



# The Alternative Work Week Schedule

**Gouya A. Ranekouhi & Nicki Karim**

## **How It Works and Calculating Overtime**

*Employers in California are well aware of the typical schedule worked by employees:* eight hours a day, five days a week, and the strict overtime wage laws that come with it. California law generally requires employers to pay non-exempt employees overtime pay for work performed in excess of eight hours per day, in excess of 40 hours per week, and on the 7<sup>th</sup> consecutive workday of the week. However, in many cases, this strict work schedule of eight hours a day for five days a week is not always the most convenient for the employees or even employers.

What many employers may not be aware of is that California law allows employees to waive ordinary overtime requirements for less restrictive requirements. Through the proper adoption and implementation of an Alternative Workweek Schedule (“AWS”), employers can create a schedule which allows employees to work longer hours but for fewer days.

## **What is the Alternative Workweek Schedule?**

California Labor Code section 511 allows employers to institute a regularly scheduled alternative-workweek under which employees may work more than eight hours in a 24-hour period, up to 10 to 12 hours per day (in limited cases), without an entitlement to overtime wages.

Alternative-workweek schedules allow employees greater flexibility, decreased commuting time, better work-life balance, and more job satisfaction. It also allows employers to cut down on overtime payment.

Alternative-workweek schedule implementation requires careful planning, procedure, and a submission to the California Department of Industrial Relations’ Division of Labor Standards Enforcement by the employer. Success is in the details. Even in situations where the employee requests to work such an alternative-workweek schedule, an employer’s failure to follow the strict requirements of the law can result in disastrous results for the employer.

Before implementing an alternative workweek schedule, an employer must meet specific requirements in terms of proposing the schedule to the work unit and conducting a secret vote. A work unit may consist of multiple employees or an individual employee as long as the criteria for an identifiable work unit are met. *See* California Code of Regulations, Title 8, Section 11170. After deciding which work unit the AWS applies to, the employer must follow a specific set of steps, as described below, and failure to comply with these steps may invalidate the schedule and result in noncompliance causing employer to be liable for overtime wages.

First, an acceptable alternative-workweek schedule cannot be more than 10 hours per day and 40 hours per week. However, if an employee works any hours beyond the alternative workweek hours or beyond 40 hours in a workweek, they are entitled to overtime for those hours.

Second, the employer must provide written notice to all affected employees expressing the employer’s intent to adopt an AWS. The employer must disclose in writing and hold a staff meeting to announce the upcoming election for the AWS at least 14 days prior to the election. The notice must sufficiently explain the alternative-workweek schedule to all the affected employees. Importantly, an employer shall provide that disclosure in a

non-English language, as well as in English, if at least five (5) percent of the affected employees primarily speak a non-English language. The employer shall mail the written disclosure to employees who do not attend the meeting. Failure to comply with this will make the election null and void.

During the meeting, the effects of the AWS on the employees' wages, hours and benefits must be discussed. The employer should provide a copy of the meeting announcement to staff members who were unable to attend. The employer should also keep a record of all employees who attended the meeting and make a note of those who were absent.

The employer must conduct a secret ballot among the employees. The secret ballot election should be held during working hours. In order for the AWS to be adopted, at least two-thirds of the votes should be in favor of the proposed AWS. Employees must then be notified of the results of the election. If two-thirds of the employees vote in favor of the AWS, the employer must send the election results and required information to the Department of Labor Standards Enforcement (DLSE) within 30 days of the final election. Information sent to the DLSE must include the final tally of the vote, the size of the unit and the nature of the business organization.

Importantly, employees affected by the new schedule may not be required to work the new schedule for at least 30 days after the announcement of the election's final results. Finally, Employer should maintain records and documentation regarding the creation of the AWS, meeting minutes, the election procedure and results, etc.

It is also required that the elected schedule is provided to employees consistently every year to avoid risk of noncompliance and unpaid overtime wages. If the employer reduced the employee's hours to fewer than they would normally be scheduled under AWS, the employer must pay overtime after eight hours in a workday. Alternatively, if the employee chooses to work less hours and clock out early, only straight time wages for time worked are owed, even if they surpass eight hours.

While this is not required, employers should create a work schedule with up to eight hours a day to accommodate employees who are unable to work the alternative schedule.

Employees affected by the AWS may repeal it. One-third of the affected employees may petition to repeal it. Once the petition is submitted to the employer, the election to repeal the AWS must be held within 30 days.

Repealing the AWS requires two-thirds of employees vote. If two-thirds of employees vote to reverse the alternative workweek schedule, an employer must comply within 60 days.

However, the same group of employees who voted in an election in favor of adopting or repealing an AWS cannot vote again within 12 months from the last election.

## How Is Overtime Paid, if any?

As noted above, the AWS implementation process is very detailed; precise compliance with each of the steps is required to have a valid AWS schedule. Failure to properly implement the AWS schedule will result in an invalid schedule, which would require employers to pay overtime for over eight hours in a day, over 40 hours in a work week, and on the 7<sup>th</sup> consecutive workday of the week. However, implementation of a valid AWS does not mean employers are exempt from paying overtime. Of course, if an employee works in excess of the proposed schedule, then employers are required to compensate the employee overtime wages at their regular rate of pay for the excess work performed.

On an AWS, employers must pay overtime at **time and one half** (1 ½) the employee's regular rate of pay for:

- All work performed in any workday in excess of the regularly scheduled hours established by the alternative workweek agreement, up to 12 hours per day
- All work performed beyond 40 hours per week
- On an AWS, employers must pay overtime at **double** the employee's regular rate of pay for:
- All work performed in excess of 12 hours per day
- Any work in excess of eight (8) hours on days other than those regularly scheduled by the alternative workweek agreement.

As an example, Employer has a valid AWS where employees work 4 days per week, 10 hours each day, Monday through Thursday. On day 4 (Thursday), Employee works 11 hours. Here, Employer is required to pay Employee one hour of overtime at one and a half times the employee's regular rate of pay.

Though Employee is supposed to be "off" on day 5 (Friday) per their AWS, Employer has a special project and needs all hands-on deck. Employee works 12 hours on day 5. Employer must pay Employee overtime at one and a half times the employee's regular rate of pay for the first eight hours worked by Employee on day 5. For the remaining four hours worked by Employee on day 5, Employer must pay Employee overtime at double the employee's regular rate of pay.

There are of course exceptions to the overtime requirements for makeup time and for occasions when an employer approves an employee's request for a substitution of workdays (i.e. Employee in above example on AWS working Monday through Thursday requests to take Monday off and work Friday instead; if approved, no overtime obligation on Friday if employee works 10 hours that day). Substitutions must be on an occasional basis and at the employee's request; the shift length must also be the same.

There are also exceptions in the health care industry which allows employees up to 12 hours in a workday within a 40-hour workweek. Health care industry employees must be paid double the employee's regular rate of pay for any time worked over the 12 hours in a day; they must be paid overtime at one and a half times the employee's regular rate of pay for all hours worked over 40 in the workweek.

**Gouya A. Ranekouhi** is a Partner in [O'Hagan Meyer's Orange County Office](#) in the Labor and Employment Litigation Group. Gouya's litigation practice focuses on defending employers in employment actions in both state and federal courts under the Fair Employment and Housing Act including wrongful termination, discrimination, harassment, and retaliation claims. She also defends employers against wage and hour single plaintiff suits, class actions, and PAGA representative actions. Gouya regularly counsels employers and businesses of varying sizes in various industries on personnel and wage and hour compliance matters, and in the preparation of employee handbooks, employment agreements, policies, and compensation plans. She also has experience defending businesses against website and physical barrier accessibility claims brought under the ADA and California's Unruh Civil Rights Act. Gouya is currently an active member of O'Hagan Meyer's Diversity Equity, Inclusion and Allyship Committee: Community Outreach Team. To contact the author, email [granekouhi@ohaganmeyer.com](mailto:granekouhi@ohaganmeyer.com).

**Nicki Karim** is an Associate in [O'Hagan Meyer's Orange County Office](#). She represents employers in single-plaintiff and class action employment cases, including harassment, discrimination, retaliation, and wrongful termination. Prior to joining O'Hagan Meyer, Nicki worked for a firm in Los Angeles, California, representing employees in class action wage and hour lawsuits. Nicki earned her undergraduate degree from the University of California at Irvine, where she received a Bachelor of Arts in Political Science with a Minor in Criminology, Law and Society. She then pursued her passion for law and earned her Juris Doctor from Chicago-Kent College of Law. While in law school, she served as the President of her law school's South Asian Association and as a member of the Muslim Association. She is currently an active member of O'Hagan Meyer's Diversity Equity, Inclusion and Allyship Committee: Community Outreach Team. To contact the author, email [nkarim@ohaganmeyer.com](mailto:nkarim@ohaganmeyer.com).