplifying the WWG system through implementation of an overtime pay system modeled after the private sector. Employees in the private sector are usually either paid overtime at time and one-half their regular hourly rate or, if exempt from the FLSA, they receive no overtime pay at all.

Historically, employees in classes assigned to WWG 1, 4A, 4B, and 4D have been viewed as exempt under the FLSA. However, in most cases these employees receive time and one-half compensation for hours worked in excess of forty in the work week. Recent court decisions suggest that all employees who receive any form of hourly overtime compensation will be considered nonexempt under the FLSA.

In light of these factors the DPA is taking the following actions:

1. Most classes assigned to WWG 1, 4A, 4B, and 4D will be reallocated to WWG 2 to standardize the calculation of overtime rates and assure compliance with FLSA criteria. Employees in classes that are being reallocated will now have premium pays
(e.g., bi-lingual pay, shift differentials) included in the calculation of their overtime rate, will not be subject to the one-hour minimum over a 40-hour work week before overtime is paid, and will be subject to FLSA travel rules.

2. A revised travel policy (see PML Memorandum 94-06), consistent with the FLSA and applicable labor agreements, regarding compensable time worked during official State travel has been issued for all employees assigned to WWG 2. The anticipated effective date of this policy is April 1, 1994.

3. Classes in WWG 4C will be reviewed in order to determine if they should be considered for reallocation to WWG 2 because they may no longer meet the so-called "salary basis" criteria for exemption from the FLSA. (See Attachment "A".)

4. All hourly overtime recognition, both formal and informal, for WWG 4C employees will be eliminated. DPA is developing alternate compensation methods for extraordinary circumstances.

5. It is anticipated that effective April 1, 1994, any remaining reallocations of WWG 4C employees to WWGs providing overtime compensation are terminated. Effective immediately, departments are prohibited from making additional reallocations pursuant to existing delegations. Departments that wish to temporarily reallocate WWG 4C employees after April 1, 1994, must receive advance approval from DPA. Approval will be given only if the employees are in classes that are no longer suitable for continued allocation to WWG 4C or meet the criteria in Attachment "A."

6. It is anticipated that effective April 1, 1994, all formal individual agreements between departments and 4C employees concerning alternative work schedules (i.e., 4/10-40; 9/8-80) shall be terminated. Such arrangements may be continued informally pursuant to #7, infra, so long as they do not provide for the accrual of so-called "excess time."

7. A comprehensive statewide policy concerning the work of employees in classes assigned to WWG 4C will be implemented. (See Attachment "B".)
Consistent with the above, I am requesting each department to take the following actions:

1. Review your use of classifications in WWG 1, 4A, 4B, and 4D to determine the impact, if any, of reallocating these classes to WWG 2. Any concerns should be sent to DPA. Departments not responding by March 15, 1994 will be presumed to have no concerns or issues.

2. Review Attachment "A" and inform DPA by March 15, 1994 regarding: 1) concerns with reallocating classes to WWG 2 that do not meet the criteria described in Attachment "A" for continued inclusion in WWG 4C; 2) concerns with not reallocating classes to WWG 2 that do meet the criteria designated in Attachment "A" for continued inclusion in WWG 4C; and 3) comments, suggestions and/or concerns regarding the proper WWG allocation for WWG 4C classes that, under the Attachment "A" criteria, have not yet been targeted for either reallocation to WWG 2 or to remain in WWG 4C.

3. Advise DPA in writing, no later than March 15, 1994, regarding the need for continued temporary reallocation of current WWG 4C employees after April 1, 1994, until such time as affected classes are reallocated to WWG 2.

Finally, departments are advised that the review undertaken by DPA has focused upon the so-called "salary basis" requirement common to all of the FLSA exemptions except for employees in attorney, teacher, or doctor classifications. Employees remaining in WWG 4C must additionally satisfy a test that establishes their duties to be administrative, professional or executive in nature.

In 1990, in response to changes in the duties test for the administrative exemption in the public sector, DPA undertook a review of all classes considered to be FLSA-exempt and moved those deemed no longer meet the test to WWG 2. While DPA believes existing practices conform with federal law, departments are directed to review the synopsis of the duties tests set forth in Attachment "C" for these three exemptions, and verify that their 4C employees meet one of these three tests. Departments should inform DPA of any problems by May 15, 1994.
All questions, concerns and suggestions should be referred to your DPA departmental Classification and Compensation Division analyst within the timelines set forth above.

David J. Tirapelle
Director
"SALARY" BASIS TEST CRITERIA

The Fair Labor Standards Act (FLSA) excludes administrative, professional, and executive employees from its coverage. The law requires the Department of Labor (DOL) to define and delimit these terms. DOL has done so by establishing a "duties" test for each exemption, together with a requirement, applicable to all exempt employees save for those in the legal, medical or teaching professions, that exempt employees be paid on a "salary basis."

Recent court decisions interpreting these regulations have held that any of the following practices are inconsistent with compensation on a salary basis, and employees subject to such practices may therefore be found to be non-exempt:

1) Deductions from leave balances for partial-day absences (although recent DOL regulations permit such deductions, the validity of the regulations is under court challenge and DPA has determined that eliminating such deductions is more consistent with the overall 4C concept, as restated);

2) Any recognition of excess time on a hour-for-hour basis, whether cash or compensatory time off (CTO);

3) Disciplinary suspensions of less than five working days for other than major safety violations;

4) Fixed work schedules and/or requirements that the employee obtain permission or secure a replacement if he/she leaves work early.

In essence, courts have required that in order to be "salaried" for FLSA exemption purposes, employees must have substantial discretion with regard to their work schedule, with performance measured in terms of whether and how well the work has been done rather than by hours spent at a desk.

In attempting to formulate criteria to be used in determining whether existing classes should remain in WWG 4C or be reallocated to WWG 2, the principal focus of the task force was to identify those groups of classifications that either: 1) required time accountability that is inconsistent with "salaried" status; or 2) historically have been regularly subject to reallocation to a WWG that pays overtime during periods of increased workload, which again is inconsistent with current law regarding salaried status.

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The general conclusion was that managers, higher level supervisors, and most rank-and-file employees in Units 2, 3, 16 and 21 should remain exempt, while for the most part first-line supervisors and a number of technically-oriented rank-and-file classes should be considered for reallocation. The specific criteria to be considered are as follows:

A. WWG 4C Classes That Should Not Be Initially Considered for Reallocation

1. Classes with CBID designation of M.
2. Classes with CBID designation of S at the level of SSM II (Supervisor) or above.
3. Classes with the CBID designation of R02, R03, R16 and R21.
4. Classes with the CBID designation of S02, S03, S216 and S21.

B. WWG 4C Classes That Should Be Considered for Reallocation

1. Classes with the CBID designation of R06, R07, R09, R11, R12 and R20.
2. Classes with the CBID designation of R01, R10, R19, S01, S04, S05, S06, S07, S08, S09, S10, S11, S12, S13, S14, S15, S17, S18, S19, and S20 which fall into one or more of the following categories:
   a. A substantial number of employees in the class are regularly reallocated to WWG 4A in order to be paid overtime for performing their regular duties.
   b. A substantial number of employees in the class are required to maintain an inflexible work schedule for the greater part of the year and it is not possible to eliminate such a requirement.
   c. A substantial number of employees in the class are required to submit detailed time sheets each pay period for other than budgetary purposes and it is not possible to eliminate such a requirement.
d. The employees in the class would suffer a pay inequity in relation to other classes that have been reallocated during recurring overtime situations.

In applying these criteria, we emphasize that they are not a restatement of the law, but rather are intended as a guide in helping to determine those classes that, as a matter of operational necessity in light of current law, must either continue to receive recognition for overtime on an hour-for-hour basis and/or must be subject to strict time accountability.

As a further guide, we are attaching a settlement agreement reached with the California State Employees Association (CSEA) (effective January 24, 1994) concerning the work policy for 4C employees in CSEA bargaining. This agreement serves as both a definitive document for 4C employees in Units 1, 3, 11, 20, and 21 and is useful for illustrative purposes for 4C employees in other bargaining units. DPA intends to bargain for this language in other bargaining units with 4C employees, and to apply a similar policy to employees not covered by collective bargaining.
WORK POLICY FOR FLSA EXEMPT EMPLOYEES

State employees who are exempt from the FLSA are not hourly workers. The compensation they receive from the State is based on the premise that they are expected to work as many hours as is necessary to provide the public services for which they were hired. Consistent with the professional status of these employees, they are accountable for their work product, and for meeting the objectives of the agency for which they work.

Following is the State's policy for all employees exempt from the FLSA:

1. Management determines, consistent with the current Memoranda of Understanding (MOU) the products, services, and standards which must be met by FLSA exempt employees.

2. The salary paid to FLSA exempt employees is full compensation for all hours worked in providing the product or service.

3. FLSA exempt employees are not authorized to receive any form of overtime compensation, whether formal or informal.

4. FLSA exempt employees are expected to work within reason as many hours as necessary to accomplish their assignments or fulfill their responsibilities.

5. Consistent with the services which management has determined must be provided, FLSA exempt employees are to be given discretion in establishing their work hours. Employees are responsible for keeping management apprised of their schedule and whereabouts, must receive approval from management for the use of formal leave (e.g., vacation, sick leave, personal leave) and for absences of one day or more and must respond to directions from management to complete work assignments by specific deadlines.
6. Consistent with the salaried nature of FLSA exempt employees, these employees:

a. Shall not be charged any paid leave for absences in less than whole day increments

b. Shall not be docked for absences of less than a day.

c. Shall not be suspended for five days or less when facing discipline.

d. Shall not have absences of less than a day recorded for attendance record keeping or compensation purposes.
A. Executive Employees

The term "executive" is somewhat of a misnomer for the exemption. A more realistic title would be full supervisory employee. If a new class is established and is designated supervisory or managerial under the Dills Act it can be assumed the employees will meet the test as executive employees, although the ultimate determination rests with DOL and/or the courts.

1. Short Test for Executive Employees

An executive employee must meet all of the following requirements to be exempt:

a. Compensation: Is paid not less than $250 per week exclusive of board, lodging, or other facilities.

b. Duties: Primarily management of the agency, department, or subdivision.

c. Supervision: Customarily and regularly direct two or more other employees.

2. Primarily Managerial Duties

Managerial and supervisory functions are described as follows:

Interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing their work; maintaining their production or sales records for use in supervision or control; appraising their productivity and efficiency for the purpose of recommending promotions or other changes in their status; handling their complaints and grievances and disciplining them when necessary; planning the work; determining the techniques to be used; apportioning the work among the workers; determining the type of materials, supplies, machinery or tools to be used or merchandise
to be bought, stocked and sold; controlling the flow and distribution of material or merchandise and supplies; providing for the safety of employees and property.

In the ordinary case it may be taken as a rule of thumb that primary duty means over 50% of the employee's duties involves managerial or supervisory responsibilities. Where the employee does not spend over 50% of his/her time involving management duties other factors may still support the conclusion that management is the primary duty. These factors include:

a. The frequency with which the employee exercises discretionary powers.

b. His/her relative freedom from supervision.

c. The relationship of his/her salary and the salary of subordinates performing nonexempt work which the employee may also occasionally perform.

3. Department or Subdivision

a. The terms department or subdivision are intended to distinguish between the supervision of a group of employees assigned from time to time to a specific job and the supervision of a unit with permanent status and function.

b. Even though an employee supervises two or more people and participates in management of a unit, they must be in charge of and have as the primary duty the management of a recognized unit which has a continuing function.

c. Supervisors who work outside the employer's establishment, move from place to place, or have different subordinates at different times may
still qualify as an executive if they are still supervising a recognized unit with a continuing function.

4. Direct Two or More Employees

a. Employees may qualify by supervising two or more full-time employees or their equivalent. Typically, when supervising only two employees other managerial duties must be present to retain the exemption.

b. The employees supervised must be employed in the same unit managed. A shared responsibility for the direct supervision of the same two or more employees does not satisfy the supervisory requirement.

c. Having the power to select and discipline supervised employees is interpreted to mean being directly concerned with hiring, firing, or other changes in status whether by direct action or by recommendation.

B. Administrative Employees

It is DPA's view that a large number of State employees meet the test as administrative employees since most State departments are established primarily to administer a body of law, rather than manufacture or process a product.

1. Short Test for Administrative Employees

An administrative employee must meet all of the following requirements to be exempt:

a. Compensation: Is paid at least $250 per week exclusive of board, lodging, or other facilities.
b. Duties: Primarily performance of office or non-manual work directly related to management policies or general business operations or the performance of functions in the administration of an educational establishment, or a department or subdivision thereof, in work related to the academic instruction or training.

c. Responsibilities: Primary duty includes work requiring the exercise of discretion and independent judgment.

2. Types of Administrative Employees

Three types of employees are considered for the administrative exemption. These include executive and administrative assistant, staff employees, and special assignment employees.

a. The first type is an assistant to an owner, manager, or another administrative employee. There has been a steady and increasing use of persons who assist executives and managers in the performance of their duties without themselves having executive authority. Typical titles of persons in this group are: Executive Assistant, Confidential Assistant, Executive Secretary and Administrative Assistant, etc.

b. Employees considered as staff employees are typically staff of functional employees, rather than line or production employees. They include, but are not limited to, tax specialists, insurance specialists, research experts, all types of analysts, investment consultants, statisticians, credit managers, purchasing agents, safety officers, personnel officers, and labor relations officers. Also,
advisory experts are included which would cover all types of specialized consultants.

c. The third category are those found in specialized assignments. Among this group are a number of persons whose work is performed away from the employer's place of business. Thus inspectors, field representatives, investigators, lease agents, etc., would fall within this category.

C. Office or Nonmanual Work

The key to this criteria is whether the employee performs office or nonmanual work directly related to management policies or general business operations?

1. This requirement restricts the exemption to "white collar" employees who meet the work test.

   a. Office work may qualify whether or not it is manual in nature.

   b. Manual work does not negate the exemption if directly and closely related to work requiring exercise of discretion and independent judgment.

   CAUTION: Employees performing substantial manual work are not exempt even if they exercise discretion and independent judgment as in operating complex machinery or performing repetitive highly technical work.
2. The exemption is limited to persons who perform work of substantial importance to the management or operation of their employer, business or his employer's customers.

3. Administrative operations include advising management, planning, negotiating, representing the employer, purchasing, promoting sales, and doing business research and control.

4. It is not necessary for an employee to participate in the formulation of management policies or in operations of the business as a whole in order to be administratively exempt. Exempt employees can carry out major assignments in conducting business operations even though their tasks relate to the operation of a particular segment of a business.

5. The test of "directly related to management policies or general business operations" is also met by advisory personnel such as claims agents, adjusters, credit managers, etc. Systems analysts and computer programmers are appropriately exempt if they develop systems for data processing to obtain solutions to complex operational problems.

CAUTION: DOL, in defining "management policies" and "general business operations" for state and local governments (as well as private sector service-oriented employer) has since 1988 strictly and narrowly held that services provided by administratively exempt employees must be truly administrative in nature (such as personnel, budget, and analysis) or policy forming (such as staff functions in a major executive's office) regardless of the amount of discretion exercised by incumbents. Employees previously considered administratively exempt may now well be found to be covered under FLSA due to the "production" nature of their work regardless of its complexity.
3. **Exercising Discretion and Independent Judgment**

An employee who exercises discretion and independent judgment is free to make decisions without the constant need to consult a superior. The work must require the employee to compare and evaluate alternative conclusions or courses of action and select one after the options have been considered.

a. A person whose work is so completely routinized that it does not significantly vary from day-to-day would not meet the exemption.

b. The exercise of discretion and judgment must be greater than occasional. The dictionary defines occasional as "appearing irregularly or now and then." This requirement will be met by employees who are expected to normally and recurringly exercise discretionary power in the day-to-day performance of their duties.

D. **Professional Employee**

The term "professional" is not restricted to the traditional professions of law, medicine, and theology. It includes those professions which have a recognized status and which are based on the acquirement of professional knowledge through prolonged study. It also includes the artistic professions.

1. **Short Test for Professional Employees**

A professional employee must meet all of the following requirements to be exempt:

a. Compensation: Is paid not less than $250 per week exclusive of board, lodging, or other facilities.

b. Duties: Primarily consist of performing work requiring advanced learning or work as a teacher.
c. Discretion: Must include work which requires the consistent exercise of discretion and judgment or consist of work requiring invention, imagination, or talent in a recognized field of artistic endeavor.

2. Advanced Learning

a. Professions are described as those requiring knowledge of an advanced type - acquired by a prolonged course of specialized intellectual instruction.

b. Generally, it must be knowledge that cannot be obtained at the high school level or from a general academic education or apprenticeship training.

c. The typical symbol of professional training and the best prima facie evidence of its possession is, of course, the appropriate academic degree. (Persons whose attainments and status are the same as those with degrees, who have reached that status through long years of experience, are not banned from the professional exemption.)

3. Artistic Profession

a. Artistic work involves work that is original and creative in character in a recognized field of artistic endeavor, the result of which depends primarily on the inventive imagination or talent of the employee.

b. Fields of artistic endeavor include, but are not limited to: music, writing, the theater, and the plastic and graphic arts.
In the plastic and graphic arts the requirement is generally met by artists who are simply given the subject matter of the painting or sculpture. It is similarly met by cartoonists who are simply told the concept or theme of the subject.

4. Teaching Professions

a. A teacher is an employee whose primary duty consists of the performance of teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in a school system, education establishment or institution.

b. Teaching personnel include, but are not limited to, the following: teachers of kindergarten or nursery school pupils or of gifted or handicapped children, teachers of semi-skilled trades and occupations, teachers engaged in automobile driving instruction; home economic teachers, and vocal or instrumental music instructors.

5. Discretion

The test for determining if an employee is exercising discretion and professional judgment is basically the same as the test for the administrative employee.

E. Special Exemptions

In some cases a class may appear to be covered by the Act based on the duties and responsibilities described. However, because of the work location or assignment, some or all incumbents in the class may be exempt under a special exemption. To date there have been three specific situations where this has occurred in the State.
1. **Recreational Establishments**

The FLSA exempts any employee who is employed by an amusement or recreational establishment if (a) the establishment does not operate for more than 7 months in any calendar year, or (b) during the preceding calendar year, the average receipts for any 6 months of such year were not more than 33% of its average receipts for the other 6 months of the year.

It is DPA's conclusion that employees of Cal Expo during the annual California State Fair and other special events are exempt under the average receipts test. Also employees of the County Fairs operated through the Division of Fairs and Expositions in the Department of Food and Agriculture meet the receipts test for exemption.

In order for employees to qualify for this exemption, they must be working at the actual amusement or recreation site. Thus headquarters employees would not qualify.

2. **Fish Hatcheries**

The FLSA exempts any employee employed in the catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shellfish, etc.

It is the DPA's conclusion that employees at the Department of Fish and Game fish hatcheries are eligible for this exemption.

3. **Seamen**

The FLSA provides that every employee employed as a seaman is exempt from the overtime requirements of the Act. This includes any crew member regardless of their duties who ultimately reports to the captain of the vessel.

It is DPA's conclusion that crew members aboard the California Maritime Academy's training vessel qualify for this exemption.