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SUPREME COURT OF CALIFORNIA

JENNIFER AUGUSTUS, et al.,

Plaintiffs and Respondents,

v.

ABM SECURITY SERVICES, INC.,

Defendant and Appellant.

2d Civil Nos. B243788 & B247392

(Los Angeles County
Super. Ct. Nos. BC336416, BC345918,
CG5444421)

PETITION FOR REVIEW

After a Decision by the Court of Appeal
Second Appellate District, Division One

Service on Attorney General and District Attorney
[Bus. & Prof. Code § 17209; *See* CRC, Rule 29(b)]

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1. **Relieved of all Duty:** Labor Code section 226.7 forbids employers from requiring employees to "work" during meal breaks and rest breaks. In *Brinker*,[1] this Court held that for employers to satisfy this requirement for meal breaks, they must relieve their employees of all duties during the break. Does the same relieved-of-all-duties standard apply for rest breaks, as well?

2. **Work:** In *Mendiola*,[2] this Court held that security guards were performing compensable "work" while they were on call. Given the prohibition in Labor Code section 226.7 on employees being required to "work" during breaks, may employers require employees to remain on call during rest breaks?

[1] *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1040.
[2] *Mendiola v. CPS Sec. Solutions, Inc.* (2015) 60 Cal.4th 833, 838.

INTRODUCTION

This is an appeal from a $94-million summary judgment in favor of a class of more than 14,000 security guards who were forced to remain on duty during their nominal rest breaks. Summary judgment was possible because the entire case hinges on a discrete legal question:

> What standard must employers follow to provide rest breaks that comply with California law?

This is a fundamental issue of California labor law, which directly affects millions of employers and employees in this State. This Court has yet to directly address the issue. In *Brinker*, it held that employees must be relieved of all duty during meal breaks, but it never expressly applied the same standard to rest breaks.

Nevertheless, because Labor Code section 226.7 forbids employers from requiring employees to work during *either* rest or meal breaks, appellate courts have consistently found that the two types of breaks were governed by the same legal standard — both before *Brinker* and after.

The Court of Appeal's decision in this case, however, rejects those findings. It declares that *Brinker*'s "relieved of all duty" standard does *not* apply to rest breaks because that test is derived from language in Wage Order No. 4 that is exclusive to meal breaks. The court therefore infers that the IWC intended to allow "on-duty rest breaks."

Every prior appellate decision about rest breaks has taken the opposite position. But the opinion in this case examines the question in significantly more depth than prior courts have. Thus, for the time being, it is the authoritative precedent in California on this vital issue. There is just one problem: it reaches the wrong conclusion.

The court's entire theory is predicated on the false belief that California law recognizes the existence of "on-duty rest breaks." In reality,

there is no such thing, because a rest break is a 10-minute period during which an employee's job duties are temporarily suspended. When the employee is not relieved of duty, the result is *not* an "on duty" rest break. It is simply *no rest break* at all.

That is why the Wage Order describes the conditions when on-duty meal breaks are permitted, but says not a word about on-duty rest breaks. The IWC did not accept the concept of an "on-duty rest break," so it avoided incorporating them into California law. Instead of allowing employees to remain on duty during rest breaks, it authorized the DLSE to issue to employers carefully crafted exemptions from the rest-break requirements when compliance would inflict undue hardship on the employer's business.

In this case, ABM knew that it was obligated to relieve its employees of all duty during rest breaks, because in 2006 it successfully applied to the DLSE for an exemption from that requirement. But it later abandoned the exemption because it found it cumbersome to administer. Thus, in the trial court and on appeal, ABM never disputed that it was obligated to relieve its guards of all duty on their breaks. The Court of Appeal's conclusion that the meaning of "work" in Labor Code section 226.7 could have different meanings for meal breaks and rest breaks was a rule it derived on its own.

Eight days after the panel issued its opinion, this Court filed its opinion in *Mendiola*, which established that the time security guards spent on call at their jobsites constituted "hours worked" for which they were entitled to compensation. That holding should have been decisive in this case, because it means that ABM was forcing its guards to work during their rest breaks — in direct violation of section 226.7.

The plaintiffs accordingly filed a rehearing petition based on *Mendiola.* Without ordering briefing from ABM, the panel denied rehearing and modified its opinion to try to avoid the import of *Mendiola.* Its new rationale was that although on-call guards may be engaging in compensable "work," they are not actually "working" in violation of section 226.7.

This is a novel and troubling interpretation, which raises far more questions than it answers about how courts, businesses, and employees can ascertain which forms of "work" are acceptable during breaks and which are not. Are employees "working" if they perform only a "few" duties during a break? Do they need to perform some, most, or all duties before their labor legally counts as work?

Moreover, this new approach lends itself to the exploitation of workers, because it permits employers to require employees to perform some types of compensable work during rest breaks, effectively giving employers the right to extract an extra 20 minutes of labor that are supposed to belong to the worker in each 8-hour shift.

Depublishing the Court of Appeal's opinion would not go far enough to protect workers or reassure businesses. It would deprive more than 14,000 members of the plaintiff class appropriate restitution for having been denied legally compliant rest breaks, and it would deny companies the guidance they need about how to craft rest-break policies that comply with California law. While a depublished opinion would not bind future courts, it would still contain a ready-made rationale for on-duty rest breaks. Many employers will be emboldened to test those arguments if ABM remains victorious, especially given this case's high visibility in employment-law circles and the involvement of so many influential amici.

As long as the legality of on-duty rest breaks remains in doubt, even honest companies may feel pressured to adopt them in order to keep pace with competitors. In the short term, workers will be harmed; in the long term, the companies themselves could face crushing statutory liability. What all sides need is a clear, definitive explanation of what it takes for a rest break to comply with California law. This Court should grant review so that it can provide a permanent, definitive answer.

STATEMENT OF THE CASE

A. Factual Summary

ABM Security Services, Inc. ("ABM"), formerly d/b/a American Commercial Security Services, Inc. ("ACSS") employs thousands of security guards in California at residential, retail, office, and industrial sites. (Opn. at 3; 10JA 2965:16-2966:15.) Some sites have only one guard on duty; others have multiple guards working at the same time. (*Id.*)

Named plaintiffs Jennifer Augustus, Emmanuel Davis, and Delores Hall are all former ABM security guards. (Opn. at 3.)

Citing an ABM document titled "Post Orders," the Court of Appeal described the typical job duties for its security guards (which ABM refers to as security officers) in these terms:

> The primary responsibility of Security at a guarded facility is to provide an immediate and correct response to emergency/life safety situations (i.e. fire, medical emergency, bomb threat, elevator entrapments, earthquakes, etc.) In addition, the Security officers must provide physical security for the building, its tenants and their employees. . . [Guards] may be required to patrol guarded buildings, identify and report safety issues, hoist and lower flags, greet visitors, assist building tenants and

> visitors, respond to emergencies, provide escorts to parking lots, monitor and restrict access to guarded buildings, eject trespassers, monitor and sometimes either restrict or assist in moving property into and out of guarded buildings, direct vehicular traffic and parking, and make reports. (Opn. at 3.)

In 2006, ABM applied to the DLSE for an exemption from California's rest-break requirements for guards at its single-guard sites. (Opn. at 5, fn. 4; 10JA 2821, 2822.) The DLSE granted ABM a one-year exemption, which expired in 2007. (10JA 2822.) ABM later applied for and received a second annual exemption, but declined to use it. (12JA 3367; ABM's AOB at 9.)

B. Procedural Summary

1. The plaintiffs' lawsuit

In 2005, Augustus filed a putative class action, seeking to represent all security guards employed by ABM. (Opn. at 4.) In 2006, her complaint was related to and consolidated with similar complaints filed by Davis and Hall, and a master complaint was filed. The master complaint alleges, *inter alia*, that ABM "fail[ed] to consistently provide uninterrupted rest periods" under Wage Order No. 4, subd. (12), or premium wages in lieu of rest breaks, as required by Labor Code section 226.7.

2. Class certification

In 2009, the trial court granted the plaintiffs' motion for class certification of the rest-break class, which dated to July 2001. (Opn. at 3.) The class period was later revised to extend from July 12, 2001 to July 1, 2011, and to exclude employees who had been paid statutory penalties for rest-break violations, as well as guards who had worked at single-guard sites

during the 1-year period when ABM had received an administrative exemption for those sites. (Opn. at 5, n. 4.)

3. The trial court finds that ABM fails to give its guards off-duty rest breaks and grants summary adjudication to Augustus on that issue

In 2009, the plaintiffs moved for summary adjudication of ABM's liability on their rest-break claim. Their motion was based principally on the admission of ABM's designated person-most-knowledgeable about ABM's rest-break policy, Fred Setayesh, ABM's Senior Branch Manager. (Opn. at 6; 2JA 476: 24-27.) Mr. Setayesh testified that ABM guards were not relieved of all duties during their rest breaks. (Opn. at 6.)

ABM cross-moved for summary judgment. In the statement of facts in its motion, ABM explained that "All guards are expected to ensure the security of their properties as well as the tenants at their worksite. This includes being available should an emergency arise, such as a medical crisis or fire, or an unexpected escort be needed." (7JA 2053:9-11.)

ABM argued that the guards were not really working during their rest breaks because it allowed them to enjoy privileges they were denied while on duty. It asserted: "Such leisure activities, like reading a book and smoking, are clearly prohibited during work hours. . . . Therefore, there is no question that when an officer engages in these non-work activities, he or she is taking a break, even if his or her cell phone or pager may (in some instances) still be on." (10JA 2914:20-24; Opn. at 6.)

In opposing the plaintiffs' motion, ABM's response to the plaintiffs' separate statement of undisputed facts acknowledged that ABM guards "must keep their radios or pagers on in case an emergency - fire, flood, criminal activity, medical crisis or bomb threat - should arise to ensure the safety of the facility and its tenants. (10JA 2901:27-2902:5.)

During oral argument of the cross-motions, ABM's counsel admitted that California's rest-break rules required employees to be relieved of all duty. (3RT 4526:24-26.) He argued that ABM complied with that requirement because "[b]eing relieved of duty doesn't mean that you are relieved of the mere possibility that you can be called back." (3RT 4526:26-28.)

On December 23, 2010, Judge Carolyn Kuhl issued a written order granting the plaintiffs' motion for summary adjudication and denying ABM's motion. (Opn. at 6; 13JA 3754-3755.) That order described the parties' respective positions this way:

> Defendant's policies make all rest breaks subject to interruption in case of an emergency or in case a guard is needed (for example, when a tenant needs an escort to the parking lot, which could not be called a life threatening emergency but nonetheless is an important job duty for a security guard.) Because a guard must be available for these situations, guards must keep their cell phones or pagers on. Defendant's position is that interruptions are so rare that the guards are effectively getting their breaks; that plaintiffs have presented no evidence that a guard who was interrupted could not restart their break; and that, because a guard is free to engage in non-work related activities during the rest period (provided the rest break is not interrupted) such as smoking cigarettes, surfing the internet, reading a newspaper or book, having a cup of coffee, etc., that the breaks are in compliance with the wage

order and should not be considered on-duty time.

(13JA 3757-3758.)

Judge Kuhl ruled that ABM security guards remained under ABM's control while they took their breaks, even though they were allowed to engage in some personal activities, and ABM therefore violated the requirement that employers provide duty-free rest breaks. (13JA 3758-3760; Opn. at 6.)

4. The trial court grants summary judgment in favor of the plaintiffs

In 2012, plaintiffs moved for summary judgment on their damages claim, contending the only remaining task was to apply the court's earlier finding to undisputed facts. (Opn. at 6.) Plaintiffs contended that, because ABM forced its security guards to remain on duty during their rest breaks, it owed each employee an additional hour of payment under Labor Code section 226.7, subdivision (b), plus a waiting- time penalty, and interest. (*Id.*)[3]

Using ABM's payroll records, plaintiffs' expert determined there were 14,788 class members who worked a total of 5,166,618 days of at least 3.5 hours in length. Multiplying that number by an average pay rate of $10.87 resulted in $56,102,198 in unpaid wages and restitution. Plaintiffs added a claim for $41,288,882 in accrued interest and $5,689,860 in waiting time penalties, and requested that judgment be entered in favor of the class in the amount of $103,808,940, plus costs and attorney fees. (Opn. at 7.)

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[3] Section 226.7 was amended in 2013. (Stats. 2013, ch. 719 (S.B. 435), § 1.) Among other things, the amendment redesignated former subdivisions (a) and (b) as subdivisions (b) and (c), respectively. All subsequent references to the statute are to the current redesignated subdivisions (b) and (c).

Judge Wiley heard the motion for summary judgment. In a tentative ruling issued before the hearing, he incorporated the court's prior summary adjudication ruling and stated that "[p]ut simply, if you are on call, you are not on break." (Opn. at 7.) He found that the pattern of evidence submitted showed that ABM did not relieve its workers of all duty during their breaks, and that these on-duty breaks were legally invalid. (*Id.*)

After the hearing, the court adopted its tentative ruling, denied ABM's concurrent motion to decertify the class, and awarded judgment to the plaintiff class for $55,887,565 in statutory damages pursuant to section 226.7, $31,204,465 in pre-judgment interest, and $2,650,096 in waiting time penalties. (Opn. at 7.)

Six months later, the court entered an amended judgment that awarded plaintiffs approximately $27 million in attorney fees, representing 30 percent of the common fund, plus $4,455,336.88 in fees under Code of Civil Procedure section 1021.5. (Opn. at 8.)

ABM appealed the original judgment and the amended judgment. (Opn. at 8.) The Court of Appeal consolidated both appeals. (*Id.*)

The appeal garnered considerable attention from both employer-side and employee-side organizations. Amicus briefs were filed in support of ABM by the California Employment Law Council and Employer's Group; by the California Chamber of Commerce; by the U.S. Chamber of Commerce, the National Association of Security Companies, and the California Association of Licensed Security Agencies; and by TrueBlue, Inc. Amicus briefs supporting the plaintiffs' position were filed by the California Employment Lawyers' Association (CELA) and by the Consumer Attorney's Association of California.

5. The Court of Appeal's original unpublished opinion

On December 31, 2014, the Court of Appeal issued an unpublished opinion that affirmed the class-certification order, but reversed the summary judgment against ABM. The court did not find that there were triable issues of fact that precluded summary judgment. Instead, it determined that on-call rest breaks did not violate the law. Its opinion acknowledged that California forbids employers from requiring their employees to "work" during rest breaks. But it held that employers are not required to relieve their workers of all duties during rest breaks. The court encapsulated its reasoning in this paragraph from page 10 of its opinion:

> Here, although ABM's security guards were required to remain on call during their rest breaks, they were otherwise permitted to engage and did engage in various nonwork activities, including smoking, reading, making personal telephone calls, attending to personal business, and surfing the Internet. The issue is whether simply being on-call constitutes performing "work." We conclude it does not. (Opn. at 10.)

6. The plaintiffs' rehearing petition

Eight days after the court filed its opinion reversing the summary judgment, this Court filed its opinion in *Mendiola v. CPS Security Solutions, Inc.*, No. S212704, Jan. 8, 2015, 60 Cal.4th 833. *Mendiola* holds that security guards who are kept on call by their employer are, in fact, "working" and are therefore entitled to compensation even if they are permitted to engage in other personal activities, "including sleeping, showering, eating, reading, watching television, and browsing the Internet." (*Mendiola* at p. 9.)

The plaintiffs argued that the holding in *Mendiola* — that security guards are working while they are kept on call — and the logic that the

Court employed to reach that holding, were irreconcilable with the Court of Appeal's opinion in this case. The plaintiffs asked the court below to grant rehearing and to decide this case in light of *Mendiola.*

7. The Court of Appeal denies rehearing, modifies its opinion, and grants the requests for publication

The Court of Appeal did not solicit a response to the rehearing petition from ABM. While the rehearing request was pending, the court received several requests for publication, including from ABM, United Site Services, the California Retailers Association, Sedgwick, LLP, and CPS Security Solutions.

On January 29, 2015, the panel issued an order denying the petition, modifying its opinion, and granting publication. The court determined that instead of requiring it to reconsider its conclusion that being on call did not constitute "work," this Court's opinion in *Mendiola* actually buttressed its decision, because it read *Mendiola* to implicitly distinguish between actually working and simply being available to work.

As the court put it: "In sum, although on-call hours constitute 'hours worked,' remaining available to work is not the same as performing work. (See *Mendiola, supra,* 2015 Cal. LEXIS at p. 9 [distinguishing readiness to serve from service itself]; see also Cal. Code Regs., tit. 8, § 11040, subd. 2(K) [distinguishing "hours worked" from work actually performed].) Section 226.7 proscribes only work on a rest break." (Order at 4.)

To reach this conclusion, the court explained that the term "work" is used as both a noun and a verb in Wage Order 4. When used as a noun it means "employment," that is, the time when an employee is subject to the employer's control. (Order at 1.) By contrast, when work is used as a verb it means "exertion." (*Id.*) In the court's view, Labor Code section 226.7,

which prohibits employers from requiring their employees to "work" while on rest breaks, "uses 'work' as an infinitive verb contraposed with 'rest.' It is evident, therefore, that 'work' in that section means exertion on an employer's behalf." (Order at 2.)

Citing *Mendiola*, the court declared that:

> Not all employees at work actually perform work. '[A]n employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen .... [I]dleness plays a part in all employments in a stand-by capacity.'"(*Mendiola v. CPS Security Solutions, Inc.* (2015) 2015 Cal. LEXIS 3, 9-10 (*Mendiola*), quoting *Armour & Co. v. Wantock* (1944) 323 U.S. 126, 133.) Remaining on call is an example. On-call status is a state of being, not an action. But section 226.7 prohibits only the action, not the status. In other words, it prohibits only working during a rest break, not remaining available to work." (Order at 2, duplicate internal quotation marks omitted.)

The panel bolstered its conclusion by noting that ABM guards who are on rest break do not perform all of the activities that they perform while on duty. (Order at 3.) It also observed that the Wage Order expressly requires that employees be relieved of all duties during meal breaks, but contains no similar requirement for rest breaks. (Order at 2.) In the court's view, "If the IWC had wanted to relieve an employee of all duty during a rest period, including the duty to remain on call, it knew how to do so. That it did not indicates that no such requirement was intended." (*Id.* at 3.)

The court acknowledged that on-call guards "must return to duty if requested, but as discussed above and as implicitly acknowledged in

Mendiola, *supra*, remaining available to work is not the same as performing work." (*Id.*)

WHY REVIEW IS WARRANTED

A. The Court of Appeal adopted two novel legal rules that nullify California's rest-break requirements

1. The opinion says the "relieved of all duty" standard only applies to meal breaks — not rest breaks

The opinion in this case announces that employers are *not* obligated to relieve their employees of all duty during rest breaks. This is a radical change in California employment law because courts previously acknowledged that both rest breaks and meal breaks had to be "duty free."

The Courts of Appeal have applied the "relieved of all duty" standard to rest breaks in numerous opinions in the recent past — not merely in dicta, but also within the *ratio decidendi* of several cases.[4] By adopting the opposite position, the court in this case has created a serious split in authority.

The rule that the panel announced in this case would have changed the outcome in *Godfrey v. Oakland Port Services Corp.* (2014) 230 Cal.App.4th 1267, which affirmed a $1.5-million judgment against a trucking company for failing to provide its drivers off-duty meal and rest breaks. (*Id.* at pp. 1272, 1286-1287.) The defendant challenged the damages calculation by pointing to testimony from a driver who said he took rest breaks while in his truck, waiting in line at the port. (*Id.* at p. 1287, fn. 21.)

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[4] "It is an elementary concept that *ratio decidendi* is the principle or rule which constitutes the basis of the decision and creates binding precedent, while dictum is a general argument or observation unnecessary to the decision which has no force as precedent." (*United Steelworkers of America v. Board of Education* (1984) 162 Cal.App.3d 823, 834, citing 6 Witkin, Cal.Procedure (2d ed. 1971) Ratio Decidendi and Dicta, § 676, p. 4589.)

The Court of Appeal held that those rest breaks were invalid because they occurred during "time that was not off duty." (*Id.*) "Waiting, even in a comfortable location, is 'on-duty' by definition," the court observed. (*Id.* at p. 1286.)

The "relieved of all duty" standard was also applied to rest breaks in *Dailey v. Sears, Roebuck and Co.* (2013) 214 Cal.App.4th 974. That case held that the fact that department-store managers were accessible by cell phone during rest breaks was not substantial evidence that they had been forced to remain "on duty," absent proof that their employer had required them to remain available. (*Id.* at pp. 1000-1002.)

The same standard had been applied in an earlier case — *Bufil v. Dollar Financial Group, Inc.* (2008) 162 Cal.App.4th 1193 — where the Court of Appeal certified a class action based on evidence that the defendant failed to "relieve the employee[s] of all duty for 10 consecutive minutes every four hours in order to accommodate lawful rest breaks."(*Id.* at p. 1199.) It held that the class was ascertainable because the employer's policy meant its workers "were never off duty and could never put up a sign saying 'I'm off on break.'" (*Id.* at p. 1208.)

The legal rationale for requiring employees to be relieved of duty during rest breaks was elucidated by *Faulkinbury v. Boyd & Associates, Inc.* (2013) 216 Cal.App.4th 220, which invoked the DLSE's opinion that a "rest period must be, as the language of Wage Order No. 4–2001 implies, duty-free." (*Id.*, quoting DLSE Opn. Letter 2002.02.22, internal brackets omitted.) That conclusion is directly at odds with the present case's holding that an "on-duty rest period . . . is permissible." (Order at 3.)

The conflict is exacerbated by the opinion's conclusion that previous statements by the DLSE that rest periods must be duty free somehow

meant something other than what they said. First, the court flatly denies that "the DLSE [letter] in 2002 . . . requires that all rest breaks be duty free." (Opn. at 12.) Later, it admits that it was "the DLSE's opinion that rest periods must be duty free" — but implies that the "scope" of that standard is up for debate. (Opn. at 13.) In reality, the DLSE made the breadth of that prohibition clear by indicating that employees could not be required to walk from one work station to another while on break. (DLSE Opn. Let. 2002.02.22.)

The DLSE's opinion was vindicated by this Court's decision in *Brinker*, which held that Labor Code section 226.7, subd. (b), obligates an employer to "relieve the employee of all duty and relinquish any employer control over the employee and how he or she spends the time." (*Id.*, 53 Cal.4th at p. 1059.) It is true the Court addressed that issue in the context of meal breaks. But the statute applies to rest breaks as well; it prohibits "work during a meal or rest or recovery period." (Labor Code § 226.7, subd. (b).) Logically, this Court's interpretation of that prohibition should also apply with equal force to each category of break.

If rest breaks were governed by a different standard, the Court would likely have mentioned that in the portion of its opinion in *Brinker* devoted to the plaintiffs' rest-break claims. Instead, the Court approvingly cited *Bufil* — a case that certified a rest-break class action based on the "relieved of all duty" standard. (*Brinker*, 53 Cal.4th at pp. 1033-1034, citing *Bufil*, 162 Cal.App.4th at p. 1208.) *Brinker* held that the trial court had correctly certified a rest-break class consisting of employees who had not been relieved of all duties during their rest breaks. (*Id.* at pp. 1032-1033.) Thus, although *Brinker* never expressly held that rest breaks must be duty free, that was clearly an unstated premise underlying the decision.

The opinion in this case rejects that logic, advancing two legal arguments in favor of "on duty" rest breaks. Neither of the two arguments can support the radical conclusion that the Court of Appeal reached.

Its opinion first points out that Wage Order No. 4 expressly states that employees must be relieved of all duty during meal breaks — but does not repeat that requirement in the subdivision mandating rest breaks. (Order at 2, comparing Wage Order. No 4, subd. 11(A) & 12(A).) The court infers that the IWC must have omitted the language for a reason, so it concludes that on-duty rest breaks must be legal.

The real answer is much simpler: The IWC did not need to specify that rest breaks should be "off duty," because rest breaks must already be "off duty" by definition. That's what a rest break is — a period in which an employee is freed from performing his or her work duties. (See Merriam-Webster.com [**rest:** "freedom from activity or labor"; **break:** "a respite from work, school, or duty"].)

If employees are required to remain on duty during their rest breaks, then there is nothing to distinguish their breaks from the remainder of the workday. The panel in this case was apparently comfortable with that outcome. (See Order at 3 ["section 226.7 does not require that a rest period be distinguishable from the remainder of the workday"].) But the IWC did not have such an incongruity in mind when it drafted Wage Order No 4.

It is clear that the IWC did not recognize the concept of an "on-duty rest break" because no such term appears in the Wage Order. There are detailed standards that describe when "on-duty meal breaks" are permissible — which makes sense, because employees may voluntarily choose to work while they eat in exchange for extra compensation. (*Id.* at

subd. 11(a).)[5] But there is simply no equivalent allowance for "on-duty rest breaks." (*Faulkinbury v. Boyd & Associates, Inc.*, 216 Cal.App.4th at p. 236 ["There does not appear to be an on-duty rest break exception as there is for meal breaks."].)

The Court of Appeal therefore has it backwards. (See Order at 2-3.) The absence of any reference to "on-duty" rest breaks in the Wage Order was not intended to indicate that those breaks were permissible. When the IWC wanted to authorize on-duty breaks, it knew how to do so. In fact, in 2001, it created a limited exception from the general requirement of off-duty rest breaks in Wage Order 5, allowing certain employees who work in 24-hour residential-care facilities to be required to "maintain general supervision of residents during rest periods," if the employee is in sole charge of the residents, and if the employer provides another rest period if the employee's rest break is interrupted. (Cal. Code Reg., tit. 8, § 11050, subd. (12)(C).)

This standard for residential-care workers is, in effect, the very standard that the Court of Appeal in this case adopted for all workers. Yet, if on-duty rest breaks were already permissible under the general rest-break provisions in all the Wage Orders, there would have been no need for the IWC to create a special provision in Wage Order 5. That narrow and specific exemption is an example of "the exception that proves the rule."

Wage Order 5 is the only Wage Order that contains this authorization for on-duty rest breaks, and it only allows it for a limited class of workers governed by that Wage Order. Rather than creating any other industry-specific exceptions to the rule that rest breaks must be duty free,

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[5] There is nothing inconsistent about employees being on duty during a meal period, as long as they are permitted to eat.

the IWC instead authorized the DLSE to issue carefully tailored exemptions on a case-by-case basis to employers who can demonstrate that the conditions of the job warrant relief from the rest-break requirements. (Wage Order 4, subd. 17.)

By endorsing across-the-board on-duty rest breaks, the Court of Appeal's opinion functionally writes this exemption process out of existence. If employers can simply choose to keep their workers on duty during rest breaks, they will never need to apply to the DLSE for exemptions from the rest-break requirements. Clearly, that was not what the IWC intended.

The opinion's second argument in favor of on-duty rest breaks is that the "the IWC's order that an on-duty meal period must be paid implies an on-duty rest period, which is also paid, is permissible." (Order at 3.) The court is mistaken.

Employees are not paid during off-duty meal periods, so they gain something of value when they agree to remain on duty in exchange for an extra half hour of wages. But the situation is reversed with rest breaks, because employees are already being paid — and therefore have nothing to gain from working. By remaining on duty each day, "an employee essentially performs 20 minutes of 'free' work." (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1104-1105.)

The court's theory also ignores the limitations that the Wage Order places on how and when on-duty meal periods may be taken. Employers are not free to unilaterally decide that workers will remain on duty. Instead, the nature of the work must make an off-duty meal impractical, and the parties must agree to an on-the-job paid meal period in a written contract that

expressly allows the employee to revoke his or her consent at any time. (Wage Order 4, subd. 11(A).)

The guards in this case never agreed in writing to take on-duty rest breaks. But the Court of Appeal still held that ABM was entitled to have them remain on duty. Thus, the analogy to legitimate on-duty meal periods breaks down completely. During a meal period, employees only have to remain on duty if they agree to do so in writing in exchange for extra money. Yet during a rest period, employees can now be forced to remain on duty — without their consent and without any additional compensation.

At worst, allowing employers to require employees to perform compensable work during rest breaks effectively eliminates rest breaks altogether. At best, it creates tremendous uncertainty for employers and employees alike, since the boundary between legal and illegal rest breaks will be indeterminate, discoverable only after an employer has crossed the line and been held liable. A clear and unambiguous rule requiring duty-free rest breaks is not only consistent with the "no work" mandate in Labor Code section 226.7, it will also be easier for all affected stakeholders to understand and administer.

This Court should grant review to provide workers and employers with the clear, objective, and predictable standard they need.

2. The opinion says employees can legally be forced to engage in compensable "work" during rest breaks

The second groundbreaking aspect of the Court of Appeal's decision is the way that it reinterprets Labor Code section 226.7's prohibition on forcing employees "to work" during rest breaks. The court holds that employers may require their employees to engage in compensable work without violating the statute.

That is a remarkable conclusion, particularly because this Court has already made it clear that "section 226.7 . . . is to be interpreted broadly in favor of protecting employees." (*Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal.4th at p. 1104.) Thus, only a truly irrefutable textual argument would justify the broad rollback of employee protections that the Court of Appeal approved. That textual argument does not exist.

Eight days before *Mendiola* was decided, the panel in this case held that guards were *not* working while they were on call because they were allowed to "engage in various non-work activities, including smoking, reading, making personal telephone calls, attending to personal business, and surfing the Internet."(Opn. at 10.) Then *Mendiola* held that on-call guards who were "sleeping, showering, eating, reading, watching television, and browsing the Internet" were nevertheless considered to be working, and were entitled to compensation for all the hours that they worked. (*Id.*, 60 Cal.4th at p. 842.)

At that point, the legal dispute in this case should have effectively ended. If time spent on call is work that guards deserve to be paid for, then it must also be work that they cannot be required to perform while on break. A rest break is supposed to be a 10-minute period in which employees do *not* engage in compensable work — but are paid their full wage anyway. (*Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal.4th at p. 1104; see also, *Bluford v. Safeway Stores, Inc.* (2013) 216 Cal.App.4th 864, 872 ["Rest periods are considered hours worked and must be compensated"].)

An employee who is forced to perform compensable labor during a rest period is therefore being deprived of his or her full rights under California law — "i.e., the employee receives the same amount of compensation for working through the rest periods that the employee would

have received had he or she been permitted to take the rest periods." (*Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal.4th at p. 1104.) That is illegal because workers are entitled to separate compensation for their rest periods. (*Bluford*, 216 Cal.App.4th at p. 873.)

Mendiola establishes that, when security guards are on call, their employer is obligated to pay them for their time. It therefore also necessarily stands for the proposition that guards may not be forced to remain on call during their rest breaks.

But the Court of Appeal would not accept that outcome. Instead of following the logic of *Mendiola,* it strained to find a way around it, settling on this Zen-like rationale: "On-call status is a state of being, not an action. But section 226.7 prohibits only the action, not the status." (Order at 2.) The nuance between status and action may be of some philosophical interest, but it is a tenuous foundation for a basic principle of California employment law.

In more familiar terms, the panel concluded that Section 226.7 "prohibits only working during a rest break, not remaining available to work."(Order at 2.) But that is irrelevant, because when security guards are on call they are not merely remaining available to work. Instead, they are performing their core job duty — i.e., maintaining a constant state of readiness and vigilance. That is precisely what security guards do. They provide security and peace of mind by waiting for the unexpected to occur. That is why *Mendiola* specifically held "that guards were engaged to wait, not waiting to be engaged." (*Id.*, 60 Cal.4th at p. 849, fn. 10, internal punctuation omitted.)

The Court of Appeal imports that concept into its opinion by quoting the United States Supreme Court's famous observation that an employer

"may hire a man to do nothing, or to do nothing but wait for something to happen." (Order at 2, quoting *Mendiola,* 60 Cal.4th at p. 840, quoting *Armour & Co. v. Wantock* (1944) 323 U.S. 126, 133, 65 S.Ct. 165, 89 L.Ed. 118.) The panel seems to assume that the latter man is not working as long as he continues to wait instead of act. Yet, the Supreme Court was making precisely the opposite point.

In *Armour*, it held that firefighters were entitled to overtime compensation for the time they spent sitting around, playing cards, and waiting for a fire. "That inactive duty may be duty nonetheless is not a new principle," the Court explained. (*Id.* at p. 133.) Even if workers are "waiting, doing nothing," they are still on duty if they are "liable to be called upon at any moment, and not at liberty to go away." (*Id.*, quoting *Missouri, K. & T. Ry. Co. of Texas v. U. S.* (1913) 231 U.S. 112, 119.)

Nor could the Court of Appeal credibly conclude that employees in that situation are not "working" because they are not exerting themselves. The defendants in *Armour* made the same argument, citing the same case — *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123* (1944) 321 U.S. 590, 598, 64 S.Ct. 698, 88 L.Ed. 949. In response, the Supreme Court made its memorable quip about hiring a man to do nothing, and disavowed any narrower definitions from its past precedents. (*Armour*, 323 U.S. at p. 132.)

It is true that in the course of responding to an emergency, guards will engage in more strenuous activity than they do while simply remaining in a state of readiness and vigilance. But the fact that "the intensity and extent of activities carried out while on call are not the same as during normal working hours . . . does not mean that time spent on call becomes rest time for the employee." (Kenner, *Working Time, Jaeger and the Seven-*

Year Itch (2004/2005) 11 Colum. J. Eur. L. 53, 73, cited with approval by *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal.4th at p. 1113.)

In order to provide a clearer legal standard, this Court should emphasize the commonality between the "control" test used for both compensability and rest breaks. It previously recognized that "being forced to forgo rest . . . periods denies employees time free from employer control that is often needed to be able to accomplish important personal tasks." (*Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal.4th at p. 1113.) Likewise, "California courts considering whether on-call time constitutes hours worked have primarily focused on the extent of the employer's control." (*Mendiola*, 60 Cal.4th at p. 840.)

Clarifying the relationship between these two analogous inquiries would avoid the current confusion about the meaning of "work," while providing a valuable new tool for demarcating reasonable and predictable limitations on what employees may legally ask of their workers.

B. The Court should grant review because the issues in this case are matters of continuing statewide importance

The legal issues in this case dramatically affect workers and companies throughout California. They will undoubtedly resurface again and again as wage-and-hour cases continue to be litigated at their current pace. Review in this case is necessary to ensure that all stakeholders get clear, reliable answers to questions that shape the conditions employees work in and the financial risks and responsibilities of the employers that hire them.

The outcome of the case itself will dictate whether or not more than 14,000 security guards will be able to recover tens of millions of dollars that their employer deprived them of through its noncompliance with California

law. And the consequences of allowing the decision to stand will directly affect millions of California employees and their employers.

As this Court has recently acknowledged, uncertainty about California employment law risks inflicting tremendous financial harm on even responsible companies. (*Mendiola,* 60 Cal.4th at p. 848, fn. 18.) In this case, the Court of Appeal has touched on issues for which there are myriad consequences and few answers.

This Court need not take the plaintiffs' word for it. According to the California Retailers Association, "interpretation of the rest break provisions in the Labor Code and the Wage Order has significant impact on hundreds of thousands of employees in the state of California and has potentially devastating effects to employers who do not comply."(CRA Pub. Letter at 2.) In a state of almost 39 million people, that is actually a severe underestimation, given that the Wage Order applies to "professional, technical, clerical, mechanical, and other similar occupations, ranging from accountants, teachers, and computer programmers to cashiers, salesperson, and clerks." (*Id.*)

The present case will decide whether or not all of those workers can be forced to remain on duty during their rest breaks. That will affect the physical and mental well-being of millions of workers because, as this Court has recognized, "[e]mployees denied their rest . . .periods face greater risk of work-related accidents and increased stress." (*Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal.4th at p. 1113.)

As one affected company explained, "This is a significant issue of continuing public interest, as evidenced by the participation of multiple amici on appeal, including the Chamber of the United States of America, the California Chamber of Commerce, the National Association of Security

Companies, the California Association of Licensed Security Agencies, the California Employment Lawyers Association, the Consumer Attorneys of California, and the California Employment Law Council and Employers Group." (United Site Services of California Pub. Letter at 3.) That is but a minute sampling of the entities and organizations that will be affected by the law made in this case.

The Legislature has declared that vigorous enforcement of the state's minimum labor standards is State policy—both to prevent employees from being forced to work under unlawful conditions "and to protect employers who comply with the law from those who attempt to gain a competitive advantage at the expense of their workers by failing to comply with minimum labor standards." (Labor Code § 90.5.) Without clear standards, employers do not compete on a level playing field.

This Court's recent decisions in *Brinker* and *Mendiola* have provided much-needed clarity for employers and employees in California. But this case reveals a profound misunderstanding of what a rest break means. A ruling from this Court requiring rest breaks to be duty free can form the final piece of a trilogy that will define the employment landscape in California for the 21st century.

CONCLUSION

The outcome of this case directly affects over 14,000 employees and involves over $100 million. But its ramifications extend far beyond the parties involved. The legal issue presented involves a fundamental aspect of the employee-employer relationship in California that will continue to be litigated in trial and appellate courts in this state for many years to come. The rules for what constitutes a valid rest break must be clear, or employees will suffer and employers may face potentially massive liability. Those rules

are not clear now, and the Court of Appeal's new decision muddies the waters further.

Accordingly, this case warrants this Court's attention. It should grant the petition for review.

Dated: March 4, 2015.

Respectfully submitted,

ROXBOROUGH, POMERANCE, NYE & ADREANI, LLP

THE EHRLICH LAW FIRM

By _____

Jeffrey I. Ehrlich
Attorneys for Plaintiffs and Respondents Jennifer Augustus, et al.

Certificate of Word Count

(Cal. Rules of Court, Rule 8.504(d)(1))

The text of this petition consists of 7,407 words, according to the word count generated by the Microsoft Word word-processing program used to prepare the brief.

Dated: March 4, 2015.

Jeffrey I. Ehrlich

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

JENNIFER AUGUSTUS, et al.,

Plaintiffs and Respondents,

v.

ABM SECURITY SERVICES, INC.,

Defendant and Appellant.

B243788 & B247392

(Los Angeles County
Super. Ct. Nos. BC336416, BC345918,
CG5444421)

ORDER MODIFYING OPINION AND DENYING REHEARING; CERTIFYING OPINION FOR PUBLICATION

[NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on December 31, 2014, be modified as follows:

1. On page 11, the following two paragraphs are added at the top of the page:

"The word "work" is used as both a noun and verb in Wage Order No. 4, which defines "Hours worked" as "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." (Cal. Code Regs., tit. 8, § 11040, subd. 2(K).) In this definition, "work" as a noun means "employment"—time during which an employee is subject to an employer's control. "Work" as a verb means "exertion"—activities an employer may suffer or permit an employee to perform. (See *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123* (1944) 321 U.S. 590, 598 [work is "physical or mental exertion (whether burdensome or not) controlled or required by the employer and

pursued necessarily and primarily for the benefit of the employer and his business"].) Section 226.7, which as noted provides that "[a]n employer shall not require an employee to work during a meal or rest or recovery period," uses "work" as an infinitive verb contraposed with "rest." It is evident, therefore, that "work" in that section means exertion on an employer's behalf.

"Not all employees at work actually perform work. "'[A]n employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. . . . [I]dleness plays a part in all employments in a stand-by capacity.'" (*Mendiola v. CPS Security Solutions, Inc.* (2015) 2015 Cal. LEXIS 3, 9-10 (*Mendiola*), quoting *Armour & Co. v. Wantock* (1944) 323 U.S. 126, 133.) Remaining on call is an example. On-call status is a state of being, not an action. But section 226.7 prohibits only the action, not the status. In other words, it prohibits only working during a rest break, not remaining available to work.

2. On page 11 continuing to page 12, the now-second paragraph, which begins with "Because ABM guards," along with the next two paragraphs, are stricken and replaced with the following:

"This conclusion is bolstered by contrasting subdivision 12(A) of Wage Order No. 4, which pertains to rest periods, and subdivision 11(A), pertaining to meal periods. Subdivision 11(A) requires that an employee be "relieved of all duty" during a meal period.[7] Subdivision 12(A) contains no similar requirement. If the IWC had wanted to relieve an employee of all duty during a rest period, including the duty to remain on call,

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[7] Subdivision 11(A) of Work Order No. 4 provides: "No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee. Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an 'on duty' meal period and counted as time worked. An 'on duty' meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time."

it knew how to do so. That it did not indicates no such requirement was intended. On the contrary, the IWC's order that an on-duty meal period must be paid implies an on-duty rest period, which is also paid, is permissible: It would make no sense to permit a 30-minute paid, on duty meal break but not a 10-minute paid rest break.

"Plaintiffs argue a security guard's on-call rest time constitutes work for purposes of section 226.7 because it is indistinguishable from any other part of the guard's workday, as a guard is always on call. The argument is without merit. First, section 226.7 does not require that a rest period be distinguishable from the remainder of the workday, it requires only that an employee not be required "to work" during breaks. Even if an employee did nothing but remain on call all day, being equally idle on a rest break does not constitute working. At any rate, although the idea that a security guard never rests has a certain appeal, according to ABM's Post Orders a security guard who is on call performs few if any of the activities performed by one who is actively on duty. As described briefly above, a guard on duty must observe the guarded campus and perform many tasks, for example, greeting visitors, raising or lowering the campus's flags, or monitoring traffic or parking. No evidence in the record suggests an ABM guard taking a rest break is required to do any of these things. Admittedly, an on-call guard must return to duty if requested, but as discussed above and implicitly acknowledged in *Mendiola*, *supra*, remaining available to work is not the same as performing work."

3. On page 13, the first full sentence, beginning with "The issue was whether . . . ," is stricken and replaced with the following:

"The issue was whether the scope of the employer's rest break policy could be determined on a classwide basis."

4. On page 16, the third paragraph is stricken and replaced with the following:

"Plaintiffs rely on *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575 and *Aguilar v. Association for Retarded Citizens* (1991) 234 Cal.App.3d 21 for the proposition that on-call rest periods are legally invalid. Neither case supports the proposition. In *Morillion*, the Supreme Court held that the time during which employees

were required to travel to the employer's work site on the employer's buses was compensable work time. (22 Cal.4th at p. 578.) In *Aguilar*, the court held that time employees were required to remain at group homes during an overnight shift, during which they could sleep but had to remain on call, was compensable work time. (234 Cal.App.3d at pp. 24, 30.) What constitutes compensable work time is not the issue here, as it is undisputed rest breaks are compensable. The question is whether section 226.7 prohibits on-call rest periods. On that issue, *Morillion* and *Aguilar* provide no guidance."

5. The last paragraph on page 16, running over to page 17, is stricken and replaced with the following:

"In sum, although on-call hours constitute "hours worked," remaining available to work is not the same as performing work. (See *Mendiola*, *supra*, 2015 Cal. LEXIS at p. 9 [distinguishing readiness to serve from service itself]; see also Cal. Code Regs., tit. 8, § 11040, subd. 2(K) [distinguishing "hours worked" from work actually performed].) Section 226.7 proscribes only work on a rest break."

There is no change in the judgment.

Respondents' petition for rehearing is denied.

The opinion in the above-entitled matter was not certified for publication in the Official Reports. For good cause it now appears that the opinion should be published in the Official Reports, and it is so ordered.

ROTHSCHILD, P. J. CHANEY, J. JOHNSON, J.

Filed 12/31/14

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

JENNIFER AUGUSTUS, et al., Plaintiffs and Respondents, v. ABM SECURITY SERVICES, INC., Defendant and Appellant.	B243788 & B247392 (Los Angeles County Super. Ct. Nos. BC336416, BC345918, CG5444421)

APPEAL from a judgment of the Superior Court of Los Angeles County. Carolyn B. Kuhl, Judge; John Shepard Wiley, Judge. Affirmed in part and reversed in part.

Gibson, Dunn & Crutcher, Theodore J. Boutrous, Jr., Theane Evangelis, Andrew G. Pappas and Bradley J. Hamburger; Littler Mendelson, Keith A. Jacoby and Dominic J. Messiha for Defendant and Appellant.

Paul Hastings, Paul Grossman for California Employment Law Council and Employers Group as Amicus Curiae on behalf of Defendant and Appellant.

Thompson & Knight, David R. Ongaro as Amicus Curiae on behalf of Defendant and Appellant.

Horvitz & Levy, John A. Taylor, Jr., Robert H. Wright and Felix Shafir as Amicus Curiae on behalf of Defendant and Appellant.

Shaw Valenza, D. Gregory Valenza as Amicus Curiae on behalf of Defendant and Appellant.

Roxborough, Pomerance, Nye & Adreani, Drew E. Pomerance, Michael B. Adreani and Marina N. Vitek; The Ehrlich Law Firm, Jeffrey Isaac Ehrlich; Initiative Legal Group, Monica Balderrama and G. Arthur Meneses; Scott Cole & Associates, Scott Edward Cole and Matthew R. Bainer; Law Offices of Alvin L. Pittman, Alvin L. Pittman for Plaintiffs and Respondents.

Law Offices of Louis Benowitz, Louis Benowitz as Amicus Curiae on behalf of Plaintiffs and Respondents.

The Turley Law Firm, William Turley and David T. Mara as Amicus Curiae on behalf of Plaintiffs and Respondents.

Plaintiff Jennifer Augustus and others, formerly security guards employed by defendant ABM Security Services, Inc. (hereafter ABM), allege on behalf of themselves and a class of similarly situated individuals that ABM failed to provide rest periods required by California law in that it failed to relieve security guards of all duties during rest breaks, instead requiring its guards to remain on call during breaks. The trial court certified a class and granted plaintiffs' motion for summary adjudication, concluding an employer must relieve its employees of all duties during rest breaks, including the obligation to remain on call. Plaintiffs then moved for summary judgment on the issue of damages, seeking unpaid wages, interest, penalties, attorney fees and an injunction. Finding no triable issue as to whether ABM was subject to approximately $90 million in statutory damages, interest, penalties, and attorney fees, the court granted the motion.

The summary adjudication and summary judgment orders rest on the premise that California law requires employers to relieve their workers of all duty during rest breaks. We conclude the premise is false, and therefore reverse the orders. We affirm the certification order.

Background

ABM employs thousands of security guards at locations in California. At some sites only a single guard is stationed, while at others dozens could be stationed. Augustus, Emmanuel Davis, and Delores Hall worked for ABM as security guards.

A typical ABM policy document, entitled "Post Orders," provides that "[t]he primary responsibility of Security at [a guarded facility] is to provide an immediate and correct response to emergency/life safety situations (i.e. fire, medical emergency, bomb threat, elevator entrapments, earthquakes, etc.) [¶] In addition, the Security officers must provide physical security for the building, its tenants and their employees. The security officer can accomplish this task by observing and reporting all unusual activities. In essence, the officer is the eyes and ears of the Building Management." According to the Post Orders, as part of his or her duties a security guard may be required to patrol guarded buildings, identify and report safety issues, hoist and lower flags, greet visitors, assist building tenants and visitors, respond to emergencies, provide escorts to parking lots, monitor and restrict access to guarded buildings, eject trespassers, monitor and sometimes either restrict or assist in moving property into and out of guarded buildings, direct vehicular traffic and parking, and make reports.

Employers must "afford their nonexempt employees meal periods and rest periods during the workday." (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1018 (*Brinker*); see Lab. Code, §§ 226.7, 512; Industrial Welfare Commission (IWC) wage order No. 4-2001 (Cal. Code Regs., tit. 8, § 11040), hereafter Wage Order No. 4.)[1] An employee who works more than three and one-half hours per day must be permitted to take a paid 10-minute rest period—during which the employee shall not be required "to work"—per every four every hours of work or major fraction thereof. (Cal.

[1] The IWC has issued 18 wage orders. Wage Order No. 4 governs security guard employees, among others. Other wage orders impose similar meal and rest period requirements for other nonexempt employees in California. For example, Wage Order No. 5, which is discussed in *Brinker*, governs restaurant employees. The pertinent provisions of that wage order are identical to those at issue here.

Code Regs., tit. 8, § 11040, subd. (12)(A); Lab. Code, § 226.7, subd. (b).)[2] An employee who works at least five hours must also be given a 30-minute unpaid meal break, during which the employee must be "relieved of all duty" if the meal period is not to be counted as time worked. (Cal. Code Regs., tit. 8, § 11040, subd. (11)(A).) Employers who fail to provide proper meal and rest periods must pay premium wages. (§ 226.7, subd. (b); Wage Order No. 4, subds. 11(B), 12(B); *Brinker*, *supra*, 53 Cal.4th at p. 1018.)

In 2005, Augustus filed a putative class action, seeking to represent all security guards employed by ABM. In 2006, her complaint was related to and consolidated with similar complaints filed by Davis and Hall, and a master complaint was filed. The master complaint alleges ABM "fail[ed] to consistently provide uninterrupted rest periods," or premium wages in lieu of rest breaks, as required by section 226.7.[3] (See Wage Order No. 4, subd. (12).)

In the course of discovery, ABM admitted it requires its security guards to keep their radios and pagers on during rest breaks, to remain vigilant, and to respond when needs arise, such as when a tenant wishes to be escorted to the parking lot, a building manager must be notified of a mechanical problem, or an emergency situation occurs. Plaintiffs contend a security guard's rest period is therefore indistinguishable from normal security work, which renders every rest break invalid.

A. Class Certification

In 2008, plaintiffs moved for class certification, arguing class certification was warranted because, inter alia, ABM had a uniform companywide policy requiring all guards to remain on duty during their rest breaks. Plaintiffs argued the legality of this policy could most appropriately be decided on a classwide basis, and records maintained by ABM could be used to identify and quantify violations.

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[2] Undesignated statutory references will be to the Labor Code.

[3] Plaintiffs also alleged ABM failed to provide meal periods as required by sections 226.7 and 512. That claim is not at issue on this appeal.

Plaintiffs supported the motion with the deposition testimony of Fred Setayesh, an ABM senior branch manager, who admitted ABM guards are not relieved of all duties during rest breaks. For example, he explained, "if they have a radio, they want to have the radio on while they're having their meal; if they have a cell phone, a pager, if there is an emergency or situation just happen to happen at that moment, the person can assist the building operating staff and then go back and finish his or her break." Setayesh also testified that if the magnitude of the emergency was large enough, every security officer would be required to respond regardless of what they were doing at the time.

ABM opposed class certification, arguing that the determination of whether any particular on-call rest break was interrupted by a return to duty would require an individualized inquiry not amendable to class treatment. ABM submitted declarations and deposition testimony of numerous employees, including the named plaintiffs, each of whom stated he or she was provided and took uninterrupted rest breaks.

The trial court granted certification in 2009, stating without elaboration that plaintiffs had "provided substantial evidence that the common factual and legal issues predominate over individual factual and legal issues." The class was defined as all ABM employees who worked "in any security guard position in California at any time during the period from July 12, 2001 through entry of judgment . . . [and] who worked a shift exceeding four (4) hours or major fraction thereof without being authorized and permitted to take an uninterrupted rest period of net ten (10) minutes per each four (4) hours or major fraction thereof worked and [had] not been paid one additional hour of pay at the employee's regular rate of compensation for each work day that the rest period was not provided."[4]

[4] The class period was later redefined to extend from July 12, 2001 to July 1, 2011. The class definition excluded employees who had been paid statutory penalties for rest period violations and those who had worked at sites covered by a rest period exemption obtained by ABM in 2006. The putative class is estimated to include over 10,000 ABM employees.

B. Summary Adjudication

In 2010, plaintiffs moved for summary adjudication of their rest period claim, contending it was undisputed ABM's employees were required to remain on call during their rest breaks, which according to Division of Labor Standards Enforcement (hereafter DLSE) Opinion Letter 2002.02.22 rendered them per se invalid. Plaintiffs supported the contention with Setayesh's admission during deposition that ABM security guards were not relieved from all duties during rest breaks. Plaintiffs offered no evidence indicating anyone's rest period had ever been interrupted.

ABM opposed the motion, submitting substantial and uncontroverted evidence, including the deposition testimony of the named plaintiffs themselves, that class members regularly took uninterrupted rest breaks during which they performed no work but engaged in such leisure activities as smoking, reading, and surfing the Internet. ABM noted plaintiffs' failure to provide any example of a rest break having actually been interrupted and submitted affirmative evidence that any rest period interrupted by a call back to service could be restarted after the situation necessitating the callback was resolved. ABM argued the mere risk of interruption, especially when there was no evidence of actual interruption, did not negate or invalidate a rest break.

The trial court granted plaintiffs' motion, concluding that "[w]hat is relevant is whether the employee remains subject to the control of an employer." "In order to make sense of the statutory scheme," the court reasoned, "a rest period must not be subject to employer control; otherwise a 'rest period' would be part of the work day for which the employer would be required to pay wages in any event."

C. Summary Judgment

In 2012, plaintiffs moved for summary judgment on their damages claim, contending the only remaining task was to apply the court's earlier finding to undisputed facts. Plaintiffs contended that because ABM forced its security guards to remain on duty during their rest breaks, it owed each employee an additional hour of payment, a waiting time penalty, and interest for "every single rest break taken by every single class member, for the duration of the Class Period." Using ABM's payroll records, plaintiffs'

expert determined there were 14,788 class members who worked a total of 5,166,618 days of at least 3.5 hours in length. Multiplying that number by an average pay rate of $10.87 resulted in $56,102,198 in unpaid wages and restitution. Plaintiffs added a claim for $41,288,882 in accrued interest and $5,689,860 in waiting time penalties, and requested that judgment be entered in favor of the class in the amount of $103,808,940, plus costs and attorney fees.

ABM opposed the motion and moved for decertification, arguing plaintiffs' claim for $104 million "because ABM had a policy which required security guards to carry radios, is a request whose absurdity speaks for itself." ABM argued no evidence had been developed as to who among the class members had been exposed to or followed ABM's policy requiring security guards to carry radios during rest periods. On the contrary, ABM presented numerous depositions that indicated many guards took breaks without radios. Further, ABM argued plaintiffs improperly compounded interest, which inflated that cost item by more than $10 million, and that its good faith defense barred plaintiffs' claim for waiting time penalties.

In a tentative ruling issued before the hearing, the trial court incorporated its prior summary adjudication ruling and stated that "[p]ut simply, if you are on call, you are not on break." Although it acknowledged evidence existed that not all security guards were required to carry radios during their breaks, the court ruled that whether a guard actually carried a radio was immaterial, as "[t]here are many alternatives to the radio for hailing a person back to work: cell phone, pager, fetching, hailing and so on." The court found that this situation "conforms to the general pattern of evidence, which is that [ABM] required all its workers to be on-call during their breaks, and so these on-call breaks are all legally invalid."[5]

After the hearing, the court adopted its tentative ruling and granted plaintiffs' motion and denied ABM's motion for decertification, finding this was "a 15,000-person one-issue case" that was "perfect for class treatment." The court awarded plaintiffs

[5] ABM's request for judicial notice of the trial court's tentative ruling is granted. All Amici Curiae requests for judicial notice are granted.

$55,887,565 in statutory damages pursuant to section 226.7, $31,204,465 in pre-judgment interest, and $2,650,096 in waiting time penalties pursuant to section 203. ABM appealed from the resulting judgment.

Six months later, the court entered an amended judgment that awarded plaintiffs approximately $27 million in attorney fees, representing 30 percent of the common fund, plus $4,455,336.88 in fees under Code of Civil Procedure section 1021.5. ABM appealed from the amended judgment. We consolidated the two appeals.

Discussion

A. Standards of Review

In reviewing an order granting summary judgment, we view the evidence and any reasonable inferences that may be drawn from it "in the light most favorable to the opposing party." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) We will affirm the order only "'if all the papers submitted show' that 'there is no triable issue as to any material fact' [citation]." (*Ibid.*) However, the trial court's interpretation of section 226.7 and Wage Order No. 4 on materially undisputed facts raises purely issues of law. That interpretation is therefore subject to independent review. (*Pugliese v. Superior Court* (2007) 146 Cal.App.4th 1444, 1448; *California Teachers Assn. v. Governing Bd. of Golden Valley Unified School Dist.* (2002) 98 Cal.App.4th 369, 375.)

We will affirm an order granting class certification if any of the trial court's stated reasons is valid and sufficient to justify the order and is supported by substantial evidence. (*Sav-On Drug Stores, Inc.* (2004) 34 Cal.4th 319, 326-327 (*Sav-On*) [trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting a class action and therefore enjoy broad discretion to grant or deny certification]; *Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1106 ["a certification ruling not supported by substantial evidence cannot stand"].) However, even a ruling supported by substantial evidence will be reversed if improper criteria were used or erroneous legal assumptions made. (*Sav-On, supra*, 34 Cal.4th at pp. 326–327; *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435–436.) A trial court's decision that rests on an error of law is

itself an abuse of discretion. (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 311; *Pfizer Inc. v. Superior Court* (2010) 182 Cal.App.4th 622, 629.)

B. Wage Orders and the Labor Code

"Nearly a century ago, the Legislature responded to the problem of inadequate wages and poor working conditions by establishing the IWC and delegating to it the authority to investigate various industries and promulgate wage orders fixing for each industry minimum wages, maximum hours of work, and conditions of labor. [Citations.] Pursuant to its 'broad statutory authority' [citation], the IWC in 1916 began issuing industry- and occupationwide wage orders specifying minimum requirements with respect to wages, hours, and working conditions [citation]. In addition, the Legislature has from time to time enacted statutes to regulate wages, hours, and working conditions directly. Consequently, wage and hour claims are today governed by two complementary and occasionally overlapping sources of authority: the provisions of the Labor Code, enacted by the Legislature, and a series of 18 wage orders, adopted by the IWC. [Citations.] [¶] We apply the usual rules of statutory interpretation to the Labor Code, beginning with and focusing on the text as the best indicator of legislative purpose. [Citation.] '[I]n light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection.' [Citations.] [¶] In turn, the IWC's wage orders are entitled to 'extraordinary deference, both in upholding their validity and in enforcing their specific terms.' [Citation.] When a wage order's validity and application are conceded and the question is only one of interpretation, the usual rules of statutory interpretation apply. [Citations.] As with the Labor Code provisions at issue, the meal and rest period requirements we must construe 'have long been viewed as part of the remedial worker protection framework.' [Citation.] Accordingly, the relevant wage order provisions must be interpreted in the manner that best effectuates that protective intent. [Citations.] [¶] The IWC's wage orders are to be accorded the same dignity as statutes. They are 'presumptively valid' legislative regulations of the employment relationship [citation],

regulations that must be given 'independent effect' separate and apart from any statutory enactments [citation]. To the extent a wage order and a statute overlap, we will seek to harmonize them, as we would with any two statutes." (*Brinker*, *supra*, 53 Cal.4th at pp. 1026-1027.)

Here, we consider the scope and duties Wage Order No. 4 and sections 226.7 and 512 impose on a security company to afford rest periods to its employees, and whether in light of those duties the trial court erred in granting summary judgment and declining to decertify the class.

C. Summary Judgment: The Nature of a Rest Period

ABM's duty to provide rest periods is defined by subdivision 12 of Wage Order No. 4, which provides in relevant part: "Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages." (Wage Order No. 4, subd. (12)(A).)

The text of the wage order does not describe the nature of a rest period, but section 226.7 offers a partial definition: "An employer shall not require an employee *to work* during a meal or rest or recovery period." (Italics added.) The DLSE has never stated specifically whether an on-call rest period is permissible. Section 226.7 therefore provides our only guidance as to the nature of a rest break, and it says only that an employee cannot be required "to work" during a break.

Here, although ABM's security guards were required to remain on call during their rest breaks, they were otherwise permitted to engage and did engage in various non-work activities, including smoking, reading, making personal telephone calls, attending to personal business, and surfing the Internet. The issue is whether simply being on-call constitutes performing "work." We conclude it does not.

Because ABM guards must respond to emergency and nonemergency calls while either on duty or on a break, the idea that a security guard never rests has certain appeal. But according to ABM's Post Orders, an on-duty security guard does more than merely wait for calls. As described briefly above, a guard must actively observe the guarded campus while on duty and perform many tasks not required during rest periods. For example, it is undisputed that a guard need not greet visitors, raise or lower the campus's flags, monitor traffic or parking, or observe or restrict movement of persons and property while taking a break. Admittedly, an on-call guard must return to duty if called to do so, but remaining available to work is not the same as actually working.

This conclusion is bolstered by contrasting subdivision 12(A) of Wage Order No. 4, which pertains to rest periods, and subdivision 11(A), pertaining to meal periods. Subdivision 11(A) requires that an employee be "relieved of all duty" during a meal period.[6] Subdivision 12(A) contains no similar requirement. If the IWC had wanted to prescribe that an employee be relieved of all duty during a rest period, it knew how to do so. That it did not indicates no such requirement was intended.

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[6] Subdivision 11(A) of Work Order No. 4 provides: "No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee. Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an 'on duty' meal period and counted as time worked. An 'on duty' meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time."

Subdivision 12(A) provides: "Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages."

Not only did the IWC decline to distinguish between on- and off-duty rest periods, its prescription that on-duty meal periods be paid, coupled with the mandate that *all* rest periods be paid, implies rest periods are normally taken while on duty, i.e., while subject to employer control. There is no support, therefore, in the text of Wage Order No. 4, the Labor Code, or any DLSE opinion letter for plaintiffs' claim that a rest break is valid only if the employee is relieved of all duties.

Plaintiffs argue both the DLSE in 2002 and the Court of Appeal in *Faulkinbury v. Boyd & Associates, Inc.* (2013) 216 Cal.App.4th 220, 237 recognized that Wage Order No. 4 requires that all rest breaks be duty free. Not so.

In 2002 the DLSE was asked by an employer whether short intervals during which an employee was required to change work stations, which apparently occurred multiple times per shift, could be aggregated and count as a "net" 10-minute rest period. The DLSE opined it could not, stating: "[T]here must be a net 10 minutes of rest provided in each 'work period' and the rest period must be, as the language implies, duty-free. This requirement would, of course, preclude the employer from using time during which the employee is required to change from one work station to another . . . ." (Dept. Industrial Relations, DLSE, Acting Chief Counsel Anne Stevason, Opn. Letter No. 2002.02.22, Rest Period Requirements (Feb. 22, 2002) p. 1 <http://www.dir.ca.gov/dlse/opinions/2002-02-22.pdf> [as of Oct. 14, 2014].)[7] The DLSE thus opined only that the employer's practice of requiring its employees to move from one work station to the next did not constitute a rest period because (1) the move itself constituted a "duty" and (2) no single move provided 10 minutes of down time. The DLSE was not asked and did not examine whether an on-call rest period—where no active duties were performed—would be improper.

In *Faulkinbury v. Boyd & Associates*, a security guard company maintained no "policy regarding the provision of rest breaks to security guards and had an express policy requiring all security guards to remain at their posts at all times." (*Faulkinbury v.*

[7] DLSE opinion letters are not controlling but constitute an informed judgment to which courts may resort for guidance. (*Brinker, supra*, 53 Cal.4th at p. 1029, fn. 11.)

Boyd & Associates, *supra*, 216 Cal.App.4th at p. 236.) The issue was whether the employer's lack of a rest break policy could be determined on a classwide basis. To examine that issue the court stated the policy would be measured at trial against the relevant rest break requirements, including Wage Order No. 4 and the 2002 DLSE opinion letter discussed above, both of which it quoted. The court concluded that "the lawfulness of [the employer's] lack of rest break policy and requirement that all security guard employees remain at their posts can be determined on a classwide basis." (*Id.* at p. 237.) The court undertook no analysis of the 2002 DLSE opinion letter or Wage Order No. 4 and made no attempt to examine the merits of the employer's policy or determine the scope of the DLSE's opinion that rest periods must be duty free.

Plaintiffs argue the Supreme Court in *Brinker* held that an employer must relieve an employee of all duty on a rest break and relinquish any control over how the employee spends his or her time. We disagree.

In *Brinker*, the trial court certified a class of restaurant employees who alleged the defendants violated state laws requiring meal and rest breaks. (*Brinker*, *supra*, 53 Cal.4th at pp. 1017-1019.) The class definition included several subclasses, including rest period and meal period subclasses. (*Id.* at p. 1019.) The Court of Appeal held the trial court erred in certifying the subclasses and granted writ relief to reverse class certification. (*Id.* at p. 1021.) The California Supreme Court granted review "to resolve uncertainties in the handling of wage and hour class certification motions." (*Ibid.*)

In its opinion, the Supreme Court reviewed general class action principles, then addressed the extent to which a trial court must address the elements and merits of a plaintiff's claim when deciding whether to certify a class. (*Brinker*, *supra*, 53 Cal.4th at p. 1023.) The court recognized that "[w]hen evidence or legal issues germane to the certification question bear as well on aspects of the merits, a court may properly evaluate them." (*Id.* at pp. 1023-1024.) "Presented with a class certification motion, a trial court must examine the plaintiff's theory of recovery, assess the nature of the legal and factual disputes likely to be presented, and decide whether individual or common issues predominate. To the extent the propriety of certification depends upon disputed threshold

legal or factual questions, a court may, and indeed must, resolve them. Out of respect for the problems arising from one-way intervention, however, a court generally should eschew resolution of such issues unless necessary. [Citations.] Consequently, a trial court does not abuse its discretion if it certifies (or denies certification of) a class without deciding one or more issues affecting the nature of a given element if resolution of such issues would not affect the ultimate certification decision." (*Id.* at p. 1025.) The court then considered an employer's duties under the Labor Code and IWC wage orders to afford rest and meal periods to employees. (*Brinker*, *supra*, 53 Cal.4th at pp. 1027-1028.)

As to a rest period claim, the court held that under the applicable wage order an employer must provide an employee with a 10-minute rest break for shifts from three and one-half hours to six hours in length, a 20-minute rest break for shifts of more than six hours up to 10 hours, and a 30-minute rest break for shifts of more than 10 hours up to 14 hours. (*Brinker*, *supra*, 53 Cal.4th at p. 1029.) The defendant employers' policy provided only one 10-minute rest break for every four hours worked, and failed to provide a second break after six hours. (*Id.* at p. 1033.) The court held the rest break subclass was properly certified because "[c]lasswide liability could be established through common proof if [the plaintiffs] were able to demonstrate that, for example, [the employers] under this uniform policy refused to authorize and permit a second rest break for employees working shifts longer than six, but shorter than eight, hours." (*Ibid.*) The court held that "[c]laims alleging that a uniform policy consistently applied to a group of employees is in violation of the wage and hour laws are of the sort routinely, and properly, found suitable for class treatment." (*Ibid.*) The court noted that class certification did not depend on resolution of "threshold legal disputes over the scope of the employer's rest break duties"—it addressed the merits of those disputes only at the parties' request. (*Id.* at pp. 1033-1034.) Absent such a request, it is generally "far better from a fairness perspective" to decide class certification independently from the merits. (*Ibid.*)

As to a meal break claim, the *Brinker* court again first considered the nature of an employer's duty under the Labor Code and wage orders to provide a meal period,

concluding, "an employer's obligation when providing a meal period is to relieve its employee of all duty for an uninterrupted 30-minute period." (*Brinker, supra*, 53 Cal.4th at p. 1038.) The court held: "An employer's duty with respect to meal breaks [citations] is an obligation to provide a meal period to its employees. The employer satisfies this obligation if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so. What will suffice may vary from industry to industry, and we cannot in the context of this class certification proceeding delineate the full range of approaches that in each instance might be sufficient to satisfy the law. [¶] On the other hand, the employer is not obligated to police meal breaks and ensure no work thereafter is performed. Bona fide relief from duty and the relinquishing of control satisfies the employer's obligations, and work by a relieved employee during a meal break does not thereby place the employer in violation of its obligations and create liability for premium pay [citations]." (*Id.* at pp. 1040-1041.)

The Supreme Court remanded the matter to the trial court to reconsider certification of the meal break subclass in light of the court's clarification of the law. (*Brinker, supra*, 53 Cal.4th at pp. 1049-1051.) The court explained its ruling on the merits, "solicited by the parties, has changed the legal landscape; whether the trial court may have soundly exercised its discretion before that ruling is no longer relevant. At a minimum, our ruling has rendered the class definition adopted by the trial court overinclusive: The definition on its face embraces individuals who now have no claim against [the employers]. In light of our substantive rulings, we consider it the prudent course to remand the question of meal subclass certification to the trial court for reconsideration in light of the clarification of the law we have provided." (*Id.* at pp. 1050-1051.)

Although *Brinker* is instructive on several levels, it said nothing about an employer's obligation to relieve an employee of all duty on a *rest* break. The discussion in *Brinker* regarding the relieved-of-all-duty requirement concerned meal periods only.[8]

Plaintiffs argue the *Brinker* standard applies with equal force to both meal and rest breaks. The argument is without merit. As discussed above, subdivision 11(A) of Wage Order No. 4 obligates an employer to relieve an employee of all duty on an unpaid meal break. Subdivision 12(A) of Wage Order No. 4 contains no similar requirement. Nor does section 226.7, which states only that an employee cannot be required "to work" on a rest break. Meal breaks are unpaid while rest breaks are paid. Meal breaks last 30 minutes; rest breaks last 10 minutes. Meal breaks and rest breaks are thus qualitatively different, and the *Brinker* standard applies to the former by mandate of subdivision 11(A) but not to the latter, which has no similar mandate.

Plaintiffs rely on *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575 and *Aguilar v. Association for Retarded Citizens* (1991) 234 Cal.App.3d 21 for the proposition that paid on-call rest periods are legally invalid. Neither case supports the proposition. In *Morillion*, the Supreme Court held that the time employees were required to spend traveling to the employer's work site on the employer's buses was compensable work time. (22 Cal.4th at p. 578.) In *Aguilar*, the court held employees required to remain at group homes during an overnight shift, during which they were allowed to sleep but required to remain on call, was compensable work time. (234 Cal.App.3d at pp. 24, 30.) But what constitutes compensable work time is not the issue here—pursuant to Wage Order No. 4, a rest period is already compensable work time. The question is what constitutes an acceptable rest period. On that issue, *Morillion* and *Aguilar* provide no guidance.

In sum, Labor Code section 226.7, contrary to the trial court's ruling, prescribes only that an employee not be required to work on a rest break, not that he or she be

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[8] Although the plaintiffs in *Brinker alleged* the employer defendant violated the Labor Code by failing to relieve employees of all duty during rest periods, the Supreme Court was not asked to and did not evaluate the merits of that claim.

relieved of all duties, such as the duty to remain on call. Remaining on call does not itself constitute performing work. (See DLSE Opn. Letter No. 1993.03.31 (Mar. 31, 1993) p. 4 [DLSE declining to "take the position that simply requiring [a] worker to [remain on call] is so inherently intrusive as to require a finding that the worker is under the control of the employer" and must be compensated for "on-call" time]; DLSE Opn. Letter No. 1994.02.16 (Feb. 16, 2002) p. 4 [same]; DLSE Opn. Letter 1998.12.28 (Dec. 28, 1998) p. 4 [same].)

Because on-call rest breaks are permissible, the trial court erroneously granted summary adjudication in 2010 and summary judgment in 2012. Those orders and the consequent order granting plaintiffs' attorneys' fees under Code of Civil Procedure section 1021.5 must therefore be reversed.

D. Class Certification

ABM contends the trial court erred in certifying a class because there is no evidence of a uniform policy requiring employees to remain on call during rest breaks. We disagree.

Under section 382 of the Code of Civil Procedure, a class action is authorized "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court." "Drawing on the language of Code of Civil Procedure section 382 and federal precedent," our Supreme Court has "articulated clear requirements for the certification of a class. The party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives." (*Brinker*, *supra*, 53 Cal.4th at p. 1021; see *Sav-On*, *supra*, 34 Cal.4th at p. 326.)

The "community of interest" requirement embodies three elements: "(1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." (*Sav-On*, *supra*, 34 Cal.4th at p. 326.) Common issues predominate when they would be "the principal issues in any individual action, both in terms of time to be

expended in their proof and of their importance." (*Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 810.) Class members "must not be required to individually litigate numerous and substantial questions to determine [their] right to recover following the class judgment; and the issues which may be jointly tried, when compared with those requiring separate adjudication, must be sufficiently numerous and substantial to make the class action advantageous to the judicial process and to the litigants." (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 460.)

The question of certification is essentially procedural and does not involve the legal or factual merits of the action. (*Sav-On, supra*, 34 Cal.4th at p. 326.) The ultimate question is whether class treatment is "superior means of resolving the litigation, for both the parties and the court. [Citation.] 'Generally, a class suit is appropriate "when numerous parties suffer injury of insufficient size to warrant individual action and when denial of class relief would result in unjust advantage to the wrongdoer." [Citations.]' [Citation.] '[R]elevant considerations include the probability that each class member will come forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the class approach would actually serve to deter and redress alleged wrongdoing.' [Citation.] '[B]ecause group action also has the potential to create injustice, trial courts are required to "'carefully weigh respective benefits and burdens and to allow maintenance of the class action only where substantial benefits accrue both to litigants and the courts.'"'" (*Newell v. State Farm General Ins. Co.* (2004) 118 Cal.App.4th 1094, 1101.)

ABM has maintained throughout the certification and summary judgment proceedings that the on-call nature of a rest break for a security guard is an industry necessity. For example, in its separate statement of additional facts in opposition to plaintiffs' motion for summary adjudication, ABM stated that "[g]uards simply must keep their radios or pagers on in case an emergency—fire, flood, criminal activity, medical crisis or bomb threat—should arise to ensure the safety of the facility and its tenants." ABM cited in support of this statement Setayesh's deposition testimony to that

same effect: If the magnitude of the emergency was large enough, all security officers would be required to respond regardless of what they were doing at the time.

From ABM's concession and Setayesh's testimony the trial court could reasonably conclude ABM possessed a uniform policy of requiring its security guards to remain on call during their rest breaks. Indeed, ABM never denied this policy below. Whether such a policy is permissible is an issue "eminently suited for class treatment." (*Brinker*, *supra*, 53 Cal.4th at p. 1033.)

ABM cites to substantial evidence indicating the policy was not uniformly applied, but such evidence would go only to the issue of damages. The trial court could reasonably conclude the necessity of individual proof of damages would not destroy the community of interest. (*Faulkinbury v. Boyd & Associates, Inc.*, *supra*, 216 Cal.App.4th at p. 237.)

Disposition

The orders granting summary adjudication and summary judgment are reversed and the amended judgment vacated. The order certifying the class is affirmed. Both sides are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.

Lead Case: *Augustus, et al. v. ABM Security Services, Inc., etc.*
Court of Appeal No. B243788 (consolidated No. B247392)
Superior Court Case Nos.: Lead Case No. BC336416
[consolidated Case Nos. BC345918 and CGC5444421]

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 237 West Fourth Street, Second Floor, Claremont, California 91711.

On **March 4, 2015,** I served the foregoing documents described as **PETITION FOR REVIEW** on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

PLEASE SEE ATTACHED SERVICE LIST

[XX] BY MAIL I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Claremont, California, in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.

[XX] ELECTRONIC Pursuant to CRC Rule 8.212(c)(2) and the Court's Local Rules, a copy was submitted electronically via the Court's website as indicated on the service list. Service copy was electronically submitted to the Attorney General via the Office of the Attorney General website.

[] BY FACSIMILE ("FAX") In addition to the manner of service indicated above, a copy was sent by FAX to the parties indicated on the service List.

[] BY OVERNIGHT MAIL/COURIER To expedite service, copies were sent via FEDERAL EXPRESS.

[] BY PERSONAL SERVICE I caused to be delivered such envelope by hand to the individual(s) indicated on the service list.

[XX] (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on **March 4, 2015,** at Claremont, California.

Isabel Cisneros-Drake, Paralegal

Lead Case: *Augustus, et al. v. ABM Security Services, Inc., etc.*
Court of Appeal No. B243788 (consolidated No. B247392)
Superior Court Case Nos.: Lead Case No. BC336416
[consolidated case Nos. BC345918 and CGC5444421]

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