

Flexible Scheduling

California Should Embrace Individual Alternative Workweek Schedules

In nearly every state, workers can agree individually with their employer to work four 10-hour days or another alternative workweek schedule (AWS). That is not the case in California. Here, employers and employees must go through a complex, time-intensive process to implement an AWS. The COVID-19 pandemic caused both employers and workers to find new routines and meet a demand for increased flexibility, but California's AWS process in fact often prohibits flexible work schedules.

An AWS is desirable for many workers. It provides them more flexible personal time with an extra day off per week, reduces commute time and therefore lessens greenhouse gas emissions, and can create more effective workplaces. Due to these benefits, The California Chamber Commerce has repeatedly advocated for a process that would allow an individual employee to enter into a one-on-one agreement with their employer whereby they could implement an AWS. That is currently unavailable under California law.

CONCERNS WITH CURRENT AWS PROCESS

The existing AWS election process is cumbersome. The CalChamber receives calls almost daily from our members about AWS and its procedures. The current process also is

disadvantageous to employees, notwithstanding claims by advocates of the current model. A few examples of the disadvantages include:

- Employees who voted against the AWS must follow it.
- New employees who did not vote in the AWS election must follow it.
 - An employee who needs an individualized AWS for care obligations or other personal needs cannot obtain one unless two-thirds of their "work unit" agrees, limiting flexibility for employees.
 - If an employee's personal circumstances change and they no longer wish to follow the AWS, they would need either to convince other employees to repeal it or convince the employer to repeal it.
 - Not all employees are eligible for an AWS and, in some cases, some of an employer's employees may be eligible while their co-workers are not.

Employees who do not want an AWS adopted under the existing legal framework must abide by it and there essentially is no flexibility for employees whose circumstances change or who cannot convince their coworkers to vote for an AWS. The law does say that the employer must provide reasonable accommodation for employees who are "unable" to work the AWS, but there is very little guidance on this, and it has been interpreted narrowly — for example for those with a medical condition. Someone whose child care needs no longer work with the AWS would likely not qualify.

INDIVIDUALIZED AWS SOLVES ISSUES ABOVE

Over the years, multiple bills have been introduced to allow individual workers to enter into an agreement with their employer to adopt a one-on-one AWS. This would allow workers to maintain different schedules that work better for their needs rather than having to adhere to the schedule of their entire work unit. Historically, the bills have failed to pass or even to be set for a hearing by both the Assembly and Senate Labor committees.

Opponents argue that employers will force employees to sign

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these agreements to avoid overtime pay. Opponents do not believe that an employee can ever really consent to an agreement with an employer. This argument does not hold up for several reasons.

- First, nothing about an AWS is “avoiding overtime.” It is simply re-shuffling the 40 hours a week that an employee works so that they, for example, get an entire extra day off, a significant benefit for the employee, and changing the inflexible 8-hour daily overtime cap to match the newly agreed upon daily hourly maximum. As before, if an employee works longer than their scheduled shift in a day or more than 40 hours in a week, they will earn overtime.

- Second, under the existing procedure, a work unit could be one person if there is a department or shift of one. The employer will know how the employee voted because there is only one vote. If that person can consent to or reject an AWS, why can’t an individual employee do this with their employer when they work in a department with more than one person? There are procedural safeguards that can be implemented to ensure there is no coercion and give the employee the right to revoke the AWS at any time.

Voters support individual alternative workweek schedules. In a poll conducted by the CalChamber, 88% of voters agree (49% of them strongly) that the state’s overtime laws should be changed to make it easier for employees to work alternative schedules, such as four 10-hour days. Indeed, when one of the individual AWS bills was being debated in recent years, one *Los Angeles Times* article called Democrats’ rejection of the idea “shortsighted.” Historically, fewer than 4% of California employers have an AWS under the current system, demonstrating that the AWS is severely underused compared to its popularity.

In the era of remote working and increased demands for workplace flexibility, the individual AWS agreement is an idea worth pursuing.

CURRENT PROCEDURE TO IMPLEMENT AN AWS IS COMPLEX

California Wage Orders outline the process to implement

an AWS. It should be noted that not every Wage Order even allows for an AWS. For example, Wage Order 14 – Agricultural Occupations does not. An agricultural employer may have some workers eligible for an AWS (for example, the accounting department, which falls under Wage Order 4), but some who are not. Further, some procedures differ slightly between the Wage Orders.

The general procedure is as follows. Employers first must present the proposed AWS or a menu of options in the form of a written agreement. They must provide written disclosures to all potentially affected employees regarding the effects of the proposed AWS on wages, hours and benefits. They must then hold a meeting 14 days prior to a secret ballot election. A secret ballot election then must be held during regular working hours and at the work site.

At least two-thirds of a “work unit” must approve the proposed AWS in the election. The work unit must be “readily identifiable,” which could be a division, job department, job classification, shift, location, or more. If, for example, the legal department comprises a single person, that individual could be their own work unit. They still would be required to vote by secret ballot. Before the AWS can be implemented, it must be approved by the Department of Industrial Relations.

If the employees wish to repeal the AWS, there must be a petition followed by an election. According to a 1999 Division of Labor Standards Enforcement (DLSE) Memorandum, if the employer wishes to unilaterally terminate the AWS, it may do so without an election as long as there is reasonable advance notice to employees.

CALCHAMBER POSITION

Increased flexibility in work schedules primarily benefits employees. The CalChamber supports legislation that makes it easier for employees to gain flexibility while also removing cumbersome, unnecessary procedures like the current AWS process that stand as a barrier to flexible work arrangements.



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