

The 2002 Update Of
The DLSE
Enforcement Policies and Interpretations
Manual
(Revised)

The Division of Labor Standards Enforcement (DLSE) Enforcement Policies and Interpretations Manual summarizes the policies and interpretations which DLSE has followed and continues to follow in discharging its duty to administer and enforce the labor statutes and regulations of the State of California.

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AUGUST, 2019

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49 **COMPUTATION OF REGULAR RATE OF PAY AND OVERTIME.**

49.1 Labor Code § 200 defines wages as “...all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis or other method of calculation.”

49.1.1 In California, as with the federal FLSA, overtime is computed based on the regular rate of pay. The regular rate of pay includes many different kinds of remuneration, for example: hourly earnings, salary, piece work earnings, commissions, certain bonuses, and the value of meals and lodging.

49.1.2 **Items of Compensation Included in Calculating Regular Rate of Pay.** In not defining the term “regular rate of pay”, the Industrial Welfare Commission has manifested its intent to adopt the definition of “regular rate of pay” set out in the Fair Labor Standards Act (“FLSA”) 29 USC § 207(e):

“...the ‘regular rate’ at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee...” (29 USC § 207(e)).

In determining what payments are to be included in or excluded from the calculation of the regular rate of pay, California law adheres to the standards adopted by the U.S. Department of Labor to the extent that those standards are consistent with California law.

49.1.2.1 **Piece Rate, Production Bonus.** The Department of Labor has interpreted § 207(e) of the FLSA to include piece rate and production bonuses in determining the regular rate of pay. (29 CFR §§ 778.110 (“production bonus”) and 778.111 (“piece-rate”))

49.1.2.2 **All Goods Or Facilities Received By Employee Are To Be Utilized In Determining Regular Hourly Rate For Overtime Computation.** Following the long-established enforcement policy of the DLSE (which closely tracks the federal regulations in this regard) housing benefits, meals, etc., are added to the cash wage paid for purposes of determining the “regular rate” of pay. The federal courts have addressed this issue and the U.S. Supreme Court in the case of *Walling v. Youngerman-Reynolds Hardwood Co.* (1945) 65 S.Ct. 1242, 1245 noted:

“The regular rate by its very nature must reflect all payments which the parties have agreed shall be received regularly during the workweek, exclusive of overtime payments. It is not an arbitrary label chosen by the parties; it is an actual fact. Once the parties have decided upon the amount of wages and the mode of payment the determination of the regular rate becomes a matter of mathematical computation, the result of which is unaffected by any designation of a contrary ‘regular rate’ in the contracts.” (See also, *Walling v. Alaska Pacific Consolidated Mining Co.* (9th Cir.1945) 152 F.2d 812, 815)

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49.1.2.3 **What Must Be Included In Calculating Regular Rate.** Any sum paid for hours worked must, of course, be included in the calculation. Also, any payment for performing a duty must be included. For example, an employment contract may provide that employees who are assigned to be available for calls for specific periods will receive a payment of \$25 for each 8-hour period during which they are “on call” in addition to pay at their regular (or overtime) rate for hours actually spent in making calls. If the employees who are thus “on call” are not confined to their homes or to any particular place, but may come and go as they please, provided that they leave word where they may be reached, the hours spent “on call” are not considered as hours worked (See discussion at Section 46.6.3, et seq. of this Manual). Although the payment received by employees for such “on call” time is, therefore, not allocable to any specific hours of work, it is clearly paid as compensation for performing a duty involved in the employee’s job and, therefore, the payment must be included in the employee’s regular rate in the same manner as any payment for services, such as an attendance bonus, which is not related to any specific hours of work.

49.1.2.4 **Payments That Are To Be Excluded in Determining “Regular Rate”:**

- (1) Sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency; (Discussed in 29 CFR § 778.212).
- (2) Payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment; (Discussed in 29 CFR §§ 778.216 through 778.224).

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- (3) Sums paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Administrator set forth in appropriate regulations which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such talent fees are defined and delimited by regulations of the Administrator) paid to performers, including announcers, on radio and television programs; (Discussed in 29 CFR §§ 778.211 and 778.213).
- (4) Contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees; (Discussed in 29 CFR §§ 778.214 and 778.215).
- (5) Extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum work-week applicable to such employee under subsection (a) of this section or in excess of the employee's normal working hours or regular working hours, as the case may be; (Discussed in 29 CFR §§ 778.201 and 778.202).
- (6) Extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days; (Discussed in 29 CFR §§ 778.203, 778.205 and 778.206).
- (7) Extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a) of this section, [FN2] where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek; (Discussed in 29 CFR §§ 778.201 and 778.206).

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- 8) Any value or income derived from employer-provided grants or rights provided pursuant to a stock option, stock appreciation right, or bona fide employee stock purchase program which is not otherwise excludable under any of paragraphs (1) through (7) if—
- (A) grants are made pursuant to a program, the terms and conditions of which are communicated to participating employees either at the beginning of the employee's participation in the program or at the time of the grant;
 - (B) in the case of stock options and stock appreciation rights, the grant or right cannot be exercisable for a period of at least 6 months after the time of grant (except that grants or rights may become exercisable because of an employee's death, disability, retirement, or a change in corporate ownership, or other circumstances permitted by regulation), and the exercise price is at least 85 percent of the fair market value of the stock at the time of grant;
 - (C) exercise of any grant or right is voluntary; and
 - (D) Any determinations regarding the award of, and the amount of, employer-provided grants or rights that are based on performance are—
 - (i) made based upon meeting previously established performance criteria (which may include hours of work, efficiency, or productivity) of any business unit consisting of at least 10 employees or of a facility, except that, any determinations may be based on length of service or minimum schedule of hours or days of work; or
 - (ii) made based upon the past performance (which may include any criteria) of one or more employees in a given period so long as the determination is in the sole discretion of the employer and not pursuant to any prior contract.
- (9) Reporting time pay, extra hour for failure to provide meal period, extra hour for failure to provide break and split shift pay need not be included. In *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, the Court indicated that meal period pay, rest period pay, reporting time pay and split shift premium are all forms of pay similar to overtime premium. Because these payments are in the nature of premiums required by law, they are not included in computing the regular rate of pay on the same basis that overtime premium is not included in regular rate calculations. (See 29 CFR §§ 778.201, 778.202 and 778.224).

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49.1.3 (section deleted – reformatted as 49.1.2.4, No. 9).

49.1.4 **Hours Used In Computation.** Ordinarily, the hours to be used in computing the regular rate of pay may not exceed the legal maximum regular hours which, in most cases is 8 hours per day, 40 hours per week. This maximum may also be affected by the number of days one works in a week. It is important to determine what maximum is legal in each case. The alternate method of scheduling and computing overtime in most Industrial Welfare Commission Orders, based on four 10-hour days or three 12-hour days does not affect the regular rate of pay, which in this case also would be computed on the basis of 40 hours per week. (*Skyline Homes v. Department of Industrial Relations* (1985) 165 Cal.App.3d 239, 245-50).¹

49.1.5 **Salaried Non-Exempt – Explicit Written Agreement No Longer Allowed.** In the past, California law has been construed to allow the employer and the employee to enter into an explicit mutual wage agreement which, if it met certain conditions, would permit an employer to pay a salary to a non-exempt employee that provided compensation for hours in excess of 40 in a workweek. (*See, Ghory v. Al-Lahham* (1989) 209 Cal.App.3d 1487, 257 Cal.Rptr. 924). Such an agreement (backing in the regular rate) is no longer allowed as a result of the specific language adopted by the Legislature at Labor Code § 515(d). To determine the regular hour rate of pay for a non-exempt salaried employee, one must divide the weekly salary paid by no more than forty hours.

¹ It is important to note that the *Skyline Homes* case was not overturned by the Supreme Court in the case of *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, as some labor attorneys have suggested. What the Court said was that to the extent that the *Skyline* court had justified reliance on DLSE internal documents which were “underground regulations,” the case was disapproved. The *Skyline* court had adopted the DLSE approach, but used an independent analysis to reach that decision. Thus, the rationale of the court concerning the fluctuating workweek method is valid. The case is still regularly cited by the Supreme Court in its decisions. (*See, Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575).

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49.2 **Methods Used in Computing Regular Rate of Pay:**

49.2.1.1 **Salaried Workers:** Multiply the monthly remuneration by 12 (months) and divide by 52 (weeks) = weekly remuneration. Divide the weekly remuneration by the number of legal maximum regular hours worked = regular hourly rate. (See Labor Code § 515(d))

49.2.1.2 **Piece Workers, Production Bonus Workers or Commission Workers:** (See O.L. 1993.02.22-1, 1988.06.15, 1988.03.28, 1994.06.17-1; 1988.07.14, 1987.02.17). Either of the following two methods can be used to determine the regular rate for purposes of computing overtime compensation:

1. Compute the regular rate by dividing the total earnings for the week, including earnings during overtime hours, by the total hours worked during the week, including the overtime hours. For each overtime hour worked, the employee is entitled to an additional one-half the regular rate for hours requiring time and one-half and to an additional full rate for hours requiring double time. This is the most commonly used method of calculation.
2. Using the piece or commission rate as the regular rate and paying one and one-half times this rate for production during overtime hours. This method is rarely used.

49.2.1.3 It is recognized that the method outlined in alternative 1, above, resembles the computation used in the illegal fluctuating workweek plans. However, there is a distinct difference: Under that federal method the salaried employee is not given the opportunity to increase his or her basic rate; in fact, it is *always* the case that the longer the employee on a fluctuating workweek works, the lower the basic hourly rate of the salaried employee becomes. Under the DLSE method for piece workers, production bonus workers or commission workers, it is recognized that these employees are actually given additional time to make more pieces or earn more commission in the overtime hours so that the basic hourly rate may increase. Therefore, the *Skyline* analysis for computing the regular rate of pay is inapplicable to computing the regular rate for piece rate and commission employees. The *Skyline* court recognized this at 165 Cal.App.3d 239, 254.

49.2.1.4 Employees compensated by a piece-rate compensation formula must be separately compensated for rest and recovery periods, which means payment of additional compensation separate from any piece-rate compensation; the rate of compensation for rest and recovery periods shall be the higher of:

An average hourly rate determined by dividing the total compensation for the work week, exclusive of compensation for rest and recovery periods and any premium compensation for overtime, by the total hours worked during the workweek, exclusive of rest and recovery periods or the applicable minimum wage. See, Labor Code § 226.2(a)(1) and (3).

One exception to this requirement was enacted by the Legislature under certain conditions for licensed barbering and cosmetology employees who are paid what are deemed in the new statute, Labor Code section 204.11, “commissions” if all the following requirements are met:

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The barbering and cosmetology employee is licensed;

The barbering and cosmetology employee is providing services for which such a license is required;

The employee received wages which include amounts paid as a percentage or a flat sum portion of the sums paid to the employer by the client recipient of such serve; and

The barbering and cosmetology employee is paid in every pay period in which hours are worked a regular base hourly rate of at least two times the state minimum wage for all hours worked in addition to commissions paid.

In addition, employees must be compensated for other non-productive time separate from any piece-rate compensation at an hourly rate that is no less than the applicable minimum wage. This means for “other non-productive time” employees paid by piece-rate must be paid additional compensation that is separate from their piece-rate compensation. See, Labor Code § 226.2(a)(4).

49.2.1.5 For a workweek of piece-rate compensation and overtime hours:

- An employee works a 6-day, 47-hour workweek, for which 7 hours constitute overtime.
- The employee has two 10-minute rest periods authorized and permitted per day, for a total of 120 minutes (2.0 hours) of rest periods for the workweek.

- The employee earns a total of \$800 in piece-rate compensation for the workweek.

The average hourly rate to be paid for the rest periods for this employee is calculated as follows:

	\$800	Compensation for the workweek, exclusive of rest and recovery periods and premium pay for overtime.
÷	45 hours	Hours worked, not including the rest and recovery periods.
=	\$17.78/hour x 2.0 hours = \$35.56	Compensation for rest and recovery periods for this workweek.

The overtime premium compensation for this employee is:

	\$800	Piece-rate compensation
+	\$35.56	Compensation for rest and recovery periods
=	\$835.56	
÷	47 hours	
=	17.78/hour	Regular rate of pay
x	.5	
=	\$8.89	Premium pay due for overtime hours
x	7 hours	Overtime hours

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=	\$62.23	
Total compensation for the workweek:		
	\$800	Piece-rate compensation
+	\$35.56	Compensation for rest and recovery periods
+	\$62.23	Premium pay for overtime hours
=	\$897.79	

As an alternative, (see 2 above) piece work performed during overtime periods may be paid by paying for each piece made during the overtime period at the appropriate rate, i.e., time and a half (1 ½) for 8 to 12 hours, or double time (2) over 12 hours.

- 49.2.2 **Group Piece Work Rates:** A group rate for piece workers is an acceptable method of computing pay. In this method the total number of pieces produced by the group is divided by the number of persons in the group and each is paid accordingly. The regular rate for each worker is determined by dividing the pay received by the number of hours worked. Again, of course, the regular rate cannot be less than the minimum wage and rest and recovery periods must be separately compensated and included in the regular rate computation.
- 49.2.3 **Note:** If notice is given to all workers before the performance of the work, the ratio among the various workers may differ (i.e., one may receive 7% while another receives only 5.5%). This is typical on some construction sites and fishing vessels where the experience of the workers is taken into consideration when calculating the shares.
- 49.2.4 **Computing Regular Rate and Overtime on a Bonus.** When a bonus is based on a percentage of production or some formula other than a flat amount and can be computed and paid with the wages for the pay period to which the bonus is applicable, overtime on the bonus must be paid at the same time as the other earnings for the week, or no later than the payday for the next regular payroll period. (See Labor Code § 204) Since the bonus was earned during straight time as well as overtime hours, the overtime “premium” on the bonus is half-time or full-time (for double time hours) on the regular bonus rate. The regular bonus rate is found by dividing the bonus by the total hours worked during the period to which the bonus applies. The total hours worked for this purpose will be all hours, including overtime hours. (See previous section)
- 49.2.4.1 **Example Involving Overtime and Bonus:** First, find the overtime due on the regular hourly rate, computing for salaried worker and piece workers as described in the sections above. Then, separately, compute overtime due on the bonus: find the regular bonus rate by dividing the bonus by the total hours worked throughout the period in which the bonus was earned. The employee will be entitled to an additional half of the regular bonus rate for each time and one-half hour worked and to an additional full amount of the bonus rate for each double time hour, if any.

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Regular hourly rate of pay	\$ 20.00
Total hours worked in workweek = 52	
Total overtime hours at time and one-half = 12	
Overtime due on regular hourly rate = 12 x \$30.00	\$360.00
Bonus attributable to the workweek	\$138.00
Regular bonus rate = \$138.00 ÷ 52 = \$2.6538 ÷ 2 = \$1.33 x 12 Overtime Hours	\$ 15.92
Total earnings due for the workweek:	
Straight time: 40 hours @ \$20.00	\$800.00
Overtime: 12 hours @ \$30.00	\$360.00
Bonus	\$138.00
Overtime on bonus	<u>\$ 15.92</u>
Total	\$1,313.92

49.2.4.2 If the bonus is a flat sum, such as \$300 for continuing to the end of the season, or \$5.00 for each day worked, the regular bonus rate is determined by dividing the bonus by the maximum legal regular hours worked during the period to which the bonus applies. This is so because the bonus is not designed to be an incentive for increased production for each hour of work; but, instead is designed to insure that the employee remain in the employ of the employer. To allow this bonus to be calculated by dividing by the total (instead of the straight time hours) would encourage, rather than discourage, the use of overtime. Thus, a premium based on bonus is required for each overtime hour during the period in order to comply with public policy. This enforcement position was adopted by the California Supreme Court in *Alvarado v. Dart Container Corp.* (2018) 4 Cal.5th 542.

49.2.4.3 Example: Involving Overtime, Double Time and Bonus. The bonus of \$300.00 for remaining to the end of the season paid to a pieceworker who worked 640 regular hours, 116 time and one-half overtime hours and 12 double time hours:

Bonus	\$300.00
Regular Bonus rate=\$300.00	
divided by 640	\$ 0.469
1½ x regular	
bonus rate = 1½ x \$0.469	\$ 0.703
Double regular	
bonus rate = 2 x \$0.469	\$ 0.938
Overtime due on bonus for time	
and one-half hours = \$0.703 x 116	\$ 81.56
Overtime due on bonus for double time hours = \$0.938 x 12	\$ 11.25
Bonus	\$300.00
Overtime on bonus	<u>\$ 92.81</u>
Total due on bonus	\$392.81
(Plus other properly computed earnings)	

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- 49.2.5 **Weighted Average Method.** Where two rates of pay are paid during a workweek, the California method for determining the regular rate of pay for calculating overtime in that workweek mirrors the federal method, based upon the weighted average of all hourly rates paid. (See 29 CFR §778.115) Initially, therefore, it must be predicated upon the finding that there are established hourly rates being paid. The rate will be established by adding all hours worked in the week and dividing that number into the total compensation for the week. This is consistent with the provisions of *Skyline v. DIR* (1985) 165 Cal.App.3d 239, since the hourly rates have already been established and what needs to be established now is the weighted average of those rates for purposes of overtime payment.
- 49.2.6 **Exception to Weighted Average.** In the situation where an employee is paid two rates during the course of the day and one of those rates is a statutorily-mandated rate (i.e., prevailing wage) the regular rate for calculating the overtime rate for work performed on the public works project must be based on the higher of either the weighted average or the prevailing wage rate in effect at the time that the work is performed. (It would be very unusual for the weighted average to be higher than the prevailing wage rate, but it is possible.)
- 49.2.6.1 Example: If an employee is employed in a workweek for some hours on a private construction job at \$14.00 per hour and then employed other hours on a public work project at \$28.00, any overtime performed on the public work site must be compensated at the overtime rate required by the prevailing wage determination in effect on that project for the craft.
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