

Four-Day Work Week: Challenges and Complexities

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Four-Day Work Week - Challenges and Complexities

The issues with four-day work weeks from a wage and hour standpoint vary depending on whether the employee is exempt or non-exempt.

For non-exempt employees, under federal law, there are no substantial issues with implementing a four-day week. However, some state laws are more problematic if hours worked during workday go up (e.g., from 8 to 10). In particular, some states and territories require payment of overtime for hours worked in excess of eight hours per day (e.g., Alaska, California, Nevada, Puerto Rico, Virgin Islands). While provisions can be made for alternative work weeks, the process is often cumbersome.

Consider in that regard California. California Labor Code 511 and the Industrial Welfare Commission (“IWC”) Wage Orders allow for alternative workweek schedules (“AWS”), which are regularly scheduled workweeks requiring an employee to work more than eight hours in a 24-hour period. Before an AWS is implemented, the employer must follow specific requirements. Failure to strictly comply with all of the requirements will void the AWS election results. The requirements are outlined below:

1. **Proposed written agreement** - The employer must propose a **written** agreement for an AWS. The proposed agreement must designate a “regularly scheduled alternative workweek” in which the **specific number of workdays and work hours** are regularly recurring. The agreement may provide for a regular schedule of up to ten hours per day within a 40-hour workweek without the payment

of overtime. The actual days worked within the AWS do not need not be specified.

- a. The employer may propose either (A) a single work schedule that would become the standard schedule for workers in the work unit, or (B) a menu of work schedule options from which each employee in the work unit would be entitled to choose. The menu may include a regular schedule of eight-hour days that are compensated in accordance with California's standard overtime provisions. Any AWS adopted must provide for not less than 4 hours of work in any shift.
- b. "Work unit" includes a division, a department, a job classification, a shift, a separate physical location, or a recognized subdivision thereof. A work unit may consist of an individual employee as long as the criteria for an identifiable work unit is met.

2. **Payment of Overtime** - An affected employee working longer than 8 hours but not more than 12 hours in a day pursuant to an AWS shall be paid an overtime rate of:

- a. No less than one and one-half times the regular rate of pay of the employee for any work in excess of the regularly scheduled hours established by the AWS and for any work in excess of 40 hours per week;
- b. Double the regular rate of pay for any work in excess of 12 hours per day and for any work in excess of eight hours on those days worked beyond the regularly scheduled workdays established by the AWS.

- c. An employer may, at the request of the employee, allow the employee to substitute one day of work for another day of the same length in the shift provided by the AWS on an occasional basis to meet the personal needs of the employee without the payment of overtime.

3. **No Reduction in Pay** - Employers are prohibited from reducing an employee's regular rate of hourly pay as a result of the adoption, repeal, or nullification of an AWS.

4. **Overtime for Shortened Schedules** - If an employer whose employees have adopted an AWS requires an employee to work fewer hours than those that are regularly scheduled by the AWS, the employer shall pay the employee overtime compensation at a rate of one and one-half times the employee's regular rate of pay for all hours worked in excess of 8 hours, and double the employee's regular rate of pay for all hours worked in excess of 12 hours for the day the employee is required to work the reduced hours.

5. **Accommodation Obligations** - An employer shall make a reasonable effort to find a work schedule not to exceed 8 hours in a workday in order to accommodate any affected employee who was eligible to vote in an AWS election and who is unable to work the AWS. An employer shall be permitted to provide a work schedule not to exceed 8 hours in a workday to accommodate any employee who was hired after the date of the election and who is unable to work the alternative schedule established as the result of the election. An employer shall explore any available reasonable alternative means of

accommodating the religious belief or observance of an affected employee that conflicts with an AWS.

6. **Disclosure rules** - An employer who proposes an AWS must provide a **written** disclosure to the affected employees before the employees vote on the proposal. The disclosure must address the effects of the proposed arrangement on the employees' wages, hours, and benefits.
 - a. In addition, the disclosure must include duly-noticed meetings for the specific purpose of discussing the effects of the AWS. The meeting(s) must be held at least 14 days before the employees vote. The employer must mail the written disclosure to employees who do not attend the meeting.
 - b. In addition, the employer must provide the disclosure in a non-English language if 5% or more of the affected employees primarily speak that non-English language.
 - c. Failure to comply with the required disclosure provisions will render the election void.
7. **Secret ballot election** - The election must occur at least 14 days after the employer conducts the meeting regarding the AWS. The election must be held at the employer's expense, during regular working hours, and at the worksite of the affected employees. At least **2/3 of the affected employees in the work unit must vote in favor** of the arrangement for it to be implemented, and the ballots may only be cast by the affected employees in the work unit. Affected employees who do not cast a vote must be counted as a vote of "no."

8. **Reporting requirements** - The employer must report the results of the election to the Division of Labor and Statistics and Research **within 30 days** after the results are finalized. The report will be a public document and will include the following information: (1) the final tally of the vote, (2) the size of the unit, and (3) the nature of the employer's business.
9. **Implementation** - An employer may not require employees affected by the adopted AWS to work those new hours for at least 30 days after the announcement of the final election results. However, employees may voluntarily agree to begin work on the new schedule sooner if they wish.
10. **Repeal** - Employees are allowed to repeal the AWS. If a petition is submitted by one-third of the affected employees, a new secret ballot election must be held within 30 days. The election must take place during regular working hours at the employees' work site. An election may not be held less than 12 months after the vote to adopt or repeal the AWS. If two-thirds of more of the affected employees vote to reverse the AWS, the employer must discontinue it within 60 days.
11. **Non-Retaliation Standards** - The law prohibits intimidating or coercing employees to vote in support of or against a proposed AWS. In addition, employees may not be discharged or discriminated against for expressing opinions or concerns regarding the AWS or the election, or for opposing or supporting its adoption or repeal. As

long as an employer does not transgress these rules, it may express its position concerning the AWS to affected employees.

In addition to the aforementioned states, Colorado requires overtime for hours worked in excess of 12 in a day, and Oregon in excess of 10 in a day.

Breaks and lunches can be impacted by 4-day work week. Federal law does not mandate breaks and lunches. However, state law may require additional breaks and lunches. Again, consider California, where employees who work more than 10 hours a day are entitled to a second lunch of 30 minutes. Colorado, New Hampshire, North Dakota and Washington are similar, and Connecticut and Delaware would also require two lunches in a 10-hour workday. Other states with lunch break laws include Illinois, Kentucky, Maine, Massachusetts, Michigan, Nevada, New York, Oregon, Rhode Island, Tennessee, Vermont and West Virginia.

Other states, including California, Colorado, Kentucky, Nevada, Oregon and Washington require a 10-minute break every four hours, so a four-day work week with extended hours would result in an extra break (from two breaks to three).

For exempt employees, if a four-day workweek does not involve a decrease in salary, there should be no wage and hour issues under federal law. However, a 4-day workweek that involves a decrease in salary raises salary basis concerns and could decrease salary below statutory minimum.

A reduction in salary could be viewed as an impermissible deduction, destroying salary basis and converting the employee to non-exempt. The key consideration, as explained above, is whether the reduction is a short-term reaction to business needs. If it is, then it may be an impermissible deduction. Of course, any reduction should be prospective in nature, and

ideally the reduction would not reduce salary below \$684/week. It is not illegal to reduce the salary below \$684/week, but it would mean that the employee no longer meets the minimum salary requirement and is therefore no longer exempt.

Other Issues

Other issues that are harder to define may also arise and merit some mention. Consider:

- Assigning some employees to one schedule and others to another schedule may lead to employment discrimination claims. This happens when an employer has some employees on, for example, a 4/10 schedule, and others on a 5/8 schedule. One schedule may be viewed as more desirable than the other, and scheduling must be done in a way to avoid discrimination. One discrimination issue that employers need to be sensitive to is disparate impact, e.g., where a facially neutral scheduling policy may have a disparate impact on one protected group and not another. For example, if 4/10 is viewed as more desirable, and a disproportionate number of female workers are working 5/8, it may be that the scheduling mechanism, while on its face fair and equitable, may be adversely impacting females more than males. Disparate impact also may occur in a setting where everyone is working on a 4/10 schedule. For example, such a schedule, while facially neutral in its application, may impact single parents more than married parents, and single parents may be disproportionately African American.
- Predictive scheduling, which primarily affects retail and food service employers, may be a problem in certain jurisdictions. Several

jurisdictions have enacted so-called “fair work week” laws, which may differ in specifics but generally include provisions such as:

- Advance notice of work schedules;
 - Additional compensation for unexpected schedule changes;
 - The right to accept or decline added or lengthened shifts;
 - Mandatory rest periods between shifts; and
 - Right to request scheduling accommodations.
- Other jurisdictions have “right to request” laws, which require employers to consider accommodation requests of employees as to scheduling. Those jurisdictions include San Francisco, New Hampshire and Vermont.
 - Longer hours may lead to increased health care costs and increased workplace injuries.
 - An increase of three-day workweeks owing to holidays such as Labor Day and Memorial Day.
 - Benefit accruals based on days worked.

While none of these issues are insurmountable, they provide additional fodder for discussion by the employer when evaluating the efficacies of a four-day work week.

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