

HOLIDAY PAY AND THE MONTHLY-PAID EMPLOYEE: RESOLVING ISSUES AND PRESCRIBING GUIDELINES*

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ABSTRACT

A fair day's wage for a fair day's labor.

More than just a play of words, the adage takes form in the Labor Code provisions ensuring that a worker be adequately compensated for his labor. Hours of work, minimum wage, overtime compensation, service incentive leave, night shift differential, and holiday pay are but among the benefits that the worker is granted by law.

The right of the worker to holiday pay only underscores the inescapable reality that he is not a machine, that respite from work is imperative to maintain the well-being of the worker—a well-being that translates into greater productivity in the workplace. Thus, the law assures the worker of pay for the regular holidays, even if he does not work on those days.

The holiday pay provisions of the Labor Code are relatively few in number and either "limited in scope" or "narrow in breadth"

if not attuned to the contemporary legal issues long waiting to be answered. The basic policy of favoring the worker is undisputed, but its implementation leaves much to be desired.

Against this backdrop, the proponent endeavors to revisit the legal issues relating to the monthly-paid employee. The end desired is to arrive at resolutions of the legal issues in a manner most in keeping with the policy that all doubts in the law are to be liberally construed in favor of labor.

INTRODUCTION

Sundays and legal holidays are set aside by law as days of rest. The life, existence, and happiness of a person do not depend only on the satisfaction of his physical needs. There are moral, intellectual, and spiritual needs as imperative as the physical ones. Ordinarily, Sundays and legal holidays are dedicated to reading and instruction so as to fill the mind with culture or some sort of advancement. On those days, the laborer enjoys longer hours in the company of his family. That gives him an opportunity to satisfy his moral needs. During Sundays and holidays, more time is dedicated to worship and other religious services. That gives a laborer an opportunity to satisfy his spiritual needs. The deprivation of

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that opportunity to satisfy his mental, moral and spiritual needs should not be ignored, and should be properly compensated.

— Justice Gregorio Fernando,
dissenting in *Manila Electric Co., v. Public Utility Employees Association*, G.R. No. L-1206, October 30, 1947.

A. Background of the Study

The Labor Code provisions on the payment of holiday pay to workers, as well as the Rules Implementing the Labor Code, do not suffice to resolve the issues that arise therefrom. This notwithstanding, the realities of the times require specific solutions to the legal issues that beset the labor force. In a few instances, the Supreme Court has provided some "answers" to the pertinent legal issues. In retrospect, however, there may have resulted more questions than answers from the doctrines laid down by the Supreme Court.

It is against this backdrop that the proponent endeavors to undertake this study. The proponent aims to examine and analyze the legal questions that arose from the leading cases of *Insular Bank of Asia and America Employees Union (IBAAEU) v. Inciong*¹ and *Wellington Investments and Manufacturing Corporation v. Trajano*² which are among the more controversial cases on the matter, with the end in view of drafting a Department Order that will both clarify and unify the varying interpretations in the legal community of the small number of Labor Code provisions on holiday pay.

B. The Problem and Objective of the Study

At present, there is no provision of law defining a monthly-paid employee as contrasted from a daily paid employee. Do these terms simply refer to the time or frequency of payment of salary, or do they go into the very nature of employment? What is the significance of characterizing an employee as either a monthly paid employee or a daily-paid employee? Does the characterization translate to the entitlement of more benefits for the employee concerned under the law? Are the doctrinal foundations laid down by the Supreme Court sufficient to resolve these questions?

Are all employees entitled to holiday pay in addition to their salaries? Of what significance will the characterization of an employee as monthly paid or a daily-paid employee be in determining the amount of holiday pay which the employee is entitled to under the law?

What is the proper treatment for the unique occurrence of two regular holidays coinciding on the same day? What is the legal implication of a regular holiday falling on an employee's scheduled rest day? What is the proper treatment of a regular holiday falling on a scheduled rest day which also happens to be a special day? In all these, of what significance will the characterization of the nature of employment be?

¹ 132 SCRA 663 (1984).

² 245 SCRA 561 (1995).

Admittedly, there are no ready answers to these queries, either from statutory provisions on the subject or from jurisprudential doctrines. Be that as it may, the proponent endeavors to analyze these legal issues in an effort to provide resolutions to these legal questions which are of pervading significance as to warrant a deeper study.

The present study seeks to analyze the varying interpretations on the legal issues concerning the holiday pay as applied to monthly paid and daily paid employees. If feasible, a unifying set of rules is proposed for the guidance of the employers and employees. To this end, the existing decisions of the Supreme Court, together with the Advisory Opinions and Explanatory Bulletins of the Department of Labor and Employment (DOLE), are examined. In the end, the proponent seeks to resolve the legal issues in the manner most consistent with well-entrenched policies and statutory provisions on the subject. The proposed resolutions are in the form of a Department Order of the DOLE.

C. The Proposition

With the problem identified, the proponent maintains the position that a clarificatory Department Order to be issued by the DOLE is imperative. The Labor Code provisions on the subject matter need clarification: although they are general in scope, the details of their application to recurring legal issues on the subject leave much to be desired. The same can be observed of the Rules Implementing the Labor Code. The seemingly conflicting decisions of the Supreme Court on the subject matter further underscores the need for a clarificatory Department Order.

D. Scope of the Study

The study will be divided into seven parts, including this introduction. The first chapter of this study will discuss the definition, rationale, and coverage of holiday pay as provided in the Labor Code and other related laws on the matter. The first chapter will give the reader a bird's eye view of how limited and insufficient the statutory provisions on the subject are.

The second chapter of this study will focus on the monthly-paid employee, as contrasted from a daily-paid employee, using the DOLE definition in the Handbook on Worker's Statutory Monetary Benefits.³ The inaccuracy of the definition notwithstanding, the working definition of a monthly paid employee will be based on the DOLE definition. Furthermore, the second chapter will trace the development of the present rule that a monthly-paid employee is entitled to holiday pay—despite the rationale of the holiday pay being primarily to protect the daily paid employee who would suffer a diminution in his wages on account of such holidays when he does not work.

The third chapter of the study will lay down in no uncertain terms the legal issues sought to be resolved by the proponent.

³ Prepared by the Bureau of Working Conditions, Department of Labor and Employment, with technical support from the NWPC, ECC, BRW, and the Department of Education, Culture and Sports (October 1994).

The fourth chapter of this study will focus on the "divisor" and the evolution of the "divisor test". The components of the "divisor" will be examined into, since the "divisor" will play an important role in the resolution of the issues.

The fifth chapter of this study will evaluate and analyze the legal issues that have been identified within the framework of the "divisor test". The Supreme Court itself has had difficulty in tackling the problem, as will be shown by the conflicting decisions it has rendered on the matter.

The penultimate part of the study will synthesize the findings and conclusions arrived at, after an analysis of the subject in the light of the "divisor test."

The last part of this study will reiterate the need for a clarificatory Department Order by the DOLE. In this respect, a framework for the Department Order will be provided, as well as a proposal therefor.

E. Limitation of the Study

At the outset, it is most obvious that the existing treatises on the subject matter have not been fertile. A survey of doctrines on the subject matter as applied in other jurisdictions is not possible, except in a few instances, for the reason that the legal issues involved are peculiar to Philippine labor laws.

F. Methodology

The doctrines and precedents laid down by decisions of the Supreme Court on the legal issues will serve as a spring-board for the critical analysis that will follow. The constant state of flux that characterizes the interpretations on the legal issues involved will be manifested by the sometimes contrasting decisions of the Supreme Court on the subject. Interestingly, this characterization still persists with the latest rulings on the interpretation of the Labor Code provisions on holiday pay benefits as applied to monthly paid employees.

I. HOLIDAY PAY

A. Definition

"Holiday" has reference to a day set apart for worship, reverence to the memory of a great leader and benefactor, to rejoice over some national or historical event, or rekindle the flames of an ideal. It means a consecrated day, a religious festival, or a day on which ordinary occupations are suspended, a day of exception, that is, a cessation from work, or a day of festivity, recreation or amusement.⁴

"Holiday pay" is a premium given to employees pursuant to law even if he is not suffered to work on a regular holiday. Additional compensation is granted to employees if they work on the said holiday.⁵

⁴ DOJ Opinion No. 100, S. 1954, citing 19 WORDS AND PHRASES 578 [hereinafter DOJ Opinion].

⁵ Jose Rizal College v. NLRC, 156 SCRA 27, 33 (1987).

But in order to receive the holiday pay on regular holidays, even if the employee does not work, there are certain conditions that must be met. He should not have been absent without pay on the working day preceding the regular holiday.⁶ If he was absent, the legal presumption is that he would have been absent also on the following day which happened to be a holiday.⁷

Holidays may be classified as:

- (1) legal or religious;
- (2) regular or special.

A "legal holiday" is a day designated and set apart by the legislative enactment for a purpose within the meaning of the term "holiday."

A "religious holiday" is a day set aside for worship or a religious festival which may or may not be recognized by the State as a legal holiday.

A "regular holiday" is a day specifically designated by law as such.

A "special holiday" has no fixed date as distinguished from a legal holiday which falls on a date specified by law. The former, however, is as much a day of rest and retirement from labor as the latter.⁸

Prior legislation on regular holidays and holiday pay provisions in the Labor Code is Republic Act No. 946 or the Blue Sunday Law. The law forbids the opening of all covered establishments, enterprises or undertakings for the conduct of business on the days specified.⁹ The Blue Sunday Law applies to private establishments, enterprises, or undertakings for profit. Unless exempted, all business establishments are subject to the law, whether commercial, industrial, or agricultural and are prohibited from opening on *Sundays, Christmas Day, New Year's Day, Holy Thursday, and Good Friday*, from 12:00 midnight to 12:00 midnight.¹⁰ Any violation of its provisions is punishable by fine, imprisonment, or both.¹¹

The constitutionality of the Blue Sunday Law has been sustained notwithstanding its adverse effect on employment contracts and collective bargaining agreements existing at the time of its approval since it is intended for the health, well-being, and happiness of the working class and is a legitimate exercise of police power.¹²

At present, holidays fall into two (2) classes: regular/legal holidays and special days.

The Labor Code provides that every worker shall be paid his regular daily wage during regular holidays, except those working in retail and service establishments regularly employing less than ten (10) workers.¹³ The employer

⁶ Rules Implementing the Labor Code, Book III, Rule IV, § 6 (1976).

⁷ 1 CESARIO A. AZUCENA, JR., THE LABOR CODE WITH COMMENTS AND CASES 277 (1996).

⁸ DOJ Opinion, *supra* note 4.

⁹ 2 PERFECTO V. FERNANDEZ & CAMILO D. QUIASON, LABOR AND SOCIAL LEGISLATION IN THE PHILIPPINES 161 (1964).

¹⁰ Republic Act No. 946, § 1. (emphasis added)

¹¹ *Id.*, at § 8.

¹² *Asia Bed Factory v. National Bed and Kapok Industrial Workers' Union*, 100 Phil. 837 (1957). See also Neil J. Dilloff, *Newer On Sunday: The Blue Law Controversy*, 39 MARYLAND LAW REVIEW 679 (1980).

¹³ Labor Code of the Philippines, P.D. 442, art. 94 (a) (1974).

may require an employee to work on any holiday but such employee shall be paid a compensation equivalent to twice his regular rate for such regular holiday.¹⁴

Unless otherwise modified by law, order or proclamation, the following regular holidays and special days shall be observed:¹⁵

A. Regular Holidays

New Year's Day	January 1
Maundy Thursday	movable date
Good Friday	movable date
Araw ng Kagitingan	April 9
Labor Day	May 1
Independence Day	June 12
National Heroes' Day	Last Sunday of August
Bonifacio Day	November 30
Christmas Day	December 25
Rizal Day	December 30

B. Nationwide Special Days

All Saints' Day	November 1
Last Day of the Year	December 31

The law recognizes five (5) Muslim holidays.¹⁶

Both Muslims and Christians working within the Muslim areas may not report to work on the days designated by law as Muslim holidays. Muslim employees working outside the Muslim provinces and cities shall be excused from reporting for work during the observance of the Muslim holiday as recognized by law without diminution of salary or wages during the period.¹⁷

The Labor Code provides that an employee is entitled to his regular daily wage for the regular holidays even if unworked, and to compensation equivalent to twice his regular rate if worked.¹⁸ The fact that National Heroes' Day always fall on the last Sunday of August will not exempt employers from treating it as a holiday even if Sunday is a non-working day in the establishment.¹⁹ On the other hand, where Sunday is a regular working day in the establishment, workers who are

¹⁴ *Id.*, at art. 94 (b) (1974).

¹⁵ Executive Order No. 203, § 1 (1987).

¹⁶ Presidential Decree No. 1083 provides for the following Muslim holidays:

1. *'Amun Jadid* (New Year), which falls on the first day of the lunar month of *Muharram*;
2. *Maulid-un-Nabi* (Birthday of the Prophet Muhammad), which falls on the twelfth day of the third lunar month of *Rabi-ul-Awwal*;
3. *Lailatul Isra Wal Mi Raj* (Nocturnal Journey and Ascension of the Prophet Muhammad), which falls on the twenty-seventh day of the seventh lunar month of *Rajab*;
4. *Id-ul-Fitr (Hari Raya Puasa)*, which falls on the first day of the tenth lunar month of *Shawwal* commemorating the end of the fasting season; and
5. *Id-ul-Adha (Hari Raya Haji)*, which falls on the tenth day of the twelfth lunar month of *Dhu'l-Hijja*

¹⁷ DOLE HANDBOOK ON WORKERS' STATUTORY MONETARY BENEFITS, No. II (c) (1994).

¹⁸ VICENTE B. AMADOR, LABOR STANDARDS ADMINISTRATION 114 (1985).

¹⁹ *Id.* at 115, citing Nuesa: Philippines Savings Bank, Nov. 5, 1979; Ford Phils. Inc., Jan. 23, 1980.

required to work on the last Sunday of August need be paid only the regular holiday pay without the thirty percent (30%) rest day premium, unless it happens to be the employee's scheduled rest day.²⁰

Special days are those proclaimed by the Chief Executive as such and the two (2) special days under Executive Order No. 203. Unless the contrary is proved by agreement or by employer practice, special holidays are *unpaid* rest days for daily employees. Since such employees or workers generally do not work on those days, they are consequently not entitled to any wage or compensation.²¹

For monthly-paid employees, special holidays are generally *paid off-days*. This is so because they receive a fixed amount per month, subject only to deductions for absences on working days for which leave with pay is not granted. Since special holidays are not working days, no such deduction is made for such days.²²

B. Rationale of Holiday Pay

The declared purpose of the holiday pay is the prevention of diminution of the monthly income of the employees on account of work interruptions.²³

The principle of "no-work, no-pay" is the animating spirit behind the grant by the law of holiday pay to workers.²⁴ Thus, the holiday pay benefits were primarily intended for daily paid employees who would otherwise suffer a diminution in wages on account of holidays were it not for the holiday pay benefits under the law.

C. Coverage

Article 82 of the Labor Code provides:

Art. 82. *Coverage*—The provisions of this Title shall apply to employees in all establishments and undertakings, whether for profit or not, but not to government employees, managerial employees, field personnel, members of the family of the employer who are dependent on him for support, domestic helpers, persons in the personal employ of another, and workers who are paid by results as determined by the Secretary of Labor in appropriate regulations.

²⁰ *Id.* citing Zapanta: Pilipino Phil. Apparel Workers Union, Sept. 24, 1980.

²¹ PERFECTO FERNANDEZ, LAW ON LABOR STANDARDS 136 (1978).

²² *Id.* at 136. As will later be discussed, the statement is inaccurate.

²³ Jose Rizal College v. NLRC, 156 SCRA 27, 33 (1987). The Labor Code of the Philippines, art. 100 provides that "[n]othing in this Book shall be construed to eliminate or in any way diminish supplements or other employee benefits being enjoyed at the time of promulgation of this Code."

²⁴ JOSELITO C. CHAN, THE LAW ON LABOR STANDARDS AND SOCIAL LEGISLATION ANNOTATED 536 (1997).

All employees are covered by the provisions on holiday pay provided for in Article 94 of the Labor Code. The Secretary of Labor, pursuant to the rule-making authority of the executive departments, promulgated the Rules and Regulations Implementing the Labor Code, thereby providing for the following exclusions:²⁵

- a. Those of the government and any of the political subdivisions including government-owned and controlled corporations;
- b. Those of retail and service establishments regularly employing less than ten (10) workers;
- c. Domestic helpers;
- d. Persons in the personal service of another;
- e. Managerial employees;
- f. Field personnel and other employees whose time and performance is unsupervised by the employer;
- g. Those who are engaged on task or contract basis or purely commission basis;
- h. Those who are paid a fixed amount for performing work irrespective of the time consumed in the performance thereof.

D. Premium on Holiday Pay

1. REGULAR HOLIDAYS

An employee is entitled to at least one hundred percent (100%) of his basic wage for any unworked regular holiday, provided he is present or on leave of absence with pay on the workday immediately preceding the holiday.²⁶

Any employee who is permitted or suffered to work on any regular holiday for a period not exceeding eight (8) hours, shall be paid at least two hundred percent (200%) of his regular daily wage. If the holiday work falls on the scheduled rest day of the employee, he shall be entitled to an additional premium pay of at least thirty percent (30%) of his regular holiday rate of two hundred percent (200%) based on his regular wage rate.²⁷ For work on a regular holiday falling on a scheduled rest day, the employee shall be entitled to two hundred sixty percent (260%).²⁸

For work performed in excess of eight (8) hours on a regular holiday, an employee shall be paid an additional compensation for the overtime work equivalent

²⁵ Rules Implementing the Labor Code, Book III, Rule IV, § 1 (1976).

²⁶ *Id.*, at § 3 (1976).

²⁷ *Id.*, at § 4.

²⁸ DOLE Handbook on Workers' Statutory Monetary Benefits, No. II (b) (1994). The 260 % is broken down as follows:

200 %	Worked regular holiday pay
+ 60 %	30% of 200 % as premium

260 % Total

to his rate for the first eight (8) hours on such regular holiday work plus at least thirty percent (30%) thereof. For overtime on a regular holiday falling on the scheduled rest day, he shall be paid an additional compensation for the overtime work equivalent to his regular holiday-rest day rate for the first eight (8) hours plus thirty percent (30%) thereof.²⁹

2. SPECIAL DAYS

As to special days, the general rule is that employees who do not report for work or were not required or permitted to work on those days are not entitled to any compensation under the law. This, however, is without prejudice to any voluntary practice or stipulation in the collective bargaining agreement providing for the payment of wages and other benefits for days declared as special days even if unworked.³⁰

On the other hand, work performed on those days merits an additional compensation of not less than thirty percent (30%) on top of the basic pay. Work performed during special days which fall on the employee's scheduled rest day shall merit an additional compensation of at least fifty percent (50%) over and above the basic pay or a total of one hundred and fifty percent (150%).³¹

II. THE MONTHLY- PAID EMPLOYEE

A. Monthly-paid employees vis-à-vis Daily-paid employees

In resolving the legal issues that will later be delineated, it is imperative that a working distinction be made between the daily paid employee and the monthly salaried employee.

The law on paid holidays was primarily intended for the benefit of the daily- paid employees whose employment and income are circumscribed by the principle of "no-work, no-pay." Judicial notice has been taken of the fact that prior to the enactment of the Labor Code, daily paid workers were not paid for unworked regular holidays unlike the monthly paid employees who do not suffer any reduction in their monthly salary for not working during such holidays. Stated differently, the holiday pay provision underscores, in no uncertain terms, the substantive difference between the daily-paid employees and the monthly-paid employees.³² The law on holiday pay is thus conceived to be the countervailing measure to partially offset the disadvantages inherent in the daily compensation system of employment.³³

Since the law does not define a monthly-paid employee, the definition in the DOLE Handbook on Workers' Statutory Monetary Benefits will be used as a

²⁹ Rules Implementing the Labor Code, Book III, Rule IV, § 5 (1976).

³⁰ DOLE Handbook on Workers' Statutory Monetary Benefits, No. II (b) (1994).

³¹ *Id.*

³² Chartered Bank Employees Association v. The Chartered Bank, NLRC Case No. RB-IV-1789-75 (March 24, 1976).

³³ SALVADOR A. POQUIZ, LABOR STANDARDS LAW 183 (1997).

working definition, inaccurate as it may be. The same is true with the definition of a daily paid employee.

A "monthly-paid employee" is one whose salary includes payments for every day of the month, including rest days, Sundays, regular and special holidays, although he does not regularly work on these days.³⁴

On the other hand, a "daily-paid employee" refers to one who is paid his wage or salary only on the days he actually works, except in cases of regular holidays wherein he is paid his wage or salary even if he does not work during those days, provided, that he is present or on leave of absence with pay on the working day; immediately preceding the regular holiday.³⁵

B. Rules on entitlement to holiday pay of monthly-paid employees

1. NOT ENTITLED

For some time in Philippine labor laws, monthly paid employees were not entitled to holiday pay because holiday pay was primarily intended for daily paid employees who would suffer a diminution of their salaries on account of holidays when they could not work.

On 16 February 1976, then Secretary of Labor Blas F. Ople promulgated the Omnibus Rules and Regulations Implementing the Labor Code ("Rules").³⁶

Section 2, Rule IV, Book III of the Rules provides:

Sec. 2. *Status of employees paid by the month*—Employees who are uniformly paid by the month, irrespective of the number of working days therein, with a salary of not less than the statutory or established minimum wage, shall be presumed to be paid for all days in the month, whether worked or not.

For this purpose, the monthly minimum wage shall not be less than the statutory minimum wage multiplied by 365 days divided by twelve.

The Rules establish a presumption that the holiday benefit is actually being enjoyed by the monthly-paid employee since the regular salary or wage of such employee is deemed to include pay for unworked regular holidays.

The conditions for the operation of the presumption are:

- (1) The employee receives a monthly salary or wage;
- (2) The monthly salary or wage is uniform in amount irrespective of the number of actual working days for any particular month; and
- (3) The monthly salary yields a daily rate (including regular holidays) which is not less than the statutory or other applicable minimum wage.³⁷

³⁴ DOLE Handbook on Workers' Statutory Monetary Benefits, No. 1 (d) (1994).

³⁵ *Id.*

³⁶ JOSEPHUS B. JIMENEZ, LABOR LAWS AND DECISIONS 143 (1988).

³⁷ PERFECTO V. FERNANDEZ, LAW ON LABOR STANDARDS 130-131 (1978).

The presumption is disputable. It could be overcome by actual proof that there is actually no payment for unworked holidays.³⁸

On 23 April 1976, the Secretary of Labor issued Policy Instructions No. 9 to govern holiday pay.³⁹

Policy Instruction No. 9 provides:

The rules implementing PD 850 have clarified the policy in the implementation of the ten (10) paid legal holidays. Before PD 850, the number of working days in a year in a firm was considered important in determining entitlement to the benefit. Thus, where an employee was working for at least 313 days, he was considered definitely already paid. If he was working for less than 313, there was no certainty whether the ten (10) paid legal holidays were already paid to him or not.

The ten (10) paid legal holidays law, to start with, is intended to benefit principally daily employees. In the case of monthly employees, only those whose monthly income did not yet include payment for the ten (10) paid legal holidays are entitled to the benefit.

Under the rules implementing PD 850, this policy has been fully clarified to eliminate controversies on the entitlement of monthly-paid employees. The *new determining rule* is this: If the monthly-paid employee is receiving not less than . . . the maximum monthly minimum wage, and his monthly pay is uniform from January to December, he is presumed to be already paid the ten (10) paid legal holidays. However, if deductions are made from his monthly salary on account of holidays in months where they occur, then he is still entitled to the ten (10) paid legal holidays.

These new interpretations must be uniformly and consistently upheld.

2. PRESENT RULE: ENTITLED

Article 82 of the Labor Code specifies the employees who can claim the benefits contained in Title I⁴⁰ of Book III such as overtime pay, weekly rest day, holiday pay and service incentive leave.

³⁸ *Id.*

³⁹ JIMENEZ *supra* note 36, at 144.

⁴⁰ Labor Code of the Philippines, P.D. 442, arts. 83-96 (1974).

Every worker shall be paid his regular daily wage during regular holidays, except those working in retail and service establishments regularly employing less than ten (10) workers.⁴¹ This notwithstanding, the provision in the Rules whereby monthly-paid employees are presumed paid in so far as holiday pay is concerned.

The conflict between the Rules and the Labor Code insofar as the entitlement of monthly-paid employees to holiday pay was resolved in *Insular Bank of Asia and America Employees' Union (IBAAEU) v. Inciong*,⁴² where Section 2, Rule IV, Book III of the Rules as well as Policy Instructions No. 9 were declared null and void, to wit:

It is elementary in the rules of statutory construction that when the language of the law is clear and unequivocal, the law must be taken to mean exactly what it says. In the case at bar, the provisions of the Labor Code on the entitlement to the benefits of holiday pay are clear and explicit—it provides for both the coverage of and exclusion from the benefits. In Policy Instruction No. 9, the then Secretary of Labor went as far as to categorically state that the benefit is principally intended for daily-paid employees, when the law clearly states that every worker shall be paid their regular holiday pay. This is a flagrant violation of the mandatory directive of Article 4 of the Labor Code, which states that "All doubts in the implementation and interpretation of the provisions of this Codes, including its rules and regulations, shall be resolved in favor of labor." Moreover, it shall always be presumed that the legislature intended to enact a valid and permanent statute which would have the most beneficial effect that its language permits.⁴³

Anent the argument of the Secretary of Labor that the intent and spirit of the holiday pay law is to correct the disadvantages inherent in the daily compensation system of employment and that holiday pay is primarily intended to benefit the daily-paid employees, the Supreme Court held that however meritorious said argument may sound, monthly-paid employees are definitely included in the benefits of regular holiday pay, that is, until the provisions of the Labor Code on holiday pay are amended.⁴⁴

The provisions of the Labor Code on holiday pay remain the same such that the present rule is that monthly-paid employees are entitled to the benefits of regular holiday pay. The same is true with the Rules Implementing the Labor Code.

⁴¹ *Id.*, at art. 94.

⁴² 132 SCRA 663 (1984).

⁴³ *Id.*

⁴⁴ *Id.*

Simplistic as the rule may sound, a monthly-paid employee at present is entitled to regular holiday compensation, despite the inescapable reality that the rationale for holiday pay is to prevent the diminution of wages of the daily paid employee. Until and unless the law itself is amended, the spirit of the law cannot prevail over the letter of the law. This notwithstanding, the principle that the interpretation of the law should not be by the letter that kills, but by the spirit that gives life. The only defense available to the employer is to prove the actual payment of holiday pay to the monthly-paid employee.

III. THE ISSUES

A. Genuine monthly-paid employee

Foremost of the legal issues at hand, is a precise characterization of a "monthly-paid employee." Does the term refer to the time of payment or to another substantive quality? The Supreme Court has not exactly provided a definition for a "monthly-paid employee" and the absence at present of a definition in the law serves to all the more confuse the legal signification that should be given the term. In this respect, a resort to the "divisor test" will be most useful in the analysis of the legal issue. This is because the "divisor" is an indication of the nature or characterization of the employment.

B. Treatment of two (2) Regular holidays coinciding on the same day

The unique occurrence last April 9, 1993 and April 9, 1998, wherein two (2) regular holidays fell on the same day has spawned a variety of interpretations as to the proper treatment therefor. Although the DOLE has issued an Explanatory Bulletin⁴⁵ on the matter, the need to further examine the situation contemplated in the light of prevailing jurisprudence on the subject persists. Again, the Explanatory Bulletin must be harmonized with the "divisor test" as regards the corollary issue of the amount to which the employee is entitled.

C. Treatment of a Regular holiday falling on a Rest Day

Although the Supreme Court has ruled on this issue in *Wellington Investment and Manufacturing Corporation v. Trajano*⁴⁶, it is *apropos* that the ruling be analyzed and evaluated. Is it in sync with prevailing doctrines on the subject? Is it good law or bad law? These questions should be resolved within the framework of established doctrines and policies applicable to the legal issue. The demandable sum will again depend on the "divisor" that is being used.

D. Treatment of Regular holiday, Rest day, and Special day falling on the same day

The treatment of a regular holiday falling on the employee's scheduled rest day, which also happens to be a special day, is not contemplated under existing

⁴⁵ Issued on March 11, 1993.

⁴⁶ 245 SCRA 561 (1995).

laws. The proper treatment for this rare occurrence must be examined in the light of the "divisor test."

E. Can the Divisor be Modified?

The common denominator among the afore-mentioned issues is the "divisor" which is significant to resolve the issues. Considering its pervading significance, the issue of whether the use of a specified "divisor" for some time, vests on the employees a protected right in the light of the "non-diminution clause"⁴⁷ under the Labor Code, will be examined.

The "divisor" is the factor or number of days used to determine the daily salary of a monthly-paid employee. The issue to be resolved is this: Can the "divisor" be changed, when to do so will result in a smaller resulting daily wage, thereby violating the non-diminution of benefits clause under the law? Connected with this issue is the question of using two (2) different "divisors" by the same employer for different purposes. What are the legal implications of such practice?

In the resolution of the afore-mentioned issues, it is necessary that the so-called "divisor" be examined and its component parts sliced and diced, so to speak, in order to properly provide solutions to the issues on hand.

IV. THE DIVISOR

A. Nature of the Divisor

The "divisor" is the factor or number of days used by an employer in determining the daily rate of monthly-paid employees. Depending on the divisor used, the presumption that the unworked regular holidays are paid off-days may arise or not.⁴⁸ While the holiday pay provisions are easy to implement as to daily-paid employees, questions arise on whether the compensation of monthly-paid employees already includes payment for holidays occurring within the month.⁴⁹

For purposes of this study, the term "divisor test" signifies the method of computing the daily wage rate of monthly-paid employees.

It is well to note that the "divisor" forms an integral element of the "divisor test."

⁴⁷ Labor Code of the Philippines, P.D. 442, art. 100 (1974).

⁴⁸ *Insular Bank of Asia and America Employees Union (IBAAEU) v. Inciong*, 132 SCRA 663, 667 (1984) [hereinafter *Insular Bank*].

B. Evolution of the Divisor Test

1. PRE-IBAAEU V. INCIONG

The doctrinal foundations bearing on the divisor test before the promulgation of *Insular Bank of Asia and America Employees' Union (IBAAEU) v. Inciong*⁵⁰ will have to be examined.

In *Philippine Manufacturing Company v. Ang Bisig ng PMC*,⁵¹ the Union asked the court to order the company to pay extra compensation for work done from 12:01 a.m. to 7 a.m. whenever the period mentioned fell on a rest day or a legal holiday. The employer contended that since the company and the Union had agreed on a working day that began at 7 a.m. of one day and lasted until 7 a.m. of the following day, the period falling on a Sunday should be considered a part of the Saturday working day. Thus, it contended that work done on the following day is not entitled to extra pay despite its being a rest day or legal holiday.⁵² The Court ruled that the question of whether work done during the shift was to be paid only the ordinary rate or the rate applicable whenever work on a Sunday or holiday is rendered, is a matter governed by law⁵³ and not by the agreement between the parties. Thus, in case a shift, which begins at 11 p.m. and ends at 7 a.m. of the following day, coincides with a legal holiday, extra compensation for work rendered from 12:01 a.m. to 7:00 a.m. on the legal holiday should be given.⁵⁴

In *San Miguel Brewery, Inc. v. Democratic Labor Organization*,⁵⁵ the security guards, who are paid on a monthly basis, sought to recover holiday pay for work rendered on holidays. The Supreme Court held that the provisions of the law are mandatory, regardless of the nature of compensation, such that the monthly-paid security guards should be given the holiday pay benefits under the law.⁵⁶

The question that comes to mind by virtue of the *San Miguel Brewery, Inc.* case is: Will the monthly-paid employee get one hundred twenty five percent (125%)⁵⁷ of his daily wage or only the twenty five percent (25%) additional compensation for the work rendered on a regular holiday? This will be resolved in subsequent decisions of the Supreme Court.

⁴⁹ AMADOR, *supra* note 18, at 117.

⁵⁰ 132 SCRA 663 (1984).

⁵¹ 8 SCRA 419 (1963).

⁵² *Id.* at 421.

⁵³ The Eight Hour Labor Law, Commonwealth Act No. 444 (June 3, 1939).

⁵⁴ 8 SCRA 419, 423, 424 (1963).

⁵⁵ *Id.* at 613.

⁵⁶ *Id.* at 618, 619.

⁵⁷ The Eight Hour Labor Law, Commonwealth Act 444, § 4 provides that "no person, firm, or corporation may compel an employee or laborer to work during Sundays and legal holidays, unless he is paid an additional sum of 25% of his regular compensation." Thus,

100 %	Work on a regular holiday
+ 25 %	Premium

125% Total Due

In *NWSA v. NWSA Consolidated Union*⁵⁸, the issue of the proper method for computing the daily rate of a monthly salaried employee for purposes of determining overtime compensation, was brought before the Supreme Court.

The employer asserted that the monthly basic pay should be divided by *thirty (30) days* in accordance with the Revised Administrative Code.⁵⁹ On the other hand, the Union wanted to divide the monthly salary by the *actual number of working hours* in the month. In other words, the Union's computation was: (a) the monthly salary divided by the actual number of working hours in a month, or (b) the regular monthly compensation divided by the number of actual working days in a month.⁶⁰

It is logical for the employer to opt to use a divisor of thirty (30) days since the resulting quotient is smaller compared with the formula of the Union using the actual days worked during the month which will give rise to a higher daily rate.

Instead of ruling squarely on the matter, the Supreme Court would rather sidestep the issue, stating that:

[I]nsofar as the employees of the General Auditing Office and of the Bureau of Public Works assigned to work in NWSA are concerned, . . . as government employees . . . they should be governed by Section 254 of the Revised Administrative Code. This section provides that in making payment for part of a month, the amount to be paid for each day shall be determined by dividing the monthly pay into as many parts as there are days in the particular month.⁶¹

The Supreme Court resolved the issue indirectly or by implication by only ruling upon the government employees working in NWSA. The legal implication is that as to the non-government employees working in NWSA, the proper divisor is the total number of actual days worked in a month.

The subsequent case of *Manalo v. Pampanga Sugar Development Co., Inc.*⁶² discussed the correct interpretation of the Eight-Hour Labor Law provisions on the premium pay due the monthly-salaried employees for work performed on legal holidays.

The case concerned employees of Pampanga Sugar Development Co., Inc. ("Pasudeco"), a sugar central operator in Pampanga. The nature of employment of the workers obliged them to work every day, including Sundays and holidays.⁶³ The employees demanded premium compensation for services duly rendered for a

⁵⁸ 120 Phil. 748 (1964).

⁵⁹ § 254 provides that "[i]n making payment for part of a month, the amount to be paid for each day shall be determined by dividing the monthly pay into as many parts as there are days in the particular month."

⁶⁰ 120 Phil. 748, 754 (1964).

⁶¹ *Id.*

⁶² 138 Phil. 755 (1969).

⁶³ *Id.* at 757.

total of 276 Sundays and legal holidays spanning close to five (5) years. At that time, the Eight Hour Labor Law⁶⁴ granted a twenty five percent (25%) additional premium to employees working on a Sunday or a legal holiday, so each worker was demanding "premium pay". The workers interpreted "premium pay" as a total of one hundred twenty five percent (125%) for work done not exceeding eight (8) hours during a Sunday or legal holiday in addition to his monthly salary.⁶⁵

Pasudeco asserted that the premium pay of twenty five percent (25%) of the worker's equivalent daily wage was all that they were legally entitled to, and that the amount had already been paid.

The Supreme Court held that the most logical and reasonable interpretation of the law would lead to the conclusion that the term "premium pay" refers to the additional twenty five percent (25%) only, excluding the base pay which the employee gets for an eight (8) hour work performed any day.⁶⁶ The Supreme Court said:

The position thus taken by the petitioners-appellants that they are entitled to the 125% premium or extra pay for the work done in each Sunday and holiday would only apply if it is shown that the monthly or yearly salaries stipulated are intended to cover work on ordinary working days only or where the nature or conditions of employment do not require work on Sundays or legal holidays. But where, in agreeing to the monthly or yearly stipend, the parties knew or had reason to know that the work would be continuous, without interruption on Sundays or legal holidays, then the wage earner would only be entitled to the 25% supplement . . . as the regular monthly or yearly wage already covered the work done on Sundays and holidays.⁶⁷

The Supreme Court further ruled that the monthly salary already took Sundays and legal holidays into account. This conclusion was arrived at by referring to the formula for determining the daily wage of a monthly salaried employee working the whole year round, including Sundays and legal holidays, devised by DOLE⁶⁸ to wit:

⁶⁴ The Eight Hour Labor Law, Commonwealth Act No. 444, § 4.

⁶⁵ 138 Phil. 755, 758 (1969).

⁶⁶ *Id.* at 759.

⁶⁷ *Id.* at 760, 761.

⁶⁸ *Id.*

$$\text{Daily Wage} = \frac{\text{Monthly Wage} \times 12}{380.5 \text{ days}}$$

where 380.5 days is broken down as follows:

303	ordinary days in a year
52	Sundays
+ 10	Regular holidays
15.5	Premium pay

380.5 days
=====

where Premium pay = 25% x 62 days = 15.5 days

The sum total of 380.5 days is *theoretically* the number of days worked by the employee in a year.

Compared with 365 days which is the *actual* number of days in a year, there is a 15.5 day difference, which represents the equivalent in days of the employee's twenty five percent (25%) premium pay for the fifty two (52) Sundays and the ten (10) legal holidays in one year.⁶⁹

The case does not indicate if the monthly salary includes or intends to cover work on ordinary days only or also includes work on Sundays and holidays. This is despite the reference made to the factor of 380.5 days prescribed by the DOLE since the reference was made for purposes of determining the signification of the term "premium pay." There was no showing either, that Pasudeco actually utilized the 380.5 day factor.

Another case involving the same employer came up in *De Leon v. Pampanga Sugar Development Co., Inc.*,⁷⁰ where what was left unanswered in the prior case was finally settled.

The *De Leon* case involved monthly-salaried security guards required to work seven (7) days a week, who were claiming one hundred twenty five percent (125%) of their regular wage for work rendered on Sundays and legal holidays. The Supreme Court ruled that whether the employees are going to receive the whole one hundred twenty five percent (125%) or only the twenty five percent (25%) premium would depend on the following: "[W]ith respect to employees paid on a monthly basis, the first one hundred percent (100%) corresponding to the regular remuneration may or may not be included in the monthly salary." If it is so included, then the employee has a right to collect only the twenty five percent (25%) premium. If it is not, then the employee is entitled to collect the entire 125%.⁷¹

In ruling upon such issue,⁷² the Supreme Court relied heavily on the allegation in the complaint as to the rate per day which was arrived at by dividing the monthly rate by thirty (30) days, which factor already includes Sundays and legal holidays. The inference made from such fact was that the regular remuneration

⁶⁹ *Id.*

⁷⁰ 29 SCRA 628 (1969).

⁷¹ *Id.* at 632.

⁷² The issue is whether the petitioners' monthly salaries already include the 100% regular compensation for Sundays and legal holidays.

of 100% was already encompassed in the petitioners' monthly salaries. The employees, by using thirty (30) days as a divisor, effectively admitted through their pleadings and demonstrated awareness that their monthly salaries covered work not only on ordinary days but also on Sundays and legal holidays.⁷³ The Supreme Court held the workers in *estoppel* from claiming otherwise.

The *De Leon* case exemplified how the divisor test is to be utilized to determine whether a monthly paid employee should be accorded holiday pay.

The year 1976 proved to be a crucial year for the development of rules on the divisor test. Section 2, Rule IV, Book III of the Rules was promulgated on February 16, 1976. One week later,⁷⁴ Policy Instruction No. 9⁷⁵ was issued by DOLE to clarify the implementation of the holiday pay provisions under the law. The prior policy, that the number of working days a year in a firm was considered important in determining the entitlement of monthly paid employees to holiday pay benefit,⁷⁶ was clarified to avoid confusion in interpretation thereof. A presumption that monthly-paid employees are already paid the unworked legal holidays was established.⁷⁷

The subsequent case of *Philippine Air Lines Employees' Association (PALEA) v. Philippine Air Lines (PAL), Inc.*,⁷⁸ muddled the already settling doctrines on the subject.

At issue in this case was the correct method for converting the monthly salaries into daily rates.

The employer used the following formula:⁷⁹

$$\frac{\text{Monthly Wage} \times 12}{365 \text{ days}} = \text{Basic Daily Rate}$$

where 365 days is the total calendar days in a year.

The Union, on the other hand, used this formula:

$$\frac{\text{Monthly Wage} \times 12}{\text{No. of Actual Working Days}} = \text{Basic Daily Rate}$$

The Supreme Court sided with the Union by ruling that "[t]here should hardly be any doubt that off-days are not paid days."⁸⁰ This notwithstanding the finding that the employees concerned are monthly-paid employees. While the

⁷³ The Court noted that had the workers not known so, they would have divided their monthly salaries only by the number of regular working days in a month.

⁷⁴ Feb. 23, 1976.

⁷⁵ The more relevant provisions of which relate to the "new determining rule" that if the monthly-paid employee is receiving not less than the maximum monthly minimum wage, and his salary is uniform from January to December, he is presumed to be already paid the ten (10) legal holidays.

⁷⁶ Such that where an employee was working for at least 313 days, he was considered already definitely paid the legal holidays. If he was working for less than 313 days, there was no certainty whether the ten (10) legal holidays were already paid to him or not.

⁷⁷ See note 75.

⁷⁸ 70 SCRA 244 (1976).

⁷⁹ *Id.* at 247.

⁸⁰ *Id.* at 251.

prevailing jurisprudence and statutory provisions held that monthly-paid employees are considered paid for all days of the month, including rest days,⁸¹ the Supreme Court apparently made an about-face when it held that:

[T]he divisor in computing a monthly paid employee's basic daily rate should be the *actual working days* in a year. The number of off-days is not to be counted precisely because on such off-days, an employee is not required to work.

Simple common sense dictates that should an employee opt not to work—which he can legally do—on an off-day, and for such he gets no pay, he would be unduly robbed of a portion of his legitimate pay if and when in computing his basic daily and hourly rate, such off-day is deemed subsumed by the divisor. *For it is elementary in the fundamental process of division that with a constant dividend, the bigger your divisor is, the smaller your quotient will be.*⁸²

The Supreme Court cited the *NWSA*⁸³ case where it implied that the actual number of working days should be used as divisor in converting the monthly salary into daily wage.⁸⁴ The Supreme Court added that PAL bound itself to "duly compensate" employees working on their off-days.⁸⁵ That statement only served to emasculate the decision since the phrase "duly compensate" could also be interpreted to mean that the premium exclusive of the base pay which is already a component of the monthly salary, be paid accordingly. The doctrine of *estoppel* was held inapplicable.⁸⁶

What is most apparent in the *PALEA* case was the confusion with the distinction between daily-paid and monthly-paid employees. In effect, the decision eliminated the distinction by treating workers as daily-paid employees since the divisor used to arrive at the daily rate is the *actual number of working days*. Although the provisions of the Rules and Policy Instruction No. 9 expressly provide that monthly-paid employees are presumed paid for all the days of the month, *whether worked or not*, the foregoing statutory provisions were not considered.

The case of *Oceanic Pharmacal Employees Union (FFW) v. Inciong*⁸⁷ laid down the ruling that an employer who continued paying the monthly-paid employees

⁸¹ See *Manalo v. Pampanga Sugar Development Co., Inc.*, 138 Phil. 755 (1969) and *De Leon v. Pampanga Sugar Development Co., Inc.*, 29 SCRA 628 (1969).

⁸² 70 SCRA 244, 252 (1976). (italics in the original)

⁸³ 11 SCRA 766 (1964).

⁸⁴ *Id.* at 783, 784.

⁸⁵ 70 SCRA 244, 252 (1976).

⁸⁶ The long standing inaction of the employees was taken as innocent silence which cannot place a party in *estoppel*. The unilateral adoption of the divisor by PAL is an act against public policy, such that the doctrine of *estoppel* cannot give validity to the same.

⁸⁷ 94 SCRA 270 (1979).

holiday pay even if he knew they were not entitled thereto cannot later on withdraw said benefits in view of the explicit prohibition against the withdrawal or reduction of any benefits, supplements, or payments for unworked holidays as provided in existing individual or collective agreements or employer practice or policy.⁸⁸

In *Citibank Phils. Employees Union-NATU v. Minister of Labor*,⁸⁹ the Supreme Court held that the Arbitrator's award ordering payment of holiday pay to monthly-paid employees becomes part and parcel of the collective bargaining agreement such that the Constitutional proscription against the impairment of the obligation of contracts, protects it from amendment through subsequent issuances by the Minister of Labor.⁹⁰

2. IBAAEU v. INCIONG

In *Insular Bank of Asia and America Employees' Union (IBAAEU) v. Inciong*,⁹¹ the Supreme Court declared Section 2, Rule IV, Book III of the Rules and Policy Instruction No. 9, null and void: in the guise of clarifying the Labor Code's provisions on holiday pay, they in effect amended the law by enlarging the scope of their exclusion.⁹² Since monthly-paid employees are not among those excluded from the benefits of holiday pay under the law,⁹³ they cannot be excluded therefrom through the exercise of the rule-making power of the Secretary of Labor. Otherwise, the administrative regulation is an *ultra vires* act.

3. POST-IBAAEU v. INCIONG

In *Chartered Bank Employees Association v. Ople*,⁹⁴ the Supreme Court held that the exclusion of monthly-paid employees from entitlement to holiday pay "constitutes a taking away or a deprivation which must be in the law if it is to be valid."⁹⁵

Despite the definite ruling in *Insular Bank*, the Supreme Court still committed an error in judgment in *Terminal Facilities and Services Corporation v. NLRC*⁹⁶ when it held that "[i]n the absence of any provision in any collective bargaining agreement of the parties, the *presumption* that a monthly-paid employee is paid even on rest days must prevail."⁹⁷ The Supreme Court, speaking through Justice Gutierrez, should have known that the *presumption* that a monthly-paid employee is considered paid for all the days, including rest days, in the month, whether worked or not, has already been declared null and void in the *Insular Bank* case.

⁸⁸ Rules Implementing the Labor Code, Book III, Rule IV, § 11 (1976).

⁸⁹ 97 SCRA 52 (1980).

⁹⁰ *Id.* at 58.

⁹¹ 132 SCRA 663 (1984).

⁹² *Id.* at 672.

⁹³ Labor Code of the Philippines, P.D. 442, art. 82 (1974).

⁹⁴ 138 SCRA 273 (1985); See also *CBTC Employees Union v. Clave*, 141 SCRA 9 (1986); *Mantrade/FMMC Division Employees and Workers Union v. Bacungan*, 144 SCRA 510 (1986).

⁹⁵ *Id.* at 282.

⁹⁶ 199 SCRA 269 (1991).

⁹⁷ *Id.* at 277.

In determining the amount of holiday pay to which an employee is entitled, jurisprudence has laid down the following considerations:

- (1) Is the employee a monthly paid employee or a daily paid employee?
- (2) Using the divisor test, does the divisor already account for the holidays?

The divisor used even determines the characterization of an employee as either a monthly paid employee or a daily paid employee. It is for this reason that the component parts of the divisor need to be identified and studied.

C. Determining the Divisor

The divisor which will be used in determining the daily rate of a monthly-paid employee is a matter which the employer and the employee must agree upon.⁹⁸

For proper guidance, the DOLE issued a suggested formula in determining the divisor or factor to be used.⁹⁹

There are four (4) groups of workers under the regulations.

Group I covers the workers who are required to work every day including Sundays or rest days, legal and special holidays. The formula applicable is as follows:

$$\frac{\text{Monthly Rate} \times 12}{390.90 \text{ days}} = \text{Daily Rate}$$

where 390.90 days is broken down as follows:

302	Actual working days	
20	10 Regular holidays x 200%	
+66.30	51 rest days x 130%	
2.60	2 special days x 130%	
<hr/>		
390.90 days	Total equivalent no. of days	
=====		

Group II workers are those who do not work and are not considered paid on Sundays or rest days. Thus, their unworked rest days are not considered paid. Their formula is as follows:

$$\frac{\text{Monthly Rate} \times 12}{314 \text{ days}} = \text{Daily Rate}$$

where 314 days is broken down as follows:

304	Actual working days	
+ 10	Regular holidays	
<hr/>		
314 days	Total equivalent number of days	
=====		

⁹⁸ PALEA laid down the rule that a divisor which was unilaterally adopted by the employer is invalid.
⁹⁹ Rules Implementing RA 6727, The Wage Rationalization Act, § 6 (1989).

Group III workers are workers who do not work but are considered paid on rest days, special days, and regular holidays. Thus, the formula is as follows:

$$\frac{\text{Monthly Rate} \times 12}{365 \text{ days}} = \text{Daily Rate}$$

where 365 days is broken down as follows:

302	Actual working days	
51	Rest days	
+ 10	Regular Holidays	
2	Special Holidays	
<hr/>		
365 days	Total equivalent no. of days	
=====		

Group IV workers are those who do not work and are not considered paid on Saturdays and Sundays, or rest days using this formula:

$$\frac{\text{Monthly Rate} \times 12}{262 \text{ days}} = \text{Daily Rate}$$

where 262 days is broken down as follows:

252	Actual working days	
+ 10	Regular Holidays	
<hr/>		
262 days	Total equivalent no. of days	
=====		

In all four (4) groups, the ten (10) legal holidays are always included in the addition of the total number of days. Hence, this presupposes that in computing the monthly rate, the ten (10) regular holidays are already considered paid.

The divisor used can be contained in the collective bargaining agreement. What is important is that there be an agreement reached since otherwise, the non-consenting party can always assail the irregularity in the use of such factor.

D. Relevance of the Divisor Test

The conversion of the monthly wage into a daily rate is of utmost importance to the employees considering that the benefits due them are denominated in terms of daily compensation. A peso difference in the daily rate owing to the use of a different divisor could add up to a substantial amount depending on the circumstances involved in the case.

More than just an arithmetical process, the very nature of employment is brought to the fore via the divisor test. Thus, the divisor test is an invaluable tool in resolving the legal issues with respect to the application of the holiday pay provisions of the law to monthly-paid employees.

More importantly, only monthly-paid employees are entitled to be paid unworked rest days and unworked special days. The monthly-paid employee can demand payment for such days because his nature of employment is such that he is paid for all the days of the month, whether he worked on those days or not. On the other hand, a daily-paid employee cannot demand payment for unworked rest days and special days since as to him, the principle of "no-work, no-pay" applies. However, by express mandate of the law, all workers are entitled to receive their regular wage for regular holidays irrespective of whether they worked on those days or not. Again, the divisor test will be used to properly characterize the employment of a worker.

The following benefits are computed on the basis of the daily rate:

- a. Overtime pay;
- b. Night differential pay;
- c. Vacation leave;
- d. Sick leave pay;
- e. Service incentive leave;
- f. Holiday premium pay; and
- g. Bonus.

For purposes of computation of the salary deductions due to the absences of the employee, the daily rate is also relevant.

V. ANALYSIS

A. Genuine Monthly-paid Employee

As previously defined, a monthly-paid employee refers to one who is paid his wages or salary every day of the month, including rest days, Sundays, regular or special holidays, although he does not regularly work on those days.¹⁰⁰

The Labor Code is mute on the proper definition of a monthly-paid employee. What is provided is that the time of payment of the salaries should be at least twice a month.¹⁰¹ It is however apparent that the term "monthly-paid employee" is not synonymous with "an employee whose salary is paid by the month."

To better illustrate this point, consider the following.

Let us assume that X receives a monthly salary equivalent for work rendered to ABC Co., a private firm in Makati City.

Is X a monthly-paid employee?

As to the time of payment, X is paid by the month. But as will be shown, to determine if he is a "monthly-paid employee" as previously defined, it is necessary that the divisor test be applied.

¹⁰⁰ DOLE Handbook on Workers' Statutory Monetary Benefits, No. I (d) (1994).

¹⁰¹ Labor Code of the Philippines, P.D. 442, art. 103 provides:

"Wages shall be paid at least once every two (2) weeks or twice a month at intervals not exceeding sixteen (16) days. If on account of force majeure or circumstances beyond the employer's control, payment of wages on or within the time herein provided cannot be made, the employer shall pay the wages immediately after such force majeure or circumstances have ceased..."

Since the working definition of a monthly-paid employee is one who is considered paid for *every day* of the month, whether worked or not, the only divisor that can be used for a *genuine* monthly-paid employee is 365 days. This is the only divisor that takes into account all the days of the year including unworked rest days, regular holidays, and special days.

Now that the applicable divisor of 365 days has been determined, it should be ascertained if the statutory minimum wage is complied with. If the resulting daily compensation is below the statutory minimum wage, then the employee is not a genuine monthly-paid employee. This is because when his monthly rate is converted into a daily rate, the amount does not comply with the minimum provided by law. Thus, he cannot be considered paid for every day of the month. In reality, he is only a daily-paid employee.

Going back to the illustration, the daily rate of X is determined:

$$\text{Daily Rate} = \frac{\text{Monthly Wage} \times 12}{365 \text{ days}}$$

$$\text{Daily Rate} = \frac{P5,500 \times 12}{365 \text{ days}}$$

$$\text{Daily Rate} = P 180.82$$

=====

Considering that the prescribed minimum wage is P 198.00 per day,¹⁰² the resulting daily rate falls below the minimum prescribed by law. The legal implication is that X is not considered paid for all days of the month. Therefore, X is a daily-paid employee.

Let us assume that the collective bargaining agreement of ABC Co. provides for a divisor of 314 days. The corresponding daily rate will then be:

$$\text{Daily Rate} = \frac{\text{Monthly Rate} \times 12}{314 \text{ days}}$$

$$\text{Daily Rate} = \frac{P5,500 \times 12}{314 \text{ days}}$$

$$\text{Daily Rate} = P 210.19$$

=====

The resulting daily rate complies with the minimum wage requirement under the law. Does this show that X is a monthly-paid employee?

Still, X is not a monthly-paid employee. The reason being that the divisor of 314 days excludes the 51 rest days of the year such that he is admittedly not being paid for all the days of the month, whether worked or not. Therefore, X is only a daily-paid employee.

¹⁰² Wage Order No. NCR-06, § 1 (1998).

If the divisor used were 262 days, then the resulting daily rate is P251.91¹⁰³ which more than complies with the minimum wage requirement. However, since the divisor used does not account for all the days of the month, whether worked or not, the employee is still only a daily-paid employee.

A divisor of 390.90 days exceeds the total number of days in any given year. What accounts for the difference?

The presumption whenever the 390.90 factor is used, is that the employee, due to the nature of his job, works on all the 51 rest days, 10 regular holidays and 2 special days. For working on those days, the premium or additional pay he will receive, computed in terms of days, is as follows:

10 Regular holidays x 100%	=	10.0 days
2 Special holidays x 30%	=	+ 0.6 day
51 Rest days x 30%	=	15.3 days
		25.9 days
		=====

The 25.9 days is the difference between 390.90 days and 365 days. It represents the equivalent in days of the premium X will receive for working on the regular holidays, special holidays, and rest days of the year. The base pay of 100% is already included in the divisor such that the employee is already deemed paid therefor. Does this mean that the employee is a monthly-paid employee?

It is submitted that with a factor of 390.90 days, the employee is not a monthly-paid employee. Although his monthly salary accounts for all the days in a month, those days are *worked* days. Should the employee be absent on any of those rest days or holidays, a corresponding deduction from his salary will be made. With the deduction due to absences, the base pay of 100%, in addition to the corresponding premium expressed in equivalent days, is deducted. In the final analysis, the remaining number of days will be less than 365 days. Thus, the employee is a daily-paid employee.

From the foregoing, there are three (3) *sine qua non* conditions that can be deduced for the determination of a *genuine* monthly-paid employee:

- (1) the divisor for determining the daily rate should be 365 days;
- (2) the daily rate should comply with the minimum wage under the law; and
- (3) no deductions should be made for unworked rest days and holidays.

The afore-mentioned conditions must concur. A divisor other than 365 days will mean that the employee is not being paid for all the days of the month. The same holds true for the requirement that the statutory minimum wage should be met. And the last condition assures the employee that he is paid for all the days of the month including *unworked* rest days and holidays.

Thus, employees falling under *Groups I, II, and IV* of the DOLE guidelines are in reality, daily-paid employees.

¹⁰³ [P5500 x 12] / 262 days = P251.91.

The fact, therefore, that an employee is paid a fixed monthly rate does not necessarily mean that he is a *genuine* monthly-paid employee.

The fixed monthly rate that an employee uniformly receives in all the months of the year may merely represent payments for the days actually worked by the employees within the month and may not include the rest days, regular holidays and special days within the period, which are *unworked*; in such case, the term "monthly-paid" does not apply.¹⁰⁴ The employer, with respect to these workers, is not obligated to pay the 52 unworked rest days in a year, as when the 314 factor is used.

It is interesting to note that the nullified Rules in the *Insular Bank* case actually contained the three (3) *sine qua non* conditions. The Supreme Court invalidated such Rules on the theory that "[w]hile the additional exclusion is only . . . a presumption that all monthly-paid employees have already been paid holiday pay, it constitutes a taking away or a deprivation which must be in the law if it is to be valid."¹⁰⁵ The Rules were invalidated for not being in accord with the law. The problem with such rationale is that, in the first place, the Labor Code is silent on the definition of a monthly-paid employee. The *Insular Bank* case also reiterated the doctrine that an administrative regulation cannot rise higher than its source, the law. On this point, it is important to determine whether the Rules indeed provide for another exclusion from entitlement to holiday pay benefits other than the exclusions in Article 82 and 94 of the Labor Code.

Going by the working definition of a monthly-paid employee, he must be paid for every day of the month irrespective of whether he reports to work on those days or not. Going by the *Insular Bank* doctrine, it is incorrect to presume that the employee is already paid for those regular holidays since Article 82, in relation to Article 94 of the Labor Code, does not exclude monthly-paid employees from entitlement to holiday pay benefits. Therefore, if the employee cannot validly be considered already paid for the regular holidays, then such employee is in reality only a daily-paid employee. Again, the definition of a *genuine* monthly-paid employee attains significance. The proponent is of the considered view that if the employee is a *genuine* monthly-paid employee, then the invalidated Rules only re-affirm the nature of a monthly-paid employee. Since a monthly-paid employee is considered paid for all the days in a month, he is also considered paid for all the *unworked* regular holidays falling within the month. If he is considered paid for those regular holidays, then the presumption under the Rules that a monthly-paid employee is paid for all days in a month whether worked or not only reiterates an existing fact. *Ergo*, there was no need to declare the Rules null and void.

If the *genuine* monthly-paid employee works on the regular holiday then he is entitled to a premium pay of 100% of his daily wage rate and not to the total of 200% since the base pay is subsumed in the monthly pay.¹⁰⁶ Thus, there is no way that the monthly salary of a *genuine* monthly-paid employee will be exclusive of the holiday pay for the regular holidays. Stated in another way, the monthly salary of a *genuine* monthly-paid employee includes the base pay for the holidays falling

¹⁰⁴ DOLE Advisory Opinion, Nov. 23, 1987, addressed to Atty. Vicente Rodriguez, counsel for United South Dockhandlers.

¹⁰⁵ 132 SCRA 663, 673 (1984).

¹⁰⁶ See *Manalo v. Pampanga Sugar Development Co., Inc.*, 138 Phil. 755 (1969).

within the month¹⁰⁷ such that in case he works on the paid off- day, he should get 100% of his daily pay in addition to his monthly pay.

With all due respect to the Supreme Court, the declaration of the pertinent Rules as null and void was unnecessary and improper.

B. Two (2) Regular Holidays Falling on the Same Day

A unique case happened on April 9, 1993 and April 9, 1998 when *Araw ng Kagitingan* and Maundy Thursday/Good Friday fell on the same day. It was unique since no law, rule or regulation ever provided for the appropriate holiday pay which should be paid for that day, worked or unworked.¹⁰⁸

Because of the confusion arising therefrom, the DOLE issued on March 11, 1993 an Explanatory Bulletin.¹⁰⁹

When two (2) regular holidays fall on the same day, the possible treatments are:

(1) Treat the day as only one regular holiday such that if *unworked*, the employee only gets the 100% of the regular holiday pay; or

(2) Treat the day as two (2) regular holidays such that if unworked, the employee is entitled to 200% representing regular holiday pay for two days..

The Explanatory Bulletin adopts the second view that: "[c]onsidering that the law assures the workers of at least ten (10) paid regular holidays, the treatment of April 9, 1993 as one instead of two paid holidays will consequently diminish the benefits of the workers who are entitled thereto under existing laws."¹¹⁰

The DOLE was of the view that:

"[T]he covered employees are entitled to 200% of their basic wage even if said holiday is unworked. The first 100% represents the payment of the holiday pay on April 9, 1993 as Good Friday and the next 100% is the payment of the holiday pay for the same date as *Araw ng Kagitingan*. The Labor Code, as amended, provides that every worker shall be paid his regular wage on regular holidays (except in retail and trade establishment regularly employing less than than (10) employees) on all the ten regular holidays in a year regardless of when the holiday falls, i.e., whether

¹⁰⁷ *Contra* De Leon v. Pampanga Sugar Development Co., Inc., 29 SCRA 628 (1969) where the Supreme Court had the occasion to state that "with respect to employees paid on a monthly basis, the first 100%, the base pay, may or may not be included in the monthly salary."

¹⁰⁸ CHAN, *supra* note 24, at 549.

¹⁰⁹ DOLE Explanatory Bulletin on Workers' Entitlement to Holiday Pay on 9 April 1993, *Araw ng Kagitingan* and Good Friday (1993). [hereinafter Explanatory Bulletin]

¹¹⁰ *Id.*

the holiday falls on an ordinary day, a scheduled rest day or on another holiday. To pay the covered employees only 100% as holiday pay on April 9, 1993 if unworked would in effect constitute a diminution of the fixed statutory benefit. It is tantamount to reducing the number of paid holidays from ten (10) as mandated by law to only nine (9) which would be a violation of the non-diminution rule of the Labor Code.¹¹¹

In situations where the employee is permitted or suffered to work on April 9, 1993, he is entitled to compensation equivalent to at least 300% of his basic wage. The 100% is in addition to the 200% to which the employee is already entitled.¹¹²

If 9 April 1993 happened to be a scheduled rest day and the employee works, then he should be given a 30% premium based on 300% such that he is entitled to, a total of 390% of his basic wage.¹¹³

The Explanatory Bulletin does not make any reference to the relevance of the divisor test. It is on this point that an analysis is most proper.

The phrase "covered employee" used in the Explanatory Bulletin contemplates both daily and monthly-paid employees as every worker is entitled to holiday pay benefits under the law.

As to daily-paid employees, for whose principal benefit the provisions on holiday pay were enacted, it will be important to qualify whether the divisor already subsumes the regular holidays in a year. If the divisor used already covers the basic pay for the (2) coinciding regular holidays,¹¹⁴ then he is not entitled to anything if that day is *unworked*, but is entitled to 100% of the daily wage rate if *worked*. If the divisor excludes the regular holidays in a year, then the employee is entitled to an additional 200% if the day is *unworked*, since his salary does not yet include the base pay for regular holidays. If the day is *worked*, then the total benefit amounts to 300%.

If the two (2) regular holidays fall on a scheduled rest day of the employee, and the divisor used includes as a component the regular holidays in a year, then the employee is entitled to an additional 190%¹¹⁵ of the basic wage if the day is

¹¹¹ *Id.* at 2.

¹¹² *Id.* at 3.

¹¹³ The amount is broken down as follows:

300%	total pay for working on April 9, 1993
90%	30% rest day premium x 300%

390% Total

¹¹⁴ Such as the 314 factor (*Group II*), 262 factor (*Group IV*), 390.90 factor (*Group I*), or any other divisor agreed upon which is inclusive of the ten (10) regular holidays.

¹¹⁵ The amount is broken down as follows:

100%	Holiday premium
90%	30% premium x 300%

190% Total

worked. If the regular holidays are not part of the divisor, then the whole 390%¹¹⁶ of the basic wage is due the employee for the work rendered on that day.

As to *genuine* monthly-paid employees, the rules are simpler. If the day is unworked, then the employee is not entitled to any additional pay other than his monthly wage. If the day is worked, then the employee gets an additional 100% of his daily rate in addition to his monthly pay. If the day falls on a rest day, and it is worked, then he should get an additional 190%¹¹⁷ of his daily rate.

The Explanatory Bulletin does not cover cases where there are existing agreements, employer practices or policies providing for more liberal benefits than those that would result with the application thereof.¹¹⁸

C. Regular Holiday Falling on a Rest day

The right of an employee to a weekly rest day is mandated by law. It shall be the duty of every employer, whether operating for profit or not, to provide each of his employees a rest period of not less than twenty-four (24) consecutive hours after every six (6) consecutive normal work days.¹¹⁹

As to the determination of which day will be the rest day, "the employer shall determine and schedule the weekly rest day of his employees, subject to collective bargaining."¹²⁰ In not a few companies, the scheduled rest day is Sunday.

Anent the issue of a regular holiday falling on a Sunday, which happens to be the scheduled rest day, suffice it to state that with the prevailing jurisprudence on the matter, there are more questions than answers.

A perusal of the pertinent provisions of the Labor Code reveals the absence of any provision relating to a regular holiday falling on a rest day.¹²¹ In contrast, the Rules provide for the following:

1. If an employee opts to work on a regular holiday which falls on his scheduled rest day, then he should be given an additional

¹¹⁶ The 390% is broken down as follows:

200%	Worked Regular holiday
190%	Premium
<u>390%</u>	Total

¹¹⁷ See the breakdown in note 115.

¹¹⁸ Explanatory Bulletin, *supra* note 109.

¹¹⁹ Labor Code of the Philippines, P.D. 442, art. 91 (a) (1974).

¹²⁰ *Id.*

¹²¹ The only related provision is Art. 93(C) which provides that "[w]here such [special] holiday work falls on the employee's scheduled rest day, he shall be entitled to an additional compensation of at least fifty percent (50%) of his regular wage."

premium of at least 30% of his regular holiday rate of 200% based on the regular wage.¹²²

2. Where the regular holiday work exceeding eight hours falls on the scheduled rest day of the employee, he shall be paid an additional compensation for the overtime work equivalent to his regular holiday-rest day rate for the first eight hours plus 30% thereof. The regular holiday-rest day rate of an employee shall consist of 200% of his regular daily wage rate plus 30% thereof.¹²³

3. A regular holiday falling on the employee's rest day shall be compensated accordingly.¹²⁴

4. Where a regular holiday falls on a Sunday, the following day shall be considered a special holiday for purposes of the Labor Code, unless said day is also a regular holiday.¹²⁵

It is evident that the only rule which could govern the case of an unworked regular holiday falling on a Sunday is Rule No. 4.¹²⁶ Although legal questions may be raised as to why it provides for circumstances which the Labor Code itself does not, until it is declared null and void, it is presumed valid as an exercise of the rule-making power of the Secretary of Labor.¹²⁷

1. THE WELLINGTON CASE

The case of *Wellington Investment and Manufacturing Corporation v. Trajano*¹²⁸ raised the basic issue of whether a monthly-paid employee is entitled to an additional pay aside from his usual holiday pay whenever a regular holiday falls on a Sunday.

The case arose from a report drawn up by a Labor Enforcement Officer who found that the company did not pay its monthly-paid employees for regular

¹²² Rules Implementing the Labor Code, Book III, Rule IV, § 4 (1976). The premium pay is arrived at as follows:

60%	200% x 30%
+ 100%	Premium for worked regular holiday
<u>160%</u>	Total

¹²³ See *id.* § 5.

¹²⁴ See *id.* § 9.

¹²⁵ *Id.* (The Rules should have qualified the word "Sunday" as being the scheduled rest day. Otherwise, Sunday is just another normal working day for many companies).

¹²⁶ Rules 1 and 2 refer to a worked regular holiday falling on a scheduled rest day whereas Rule 3 refers to a regular holiday falling on the employee's rest day other than a Sunday.

¹²⁷ RULES OF COURT, Rule 131, § 3 (m) provides the disputable presumption "[t]hat official duty has been regularly performed."

¹²⁸ 245 SCRA 561 (1995).

holidays falling on a Sunday.¹²⁹ Wellington argued that such finding has no legal basis since the monthly salary of its monthly-paid employees already includes the holiday pay for all the regular holidays falling within the month. It used the 314 factor which undeniably covers all the working days in the month as well as the ten unworked regular holidays within a year. Such argument failed to persuade the DOLE Regional Director who ruled that "[w]hen a regular holiday falls on a Sunday, an extra or additional working day is created and the employer has the obligation to pay the employee for the extra-day except the last Sunday of August since the payment for the said holiday is already included in the 314 factor."¹³⁰

On appeal, Undersecretary Cresenciano Trajano affirmed the Regional Director in this wise:

By using the 314 factor, Wellington assumes that all the regular holidays fell on ordinary days and never on a Sunday. Thus, the respondent failed to consider the circumstance that *whenever a regular holiday fell on a Sunday, an additional working day is created and left unpaid*. In other words, while the said divisor may be utilized as proof evidencing payment of 302 working days, 2 special days, and the 10 regular holidays in a calendar year, the same does not cover or include payment of additional working days created as a result of some regular holidays falling on a Sunday.¹³¹

The Supreme Court ruled that a legal holiday falling on a Sunday creates no legal obligation for the employer to pay extra compensation aside from the usual holiday pay to its monthly-paid employees.¹³²

2. IS WELLINGTON GOOD LAW?

It is interesting to note that even in 1995 when the case was decided, the Supreme Court still had difficulty characterizing employees as daily-paid or as monthly-paid employees. The *Wellington* case involved alleged monthly-paid employees. The use of the 314 factor by the company points to the legal implication that its so-called monthly-paid employees are in reality daily-paid employees. This is so because in contrast to a genuine monthly-paid employee, the Wellington employees were not being paid their wages for the rest days of the year. They are not *genuine* monthly-paid employees since the fifty-one rest days are not paid off-

¹²⁹ Although the decision did not expressly lay the foundation that Sunday is the scheduled rest day in the company, it is safe to assume that it is the rest day since all the legal provisions used refer to a regular holiday falling on a scheduled rest day.

¹³⁰ *Wellington Investment and Manufacturing Corp. v. Trajano*, 245 SCRA 561, 563 (1995). [hereinafter *Wellington*]

¹³¹ *Id.*

¹³² *Id.* at 567.

days, although the ten (10) regular holidays are covered by the 314 factor.¹³³ In short, the alleged monthly-paid employees are in reality daily-paid employees. Again, this apparent lapse in the decision could have been avoided had there been statutory provisions clearly defining a *genuine* monthly-paid employee.

It is important to note that although the 314 factor was used, the Supreme Court justified its ruling, which used the 365 factor, by repeatedly referring to Wellington's compliance with the law when it paid its employees an amount not less than the statutory minimum wage "multiplied by 365 days divided by twelve."¹³⁴ The employees who are in reality daily-paid, were classified by the Supreme Court as monthly-paid employees.

The most glaring error committed by the Court, speaking through Chief Justice Andres Narvasa, lies in its using as legal basis for its decision the pertinent Rules that have long been declared null and void in the *Insular Bank* case.

From the text of the decision, it is probable that the error may have been intentional on the part of the ponente for two (2) reasons:

(1) The provisions of the nullified Rules were never quoted in full but only in bits and pieces. This is evident in the following portion of the decision:

Particularly, as regards employees "who are paid by the month," "the monthly minimum wage shall not be less than the statutory minimum wage multiplied by 365 days divided by twelve." This monthly salary shall serve as compensation "for all days in the month whether worked or not," and "irrespective of the number of working days therein."¹³⁵

It is apparent that the provisions enclosed in quotation marks form part and parcel of the Section 2, Rule IV, Book III of the Rules which the *Insular Bank* case struck down as void. The full text reads:

Sec. 2. *Status of employees paid by the month*—Employees who are uniformly paid by the month, irrespective of the number of working days therein, with a salary of not less than the statutory or established minimum wage, shall be presumed to be paid for all days in the month, whether worked or not.

For this purpose, the monthly minimum wage shall not be less than the statutory minimum wage multiplied by 365 days divided by twelve.

¹³³ *Contra* the Supreme Court's characterization of the employees as monthly-paid employees since "their monthly salary thus fixed actually covers payment for 314 days of the year, including regular and special holidays, as well as days when no work is rendered by reason of fortuitous causes not attributable to the employer."

¹³⁴ *Wellington*, *supra* note 130, at 567.

¹³⁵ *Wellington*, *supra* note 130, at 564, 565.

(2) The citation for the nullified Rules is "Section 1, Omnibus Rules Implementing the Labor Code."¹³⁶ There is no indication as to what Rule and Book is involved. Perhaps the reason for the ambiguity in the citation is the fact that such authority is not in the statute books anymore, having been nullified in the *Insular Bank* case for providing a presumption which is nowhere in the law.

Both the decisions in the *Wellington* case and the *Insular Bank* case were rendered by a division of the Supreme Court,¹³⁷ so that one cannot be considered to have reversed the other. It would have been different had the *Wellington* decision been rendered by the Supreme Court *en banc*.¹³⁸ Then, the prior ruling rendered by a division could be considered as effectively reversed by the *en banc* ruling.

The *Wellington* case concerned regular holidays falling on Sundays in 1988, 1989, and 1990, where 2 or 3 regular holidays fell on Sundays.¹³⁹ The Undersecretary of Labor opined that the 314 factor did not accurately reflect the actual working days in a year since "whenever a regular holiday coincides with a Sunday, an additional working day is created and left unpaid." The Supreme Court countered that, in effect, what the Undersecretary is saying is that the 317 factor should have been used instead of the 314 factor.¹⁴⁰

[T]he theory loses sight of the fact that the monthly salary in *Wellington*—which is based on the so-called 314 factor—accounts for all 365 days of a year, i.e., *Wellington's* 314 factor leaves no day unaccounted for; it is paying for all the days of the year with the exception only of the 51 Sundays.

The respondent's theory would make each of the years in question a year of 368 days. Pursuant to this theory, no employer opting to pay his employees by the month would have any definite basis to determine the number of days in a year for which compensation should be given to the work-force. He would have to ascertain the number of times legal holidays would fall on Sundays in all the years of the expected or extrapolated life of his business. Alternatively, he would be compelled to make adjustments in his employees' monthly salaries every year, depending on the number of times that a legal holiday fell on a Sunday.

The Supreme Court pointed out that there is no legal basis for compelling the employer to make such adjustments since the law only requires assurance that

¹³⁶ Footnotes 12 and 17 in *Wellington*.

¹³⁷ Both these cases were decided by the second division of the Supreme Court.

¹³⁸ Since "[i]n]o doctrine or principle of law laid down by the court in a decision rendered *en banc* or in a division may be modified or reversed except by the court sitting *en banc*." 1987 PHIL. CONST., art. VIII, § 4.

¹³⁹ *Wellington*, *supra* note 131, at 564.

¹⁴⁰ *Id.*, at 567.

"the monthly minimum wage shall not be less than the statutory minimum wage multiplied by 365 days divided by twelve", and payment of that salary "for all days of the month whether worked or not" and "irrespective of the number of working days therein."¹⁴¹

On this point, although without legal basis, the doctrine of "a fair day's wage for a fair day's labor"¹⁴² coupled with the policy that all doubts should be interpreted liberally in favor of labor¹⁴³ serve to fill in the gap. Further, it bears reiterating that the legal basis used by the Supreme Court in its decision has already been declared null and void as early as 1984.

The theory that a regular holiday falling on a Sunday does not create an additional working day in case the divisor is 314 days,¹⁴⁴ needs to be re-examined.

Let us assume that in a given year, four (4) regular holidays coincide with a Sunday. Will the divisor of 314 days still accurately reflect the actual working days?

The 314 factor is broken down as follows:

304	Actual working days
+ 10	Legal holidays
314	
Divisor	
===	

It is apparent that due to the regular holidays falling on a Sunday, the component figure for actual working days is inaccurate, although for the legal holidays remain unchanged since the law mandates payment therefor. The 304 days represent the working days from Mondays to Saturdays. Sundays are excluded from the divisor since the 51 rest days are deducted from 365 total number of days in a year. Thus, the four (4) regular holidays which coincided with a Sunday created additional working days since those days should have been holidays. The employee will have had to work on those days, since with the use of the 314 factor, he is only a daily-paid employee. It appears then, that he will not get compensated for work on those days since his salary only accounts for the 304 actual working days. This is attributed to the fact that the component for actual working days in the 314 factor did not consider the additional working days created by the regular holidays coinciding with Sundays.

Contrary to the theory of the Supreme Court, the year did not increase in terms of days even, with the additional working days created; only the component figures changed.

The provision in the Rules that, "where a regular holiday falls on a Sunday, the following day shall be considered a special holiday . . . unless said day is also a regular holiday",¹⁴⁵ was not considered by the Supreme Court in the *Wellington* case. An application of the afore-mentioned provision of the Rules means that the Monday following the Sunday-regular holiday is a special holiday. The proponent

¹⁴¹ *Id.*

¹⁴² See PHIL. CONST., art. XIII, § 3.

¹⁴³ Labor Code of the Philippines, P.D. 442, art. 4 (1974).

¹⁴⁴ *Wellington*, *supra* note 131, at 566.

¹⁴⁵ Rules Implementing the Labor Code, Book III, Rule IV, § 9 (b) (1976).

believes that the only way to justify the Wellington doctrine is by invoking such provision in the Rules. Then, it can be argued that the additional working day is offset by the special holiday. It is, however, questionable since the special holiday that the Rules created was not so provided for either in the Labor Code or Executive Order No. 203. On this score, the Rules can be considered to have been issued by the Secretary of Labor in excess of his rule-making powers since what the Secretary effectively did was to legislate an additional special holiday.

Finally, the Supreme Court held that the "legal provisions governing monthly compensation are evidently intended precisely to avoid re-computations and alterations in the salary on account of the contingencies which are routinely made between the employer and the employees when the wages are paid on a daily basis."¹⁴⁶ This ratiocination loses force when we consider the reality that the Wellington employees are actually daily-paid employees. In addition, a practical approach is for the employer to make sure that the actual number of working days are indeed as they are reflected in the divisor otherwise, justice and equity dictate that the employees be paid accordingly for the additional working days. This holds true notwithstanding the inconvenience that may be caused the employer.

D. Regular Holiday Falling on a Rest Day which is a Special Day

Although the law is silent on how to treat a regular holiday falling on a rest day which is also a special day, the proponent submits that in keeping with the policy that all doubts shall be liberally construed in favor of labor, work rendered on such day merits a compensation of 300%¹⁴⁷ all in all. The 200% represents the work rendered on a regular holiday while the other 100% represents the premium for work rendered on a special day falling on a scheduled rest day.

In the case of a *genuine* monthly-paid employee, should no work be rendered on that day, he is entitled to no additional benefit other than his monthly salary. On the other hand, if he works on that day, then he is entitled only to 200%¹⁴⁸ since the base rate is included in his monthly pay.

As to daily-paid employees, if the divisor subsumes the regular holidays and the day is worked, then the daily-paid employee is entitled to 200% of his regular pay in addition to his salary. If the regular holidays are not considered in the divisor, then the employee is entitled to the entire 300%.¹⁴⁹

¹⁴⁶ Wellington, *supra* note 130, at 567, 568.

¹⁴⁷ Labor Code of the Philippines, art. 94 (b) provides that work on a regular holiday is entitled to 200% of basic pay while art. 93 (c) provides that work on a special holiday falling on a rest day is to be given a 50% premium. Thus, the 300% is broken down as follows:

200 %	Worked regular holiday
+100 %	50 % x 200 % as premium

300 % Total

¹⁴⁸ Only if the Sunday is his scheduled rest day since the other 100% is already included in his monthly salary.

¹⁴⁹ See computation in note 147.

E. Changing the Divisor

With respect to genuine monthly-paid employees, the divisor can only be 365 days since any other divisor will fail to consider even the unworked rest days and regular and special holidays.

As to daily-paid employees, a variety of divisors can be used depending upon the agreement of the employer and the employees. What are the legal implications of a change in the divisor insofar as daily-paid employees are concerned?

For example, a change from *Group IV* to *Group II* will result in a lower daily rate since the divisor of 314 days will yield a lower daily rate.

The Rules provide that nothing therein shall justify an employer in reducing the compensation for the unworked Sundays, holidays or other rest days which are considered paid off-days or holidays by agreement or practice.¹⁵⁰

On the other hand, the Labor Code provides for the "non-diminution of benefits rule."¹⁵¹ It essentially means that benefits being given to employees cannot be taken away by the employer because the benefit has become part of the employment contract, written or unwritten.¹⁵²

The rule against diminution of benefits is applicable if it is shown that the grant of the benefit is based on an expressed policy, or has ripened into practice over a long period of time and that the practice is consistent and deliberate.¹⁵³

Thus, insofar as a change in the divisor whereby the ten (10) regular holidays are deducted, and whereas previously they were not, it is submitted that to do so will violate the non-diminution of benefits rule. The Supreme Court has held that "[l]egal holiday pay benefit cannot be withdrawn after being practiced continuously."¹⁵⁴

If the change contemplates maintaining the regular holiday component but adopting a different divisor, it is important that the resulting daily rate should be higher than the previous resulting daily rate. Otherwise, the employees will also suffer a diminution in the benefits received since the daily rate comes into play in a variety of benefits being enjoyed by the employee.

There are institutions that use two (2) different sets of divisors simultaneously but for different purposes.¹⁵⁵ One divisor may be used for purposes of overtime computation and conversion of leave benefits while another divisor may be used to comply with the wage increase mandated by law.¹⁵⁶ A *caveat* has to be made on this point. If the larger divisor is used to compute the overtime and leave benefits, then this is clearly not favorable from the point of view of the employee since the resulting daily wage using the larger divisor will be smaller. However, if it is the smaller divisor that is used for such benefits, then this will be

¹⁵⁰ Rules Implementing the Labor Code, Book III, Rule III, §8 (1976).

¹⁵¹ Labor Code of the Philippines, P.D. 442, art. 100 (1974).

¹⁵² CESARIO A. AZUCENA, JR., EVERYONE'S LABOR CODE 64 (1997).

¹⁵³ *Id.*

¹⁵⁴ Cebu Institute of Technology v. Ople, 156 SCRA 629, 632 (1987).

¹⁵⁵ See Chartered Bank v. Ople, 138 SCRA 273 (1965).

¹⁵⁶ Interview with Ms. Susana Quimpo, Supervising Labor and Employment Officer of Wage and Hours Standards Division of the Bureau of Working Conditions, DOLE (Oct. 21, 1998).

favorable to the employee. The same is also true insofar as deductions from wages on account of absences are concerned, the only difference being that a larger divisor will be favorable to the employee since the resulting daily wage will be smaller.

In all the foregoing, it must be emphasized that the use of two (2) different divisors should be agreed upon by both employer and employee, after taking into account the *caveat* mentioned.

F. The Transition Period

In enforcing and implementing the proposed clarificatory Department Order, the question is whether the holiday pay benefits given the employees before the issuance thereof, can still be withdrawn. Of primordial significance is Article 100 of the Labor Code which provides that, "[n]othing in the Book shall be construed to eliminate or in any way diminish supplements or other employee benefits being enjoyed at the time of the promulgation of the Code."

The provisions of the Civil Code find supplementary application as to obligations derived from law which are not covered by the provisions of the Labor Code.¹⁵⁷ Pertinent in this respect are the relevant Civil Code provisions on *solutio indebiti*.¹⁵⁸

Prescinding from jurisprudence,¹⁵⁹ Article 100 of the Labor Code will preclude the withdrawal of such benefits only in cases where the error in implementation is reduced into writing in the form of a contract or agreement.

Furthermore, in *Globe Mackay Cable and Radio Corp. v. NLRC*,¹⁶⁰ the Supreme Court ruled that in the absence of proof of the following: 1) employer practice over a long period of time and 2) in a consistent and deliberate manner, no vested right can arise from the error in implementation.¹⁶¹

Thus, an error in implementation of the law not incorporated in a binding contract between the employer and the employee can still be rectified for as long as it does not constitute an established employer practice.

Then, a rectification of the erroneous practice only leads to compliance with the provisions of the Labor Code and would not extend to the withdrawal or diminution of conscious grants of benefits in excess of the minimum requirements.¹⁶²

VI. CONCLUSION

In synthesis, a proper characterization of the employee either as a monthly-paid or a daily-paid employee must be made in order to resolve the issue of entitlement to holiday pay. Towards this end, the use of the divisor test will be

¹⁵⁷ Civil Code, art. 1158.

¹⁵⁸ Art. 2154 provides that "[i]f something is received when there is no right to demand it, and it was unduly delivered through mistake, the obligation to return it arises."

Art. 2155 provides that "[p]ayment by reason of a mistake in the construction or application of a doubtful or difficult question of law may come within the scope of the preceding article."

¹⁵⁹ See *Oceanic Pharmacal Employees Union (FFW) v. Inciong*, 94 SCRA 270 (1979), and *Citibank Phils. Employees Union-NATU v. Minister of Labor*, 97 SCRA 52 (1980).

¹⁶⁰ 163 SCRA 71 (1988).

¹⁶¹ *Id.*

¹⁶² AMADOR, *supra* note 18, at 160.

necessary. The monthly-paid employee is entitled to holiday pay irrespective of whether it is a regular holiday or a special day, and whether he worked on that day or not. As to regular holiday pay, if the divisor used already took into account the regular holidays, then the monthly paid employee cannot anymore ask for additional compensation. His salary already includes the regular holiday pay in such scenario. A monthly paid employee is also entitled to compensation for unworked rest days, since the salary of a genuine monthly-paid employee includes payment for every day of the month. The same cannot be said of a daily-paid employee. However, the daily-paid employee can demand regular holiday pay equivalent to his daily rate if the divisor used does not yet account for the regular holidays. Otherwise, the salary received by him already includes his regular holiday pay under the law.

When two regular holidays fall on the same day, the worker is entitled to 200% of his daily rate if he does not work on that day. However, the amount demandable from the employer will depend on the divisor used. If the divisor takes into account the regular holidays, then a monthly-paid or daily-paid employee who does not work on that day, cannot ask for payment therefor since it already forms part of his salary. Work rendered on that day merits an additional 100 % of the daily rate as premium pay.

The amount to which an employee is entitled in case a regular holiday falls on a rest day, which is also a special day, will again depend on the divisor test. The same is true for a regular holiday falling on a rest day. In the latter case, since the component of the divisor for actual working days is no longer accurate, the employee characterized as a daily paid employee should be compensated for the additional working days.

As to multiple divisors in one company, there exists no legal obstacle for as long as more benefits are granted the employee. The same can be said for the issue of modifying the divisor. As long as the new daily rate for purposes of computing employee benefits is higher, then not only should it be allowed, it should even be encouraged.

All told, the fundamental function of the courts is to interpret the law, notwithstanding the mandate that "no judge or court shall decline to render judgment by reason of the silence, obscurity or insufficiency of the laws." Setting aside these varying interpretations, the issuance of a clarificatory Department Order on the legal issues discussed in this study, is most certainly necessary in order that the Labor Code be read in a "manner that would breathe life into it, rather than defeat it." It is a step in the right direction.

VII. RECOMMENDATIONS

"The law is stable, but it cannot be still."

—Dean Roscoe Pound

A. The Need for Clarificatory Rules

The flip-flopping of the Supreme Court on the legal issues tackled in this study is rooted in the insufficiency of statutory provisions, compounded by the numerous interpretations given them.

The DOLE is given by law the authority to promulgate the necessary implementing rules and regulations.¹⁶³ Being the lead agency in enforcing the labor laws, it possesses rule-making power for the enforcement of the Labor Code.¹⁶⁴ Such rules and regulations have the force of law.¹⁶⁵ As long as the delegating statute satisfies the requirements of completeness and sufficiency of standards, the regulations passed by an administrative body are just as binding as if the regulation had been written into the original statute itself.¹⁶⁶

This study has highlighted the need for clarificatory Rules on the Labor Code provisions on holiday pay. Towards this end, it is submitted by the proponent that a Department Order in this regard is both timely and appropriate.

B. A Blue Print for a Department Order

The clarificatory Department Order should provide pertinent guidelines on the following gray areas, all of which are of paramount importance:

- (1) Proper characterization of a monthly-paid employee;
- (2) Proper characterization of a daily-paid employee;
- (3) Differentiation between the above definitions from the time of payment of wages;
- (4) The Divisor Test:
 - a. Definition of the divisor;
 - b. Definition of the divisor test;
 - c. Relevance of the divisor test;
 - d. Guidelines on the proper divisor to be used for a monthly-paid employee;
 - e. Guidelines on allowable divisors that can be used for a daily-paid employee.
- (5) Modified the divisors:
 - a. As applied to a monthly-paid employee;
 - b. As applied to a daily-paid employee;
 - c. To rectify erroneous employer practice.
- (6) Two divisors, one establishment:
 - a. General Rule: one divisor per company;
 - b. Exceptions:
 - i. More favorable to the employee;
 - ii. Lower divisor to be used for increments to wages;
 - iii. Higher divisor to be used for deductions from wages.
- (7) Proper procedure to be followed in the event the following scenarios occur:
 - a. Two regular holidays coinciding on the same day;
 - b. Regular holiday falling on a rest day;

¹⁶³ Labor Code of the Philippines, P.D. 442, art. 5 (1974).

¹⁶⁴ AZUCENA, *supra* note 152, at 5.

¹⁶⁵ JOAQUIN G. BERNAS THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 611 (1996).

¹⁶⁶ *Id.* at 612.

- c. Regular holiday coinciding with a rest day which is also a special day.
- (8) Supersession Clause

C. The Proposal

This study would be incomplete without a proposal of the contemplated clarificatory Department Order. The Department Order will form part and parcel of the Rules Implementing Book III of the Labor Code.

The proponent hereinafter provides the clarificatory Department Order integrating the legal issues examined in this study, as follows:

RULE IV-A

HOLIDAY PAY

of

DAILY PAID and MONTHLY PAID EMPLOYEES

"SECTION 1. Rationale. This Rule is being issued to clarify the provisions of the law as to the proper treatment of several scenarios and basic principles which have been subject to varying interpretations.

"SECTION 2. Coverage. This Rule shall apply to all employees except those excluded by the Labor Code.

"SECTION 3. Definition of terms. As used in this Rule, the following shall mean:

a. "Regular Holiday" refers to the ten (10) regular holidays in any calendar year, which are enumerated under Executive Order No. 203;

b. "Special Day" refers to All Saints Day and the Last day of the Year, in addition to those proclaimed by the President of the Philippines as such;

c. "Monthly-paid Employee" is one whose salary includes payments for every day of the month although he does not regularly work on his designated rest day and/or regular holidays and special days. The equivalent daily wage, i.e., the monthly salary times twelve divided by 365 days should not be less than the statutory minimum wage per day. Provided, however, that no deductions are made from the monthly salary for unworked rest days and holidays, whether regular or special, and that said monthly salary is uniform throughout the year;

d. "Daily-paid Employee" refers to one who is paid only for the days he actually worked. For unworked regular holidays, he is paid his basic wage and allowance, provided, he is present or on leave of absence with pay on the working day immediately preceding the regular holiday;

e. "Employees paid monthly" refers to monthly or daily-paid employees, as defined in subsections (c) and (d), who are paid their wages at intervals greater than one day but no greater than sixteen (16) days." Provided, however, that a daily paid employee can at the same time be paid monthly which represents payments for the days actually worked within the month;

f. "Divisor" refers to the equivalent number of days agreed upon by the employer and employees for converting the equivalent monthly salary into a daily salary;

"SECTION 4. **The Divisor Test.** The process of converting the monthly salary of an employee, who may be a monthly-paid employee or a daily-paid employee. In the case of a monthly-paid employee, work rendered on a rest day, a regular holiday, or a special day entitles the employee only to the premium or additional payment over and above the monthly salary. In the case of a daily-paid employee, if the divisor already includes the rest day or regular holidays, then the base pay therefor is already included in his salary, such that he is entitled only to the corresponding premium payment under the law; otherwise, the base pay for the day, as well as the premium, are due the employee in case he works on the rest day or regular holiday;

"SECTION 5. **Divisor for a Monthly-paid Employee.** The only divisor that can be used for a monthly-paid employee, as defined herein, is 365 days, the total number of days in any calendar year;

"SECTION 6. **Divisor for a Daily-paid Employee.** In the case of a daily-paid employee, any divisor other than 365 days can be agreed upon by the employer and employees;

"SECTION 7. **Modifying the divisor.** Changing the divisor of 365 days for a monthly-paid employee to other divisors, alters the nature of the employment to that of daily-paid employee; Changing the divisor used for daily-paid employees can be made. Provided, however, that the new divisor for employee benefits is smaller than the previous divisor, thereby increasing the daily rate.

A divisor embodied in a collective bargaining agreement cannot be changed during the life of the agreement. Provided, however, that the erroneous interpretation of a difficult or doubtful question of law not embodied in an agreement, may be discontinued if it has not been practiced over a long period of time and in a consistent and deliberate manner;

"SECTION 8. **Multiple divisors.** Only one divisor should be agreed upon. Provided, however, that the use of multiple divisors can be made for as long as the smaller divisor is used for determining increments to the wage or salary, Provided further, that the larger divisor is used for purposes of determining deductions from wages;

"SECTION 9. **Two Regular Holidays on the Same Day.** When two regular holidays fall on the same day, the employees who are not otherwise excepted by the Labor Code from entitlement to holiday pay benefits are entitled to 200% of their daily salary, even if no work is rendered thereon; Provided, however, that they are present, or on leave of absence with pay, on the working day immediately preceding such regular holiday;

When work is rendered thereon, the employee permitted or suffered to work is entitled to an additional 100% over and above the 200% basic wage for that day; Provided, that when the day is also a scheduled rest day, work rendered thereon is entitled to an additional thirty percent (30%) of the 300%; of the daily rate. Provided further; that this is without prejudice to more liberal employee benefits granted by the employer;

The amount of holiday pay benefits will depend on the divisor used, i.e., whether it already includes the base pay for that day. Monthly-paid employees who work on that day are entitled only to the additional 100% since the 200% base pay is included in their monthly salary. Daily-paid employees, whose divisor already includes the base pay, are entitled only to the additional 100% of their daily rate; otherwise, the daily-paid employee is entitled to the total of 300% of his daily salary;

"SECTION 10. **Regular Holiday falling on a Rest day.** A regular holiday falling on a rest day creates additional working days for daily-paid employees, which days, if worked, should be duly compensated. Provided, however, that for National Heroes' Day where the

daily-paid employee's divisor excludes 51 Sundays as rest days, no additional working day is created; Provided, further, that this does not apply to monthly-paid employees who are considered paid for all the days of the month, whether worked or not;

"SECTION 11. **Regular Holiday on a Rest Day declared a Special Day.** When a regular holiday falls on a rest day which is also a special day, a daily-paid employee who is permitted or suffered to work on that day is entitled to 300% of his daily rate, Provided, however, that if the divisor of the daily-paid employee already includes the base pay of 100%, then only the premium of 200% should be given the employee; Provided further, that when a monthly-paid employee works on that day, an additional 200% of his daily rate is forthcoming in addition to the monthly salary;

"SECTION 12. **Supersession.** All rules and regulations issued by the Secretary of Labor and Employment inconsistent with the provisions of this Rule are hereby superseded. "