

Alternative Workweeks

YOUR LEGAL RIGHTS

1. What is an “Alternative Workweek”?

With a “normal” workweek, if you work more than 8 hours in a day, your employer must pay you overtime (at least 1 ½ times your regular pay rate per hour). For example, if you make \$8 an hour, and you work 10 hours in a day, your employer must pay you \$8 an hour for the first 8 hours (or \$64) *plus* \$12 an hour for the two extra hours (or \$24).

With an “*alternative*” workweek, your employer does NOT have to pay overtime if you and other employees at your job agree to work a regular schedule of:

- 10 hours or less per day, and
- 40 hours or less per week, and
- 6 days or less per week.

Employees in private homes and in some agricultural jobs cannot have an alternative workweek and must be paid daily overtime. However, if you have one of these jobs, there are special rules for overtime that are not described in this Fact Sheet.

2. Why is there an option to work an alternative workweek?

Alternative workweeks generally are designed to give employees flexible schedules. For example, some employees would rather work four long days and have an extra day off rather than work five regular workdays. An alternative workweek allows an employer to schedule four (4) 10-hour days instead of the normal five (5) 8-hour days without paying overtime for the extra two hours each day. Workdays during a valid alternative workweek do not have to be 10 hours; they can be less.

3. Can I agree to an alternative work schedule where I agree to work more than 10 hours a day without overtime?

Generally no. If your employer requires you to work more than 10 hours in a day or more than 40 hours in a week, it must pay you overtime for any hours worked beyond the legal limit. Note: Employees who work in the **healthcare industry** and are part of a team that delivers care to patients can agree to work up to 12 hours per day without overtime. Workers in certain other industries, such as ski resort employees, can work more hours without receiving overtime pay.

ESTABLISHING AN ALTERNATIVE WORKWEEK

4. How can my employer legally set up an alternative workweek?

If an employer wants to set up an alternative workweek and not pay overtime for hours over 8 in a day, it must comply with **four very specific requirements**. First, the employer must propose the schedule in writing to the employees and tell the employees the different arrangements that will be available. The employer does not have to say exactly which days each employee will work, but only needs to describe the schedule. Second, the employer must tell the employees that they are giving up their right to overtime in exchange for a flexible schedule. Third, the “affected employees in the work unit” must vote to accept the new deal (see below for definition of who is “affected” and what is a “work unit”). This vote must be by a secret ballot and 2/3 of the affected employees must vote to accept the new schedule. Finally, the alternate schedule must establish a *regular* schedule of workdays that has a maximum of 10 hours in any day and a maximum of 40 hours in a week. (For example, a workweek of three (3) 12-hour days would not meet the qualifications for an alternative workweek unless it is in the healthcare industry).

If an employer chooses, it can offer its employees different schedule options, so long as those options comply with the law. For example, an employer can offer four days of nine hours each and one day of four hours or it can offer 4 days of 10 hours each with an extra day off each week.

5. Who are the “affected employees in the work unit” who can agree to an alternative workweek?”

An employer can agree to an alternative workweek with a group of employees known as a “readily identifiable work unit.” This work unit is made up of the employees who will be “affected” by the new workweek, that is, the workers who will not get overtime even if they work up to ten hours per day.

It is not entirely clear who is in a “work unit” because it is difficult to know who can be “affected” by an alternative workweek. “Work unit” can mean the entire staff, but it also can refer to a single division, department, job classification, shift, separate physical location, or recognized subdivision—including a single individual if he or she meets the definition. Therefore, an employer can ask one group of workers to have an alternative workweek, but not offer that option to another group of workers, so long as the groups are distinct. Because a work unit can also apply to a single individual, one employee could agree to an alternative workweek by herself, so long as she is the only worker in her unit.

Example: In a restaurant, the “work unit” could be the entire staff, but it could also mean just the bussers, waiters, or kitchen staff. It could even mean a single individual, for example a host, if that person is the only person in that type of job.

6. What if my employer sends me home before the end of my ten (10) hour shift?

If your employer has a valid alternative workweek schedule and sends you home before the end of your regularly scheduled workday, the employer must pay you overtime (time and a half) for any time worked beyond eight (8) hours.

REASONABLE ACCOMMODATION

7. What if my employer starts an alternative workweek, and I cannot work the new schedule?

If you could have voted in the alternative workweek “election,” your employer must make “a reasonable effort” to give you an 8 hour workday schedule if you are *unable* to work the new schedule.

Unable to Work

You will probably be considered unable to work an alternative workweek if you:

- a. have serious child care problems or other family concerns that make working an alternative workweek difficult, or
- b. have an injury that will be aggravated by long work hours, or if you do not have the stamina to work long hours.

Reasonable Effort

It is not yet clear what a “reasonable” effort requires, but your employer will probably have to make at least some good faith effort to work with you and find alternatives.

8. What if I was just hired, but I cannot work the employer’s alternative schedule?

You do not have the right to a regular eight (8) hour schedule if you come into a job with an established alternative workweek. The law *permits* your employer to give you an eight (8) hour day if you are a new employee, but does not require it. In other words, you may have to work the hours or lose the job, but your employer could agree to give you only an eight hour day if you ask for it.

9. What if my employer’s alternative workweek interferes with my religious practices?

Your employer must explore any available “reasonable” alternative means of accommodating your religious beliefs and practices. The difference between this language and the *reasonable* effort

language regarding employees who are *unable* (see #7 above) to work the schedule is, unfortunately, still unclear. At a minimum, your employer will likely have to make a good faith effort to accommodate your religious beliefs.

10. How can I get rid of my employer's alternative workweek?

Employees working alternative workweeks can get rid of that workweek by holding another election. This election cannot be held until one year has passed since the vote to accept the alternative workweek.

One-third (1/3) of the affected employees must ask the employer for an election to get rid of an alternative workweek and receive overtime for working over eight hours in a day. Within 30 days of the workers' request, the employer must hold a secret ballot election (this time limit is extended if it has been less than a year since the vote to accept the workweek). The election must be by secret ballot, and two-thirds (2/3) of the affected employees must vote to end the schedule.

11. We refused to adopt an alternative workweek, and our employer lowered our pay rate. Is that allowed?

Probably not. Although not explicitly prohibited, your employer cannot lower your pay rate because of the "adoption, repeal or nullification of an alternative workweek schedule." The law is supposed to protect employees from retaliation because of their decisions about alternative workweeks.

12. I voluntarily work more than eight (8) hours a day without receiving overtime. Can I continue to work this schedule and not be paid overtime?

Normally, you cannot give up your right to receive overtime unless there is a valid alternative workweek. Only under very limited circumstances can you have an individual agreement with your employer to work without overtime. First, you must have been working this schedule as of July 1, 1999. Second, you must have established the schedule after January 1, 1998. Third, the schedule cannot require days longer than ten (10) hours. If you are scheduled to work more than ten (10) hours a day, the schedule is NOT valid. Fourth, you must have made a written request to continue the schedule before June 1, 2000. Most workers who have an informal agreement to work more than eight hours a day without overtime do not meet all four of these requirements, meaning that their employer must either pay them overtime or cut their hours down to eight in a day.

If you are one of the few workers with a valid agreement to work longer days without overtime, you may stop working this schedule at any time by telling your employer, in writing, that you wish to stop. You must tell your employer thirty (30) days before you want to stop.

MAKING UP TIME

13. I need to miss work, but I would like to make the time up. Do I still get overtime for those make up hours if they put me over 8 or 10 hours in a day?

Hours that you “make up” do NOT count as overtime if the following conditions apply: (1) *you* must request, *in writing*, to make up the lost time. (your employer may NOT encourage you to make this request), and (2) you must make up the hours *in the same week* as the time missed. If you work more than eleven (11) hours in a single day or more than forty (40) hours in a week because of the make up hours, your employer must still pay overtime for those hours above eleven (11) in a day or forty (40) in a week.

This fact sheet is intended to provide accurate, general information regarding legal rights relating to employment in California. Yet because laws and legal procedures are subject to frequent change and differing interpretations, the Legal Aid Society - Employment Law Center cannot ensure the information in this fact sheet is current nor be responsible for any use to which it is put. Do not rely on this information without consulting an attorney or the appropriate agency about your rights in your particular situation.

For further information about your employment rights, please call:

The Workers’ Rights Clinic

415-864-8208 (SF Bay Area) or **866-864-8208** (Toll Free in CA)

The Workers’ Rights Clinic is a project of The Legal Aid Society - Employment Law Center, a non-profit organization focusing on the employment-related legal rights of low-income workers and providing free legal information on a wide range of employment-related problems.