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## new law serves up additional menu items for alternative workweeks

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### *MSK Client Alert*

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In our current unstable economy, employers are looking for ways to cut costs. Flexible scheduling, such as by operating on a four day workweek and/or permitting employees to work longer days without incurring daily overtime, may lead to significant savings for employers. For many years, California law has permitted groups of employees to vote on whether to work such an "alternative schedule." Implementation, however, is subject to strict compliance with detailed procedures set forth in California Labor Code Section 511 and the California Industrial Welfare Commission ("IWC") wage orders. Recently, Governor Schwarzenegger signed into law Assembly Bill 5, which provides more flexibility in the rules concerning alternative workweeks. This new law became effective on May 21, 2009.

### **Background**

Under California law, nonexempt employees must be paid time and a half for all hours worked in excess of eight in a day and double time for all hours worked in excess of twelve in a day. Alternative work schedules provide some relief from these daily overtime requirements. With a lawfully adopted alternative work schedule, an employer may require employees **to work up to ten hours** per day without incurring any daily overtime. An alternative work schedule may be implemented only if two-thirds of the "affected" employees in a "work unit" vote in favor of the schedule in a secret ballot election

An agreed-upon alternative schedule may be any combination of hours up to twelve per day. The most common alternative schedule is the "4/10," where employees work four ten-hour days per week. However, there are numerous others that meet the requirements of most of the wage orders. With the exception of employees falling under Wage Order 16 (Certain On-Site Occupations in the Construction, Drilling, Logging and Mining Industries), employees must be scheduled a minimum of four hours per day when working an alternative workweek schedule. Additionally, a majority of the wage orders

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require that employees working an alternative workweek receive two consecutive days off a week.

Where an alternative schedule has been lawfully adopted, only those daily hours in excess of ten in a day (on regularly scheduled days) are paid at time and a half. In addition, hours in excess of twelve per day and in excess of eight on days not regularly scheduled must be paid at double time. If an alternative workweek is adopted, an employer must make a reasonable effort to accommodate those employees who are unable to work the voted-upon schedule.

Employers may propose two types of alternative workweek schedules: (1) a single work schedule that would become the standard schedule for employees in the work unit or (2) a "menu" of work schedule options. If a "menu" is adopted, an employer must allow each employee to **choose** a schedule from the "menu of options." Employers may not unilaterally assign an employee to a particular schedule, even if the reason for doing so is that too many or too few employees choose one of the alternative schedules offered. Therefore, if the employer's business needs prevent employees from choosing freely from a number of work schedule options, the employer should not propose a "menu of options." Rather, it should offer a single alternative work schedule or divide the work force into separate work units and propose a different alternative work schedule for each unit.

The various wage orders contain nuanced rules regarding alternative workweeks. For example, Wage Orders 4 and 5 allow employees in the health care industry to agree to an alternative workweek schedule of up to twelve hours in a day at straight time (as opposed to the typical ten-hour cap). Moreover, the rules concerning the secret ballot procedures are quite specific. Therefore, employers interested in establishing an alternative work schedule should consult counsel to ensure compliance with the specific requirements of the applicable wage order.

### The New Law

Assembly Bill No. 5 provides for three main changes to the law regarding alternative work schedules. First, the new law permits an employer to propose among the "menu of options" a regular workweek schedule of five eight-hour days. Under prior law, the Department of Labor Standards Enforcement ("DLSE"), the California state agency that regulates state wage and hour law, took the position that this standard five days/eight hours schedule could not be among the menu of options. This change enables an employer to offer a menu of options that will most likely be palatable to all employees, increasing the likelihood that two-thirds will vote for the menu.

Second, the new law provides that, with the employer's consent, an employee may switch between schedules provided in the "menu of options" on a week-to-week basis. Under the prior law, the DLSE took the position that an alternative work schedule would be invalidated if employees moved from one schedule to another on a week-to-week basis.

Finally, the new law clarifies the term "work unit" to include a division, department, job classification, shift, separate physical location, or recognized subdivision thereof. A work unit may even consist of a single employee, as long as the criteria for an identifiable work unit are met.