CASE #: S244751

S_____

IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

KURT STOETZL, ET AL.

Respondents-Plaintiffs-Appellants,

v.

STATE OF CALIFORNIA, DEPARTMENT OF HUMAN RESOURCES, ET AL.

Petitioners-Defendants-Respondents.

On Review From The Court Of Appeal For the First Appellate District, Division One, 1st Civil No. A142832

After An Appeal From the Superior Court For The State of California, County of San Francisco, Case Number CJC11004661, The Honorable John E. Munter

---

PETITION FOR REVIEW

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
*David W. Tyra, State Bar No. 116218
dtyra@kmtg.com
Susana P. Solano, State Bar No. 274411
ssolano@kmtg.com
400 Capitol Mall, 27th Floor
Sacramento, California 95814
Telephone: (916) 321-4500
Facsimile: (916) 321-4555

FROLAN R. AGUILING, Chief Counsel, SBN 235874
CHRISTOPHER E. THOMAS, Labor Relations Counsel, SBN 186075
DAVID D. KING, Labor Relations Counsel, SBN 252074
CALIFORNIA DEPARTMENT OF HUMAN RESOURCES
1515 S Street, North Building, Suite 400
Sacramento, CA 95811-7258
Telephone: (916) 324-0512
Facsimile: (916) 323-4723
Email: *Frolan.Aguiling@calhr.ca.gov*

Attorneys for State of California, Department of Human Resources, California Department of Corrections and Rehabilitation and California Department of State Hospitals

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

Federal Statutes

State Statutes

Rules

Regulations

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Petitioners the State of California, California Department of Corrections and Rehabilitation (CDCR), California Department of Human Resources ("CalHR," formerly Department of Personnel Administration), and the California Department of State Hospitals ("DSH," formerly Department of Mental Health) (Collectively "the State" or "Petitioners") hereby petition this Court for review of the decision of the First District Court of Appeal reversing, in part, the trial court's judgment in favor of Petitioners. A copy of the decision of the Court of Appeal, which became final on September 30, 2017, is attached to this Petition.

I.

ISSUES PRESENTED

Petitioners submit the following issues for this Court's consideration on review:

1. Whether the Court of Appeal erred in holding the definition of "hours worked" found in the Industrial Wage Commission's Wage Order No. 4, as opposed to the definition of that term found in the federal Fair Labor Standards Act, constitutes the controlling legal standard for determining the compensability of the Unrepresented Employee subclass' preliminary and postliminary "walk time."

2. Whether the Court of Appeal erred in holding that the Unrepresented Employee subclass can pursue a common law breach of contract claim for unpaid overtime, without adducing evidence at trial of an implied contract from which such contractual obligations may be derived.

II.

WHY THIS COURT SHOULD GRANT REVIEW

This Court should grant review of that portion of the Court of Appeal's decision reversing the trial court's judgment finding in favor of Petitioners against the Unrepresented Employee subclass.

As this Court has observed, "[u]nder the California Constitution it is *the Legislature* … that generally possesses the ultimate authority to establish or revise the terms and conditions of state employment through legislative enactments…." (*Professional Engineers in California Government v. Schwarzenegger* (2010) 50 Cal.4th 989, 1015-1016.) The Court of Appeal's decision in this action improperly undermines the Legislature's constitutional authority because it fails to give proper deference to the Legislature's express delegation of authority to CalHR to establish rules and regulations governing the hours and wages of unrepresented state employees. In so doing, the Court of Appeal's decision imperils the decades-long method by which the State of California compensates unrepresented employees. Accordingly, review is necessary in this action to settle an important question

of law that has statewide implications. (See Cal. Rules of Court, rule 8.500 (b)(1).)

This class action constitutes what commonly is known as a "walk time" case. In this action, the plaintiff class[1] alleges it was not paid for pre- and post-work activities (hereinafter, "PPWA") that consisted of time spent walking from the entrance of state correctional facilities to plaintiffs' posts in those facilities.

Pursuant to the stipulation of the parties, the trial court "trifurcated" this case for trial. The first phase, the phase at issue here, consisted of a bench trial of certain foundational legal issues on which the plaintiffs needed to prevail in order for the case to proceed.

---

[1] The class certified by the trial court consists of,

> [a]ll persons who are or who have been employed as Correctional Officers, Correctional Sergeants, Correctional Lieutenants, Medical Technical Assistants, Senior Medical Technical Assistants, Correctional Counselors I, Correctional Counselors II, Youth Correctional Officers, and/or Youth Correctional Counselors to work at adult or youth correctional institutions within the California Department of Corrections and Rehabilitation in the period commencing April 9, 2005 until the notice of pendency of this class action is given.

On January 6, 2012, the trial court approved the parties' stipulation dividing the plaintiff class into two subclasses: Represented Employees, whose employment with the State of California is governed by the Ralph C. Dills Act ("Dills Act," Gov. Code § 3512, et seq.) and Unrepresented Employees, i.e., excluded supervisory employees whose employment with the State of California is governed by the Bill of Rights for State Excluded Employees (Gov. Code § 3525, et seq.).

The first of these legal issues that is relevant here involved the question of what legal standard governs the determination of whether the disputed PPWA constituted compensable hours of work: California's "control" test, as embodied in the Industrial Wage Commission's (IWC), Wage Order No. 4 (i.e., "the time during which an employee is subject to the control of an employer" – see Cal. Code Regs, tit. 8, § subd. (2)(K)); *Morillion v. Royal Packing Company* (2000) 22 Cal.4th 575) or the definition of compensable hours of work found in the Fair Labor Standards Act. ("FLSA," 29 U.S.C. § 201, et seq.) (i.e., an activity must be integral and indispensable to the principal activities that an employee is employed to perform to be compensable – see *Integrity Staffing Solutions, Inc. v. Busk* (2014) 135 S.Ct. 513, 519). Petitioners argued at trial that for the Represented Employee subclass, the FLSA standard was controlling as a result of a series of collectively bargained memoranda of understanding (MOUs) negotiated between the parties pursuant to the Ralph C. Dills Act ("Dills Act," Gov. Code § 3512, *et seq*.) dating back to 1998. For the Unrepresented Employee subclass, Petitioners argued at trial that the FLSA standard was controlling as a result of pay scales adopted by the CalHR pursuant to express authority delegated to it by the Legislature. Because application of the FLSA, and particularly the Portal-to-Portal Act (29 U.S.C. §§ 251-262), "relieves an employer of responsibility for compensating employees for activities which are preliminary or postliminary to the

principal activity or activities of a given job" (*Bamonte v. City of Mesa* (9th Cir. 2010) 598 F.3d 1217, 1221), Petitioners argued the claims of both subclasses could not proceed as a matter of law.

The second foundational issue submitted to the trial court in Phase 1 that is relevant here was whether the plaintiff class could proceed with a common law breach of contract action based on CalHR policies establishing rules and regulations for hours and wages of state employees. Petitioners argued at trial that plaintiffs' failed to establish that the disputed policies created implied contractual obligations pursuant to this Court's test in *Retired Employees Association of Orange County, Inc. v. County of Orange* [*"Retired Employees*"] (2011) 52 Cal.4th 1171, 1189. Specifically, Petitioners argued that because neither the express language of the CalHR policies in question nor the circumstances surrounding their adoption "clearly evince[d] an intent to contract as opposed to an intent to make policy" (*id.*), the plaintiff class could not ground their implied contract claim in those policies.

Following the trial of Phase 1, the trial court issued its Statement of Decision (Appellants' Appendix ["AA"], Vol. 20, p. AA005409.) in which it agreed with Petitioners that the FLSA controlled the determination of whether the disputed PPWA constituted compensable hours of work for both the Represented Employee and Unrepresented Employee subclasses. The trial court further agreed that plaintiffs had failed to establish the existence

of either an express or implied contract for payment of overtime. Accordingly, the trial court entered judgment in favor of Petitioners and the plaintiff class appealed.

On appeal, the First District Court of Appeal affirmed the trial court's decision as to the Represented Employee subclass on both of the above issues, but reversed as to those issues with respect to the Unrepresented Employee subclass. It is that portion of the Court of Appeal's decision reversing the trial court's judgment regarding the Unrepresented Employee subclass on which Petitioners now seek review.

With respect to the question of the governing legal standard for determining the compensability of the Unrepresented Employees' PPWA, the Court of Appeal characterized the question as a "close one," but concluded, "[o]n this record," the definition of "hours worked" found in the IWC's Wage Order No. 4 governed the determination of whether the disputed PPWA constituted compensable hours of work. (Slip Opn., p. 18-19.) The Court of Appeal's conclusion on this issue is flawed for several reasons.

First, the Court of Appeal's decision is contrary to the express authority granted to CalHR by the Legislature to utilize FLSA standards for measuring employees' hours of work. This authority emanates from a series of Government Code sections enacted in 1981. (See Stats. 1981, Ch. 230, Sec. 55), Thus, CalHR's reliance upon, and exercise of, its legislatively

delegated authority predates the adoption of the 2001 IWC Wage Order No. 4 by twenty years.

Second, the decision fails to take into account, or even meaningfully address, the substantial evidence establishing the long history of the state using the FLSA as the standard for determining the compensable hours of work for unrepresented employees based on the express authorization to do so granted by the Legislature.

Finally, while the Court of Appeal purports to "harmonize" the IWC's Wage Order No. 4 with the CalHR pay scales (see Court of Appeal's decision, p. 19), its decision only serves to create an untenable, and ultimately irreconcilable, conflict in the methodology for establishing compensable hours of work for unrepresented state employees.

The Court of Appeal's decision reversing the trial court's judgment in favor of Petitioners on the Unrepresented Employees' common law contract claim is equally flawed.

First, the decision that the Unrepresented Employee subclass may proceed with a common law breach of contract claim relies on the erroneous decision that the California "control" test, rather than the FLSA "principal activity" test applies to the Unrepresented Employee subclass. (Slip Opn., p. 24.) Because the Court of Appeal's erroneous conclusion that the control test applies to the Unrepresented Employee subclass serves as the predicate

for its conclusion regarding the common law breach of contract claim, that conclusion is equally in error and should be reversed.

Furthermore, the Court of Appeal's decision in favor of the Unrepresented Employee subclass on the common law breach of contract claim improperly fails to apply this Court's test as stated in *Retired Employees, supra,* 52 Cal.4th 1171, 1189. Contrary to the decision in that case, the Court of Appeal's decision here neither identifies specific policies on which the Unrepresented Employee subclass may base its common law contract theory nor how either the express language of those policies or the circumstances surrounding their adoption "clearly evince an intent to contract, *as opposed to an intent to make policy.*" (*Ibid.*)

In order to resolve these important questions of law and to ensure uniformity of decision, Petitioners urge this Court to grant review of that portion of the Court of Appeal's decision reversing the trial court's judgment in favor of Petitioners and against the Unrepresented Employee subclass.

III.

STATEMENT OF THE CASE

A. Statement of Facts.

1. The Parties.

(a) Petitioners.

Petitioners in this action are the State of California and three of its Departments: CDCR, DSH, and CalHR. CDCR operates the state prison

system and employs over 40,000 employees, who are primarily assigned to work at one or more of the 34 adult correctional facilities and three youth correctional facilities throughout California. During the class period, DSH operated a psychiatric program within two CDCR adult correctional facilities: the Salinas Valley Psychiatric Program located within Salinas Valley State Prison and the Vacaville Psychiatric Program located within the California Medical Facility.[2]

CalHR was created on July 1, 2012 to consolidate the former Department of Personnel Administration and certain programs of the State Personnel Board. For employees covered by the Ralph C. Dills Act ("Dills Act"), CalHR acts on behalf of the Governor, as the state employer, to collectively bargain with the recognized employee organization regarding terms and conditions of employment. (Gov. Code § 3517.) In the case of managerial or supervisory employees, who are exempted from coverage under the Dills Act and subject to the Bill of Rights of State Excluded Employees, CalHR is responsible for establishing rules and regulations regarding the terms and conditions of their employment. (Gov. Code §§ 3525, *et seq.*) This responsibility is delegated to CalHR by the Legislature through various Government Code sections, including without limitation, sections 19826, 19843 to 19845, 19848, and 19849.

---

[2] As of July 1, 2017, CDCR operates all psychiatric facilities within state correctional facilities.

(b) The Unrepresented Employee Subclass.

The Unrepresented Employee subclass consists of excluded supervisory employees who were employed at CDCR or DHS during the class period of April 9, 2005 to December 6, 2011. (See footnote 1, *supra*, for the full definition of the plaintiff class and subclasses.)

2. Labor Relations Between the State and Unrepresented Employees.

Pursuant to the Bill of Rights for State Excluded Employees, Government Code section 3525, *et seq.*, employees in the Unrepresented Employee subclass are not permitted to collectively bargain for their wages, hours, or other terms and conditions of employment. (AA, Vol. 3, p. AA000605.) Instead, the Legislature has delegated to CalHR the authority to adopt rules and regulations establishing unrepresented state employees' wages and working hours. (See *California Assn. of Professional Scientists v. Department of Finance* (2011) 195 Cal.App.4th 1228, 1232; see also, *Lowe v. Cal. Resources Agency* (1991) 1 Cal.App.4th 1140, 1151 ["[s]etting compensation for employees is a legislative function"], citing *State Trial Attorney's Association v. State of California* (1976) 63 Cal.App.3d 298, 303.)

The Legislature's delegation of this authority to CalHR is found in a series of Government Code sections. For instance, Government Code section 19826, subdivision (a) specifically delegates to CalHR the authority to set "establish and adjust salary ranges for each class of position in the state civil

service." (AA, Vol. 13, p. AA003619.) Government Code section 19843, subdivision (a) grants to CalHR the authority to "establish and adjust workweek groups and [to] assign each class or position to a workweek group." (AA, Vol. 13, p. AA003621.) Government Code section 19844, subdivision (a) authorizes CalHR to "establish the method by which ordered overtime or overtime in times of critical emergency is compensated." (AA, Vol. 13, p. AA003622.) Government Code section 19845, subdivision (a) authorizes CalHR "to provide for overtime payments *as prescribed by the federal Fair Labor Standards Act* to state employees." (AA, Vol. 13, p. AA003623, emphasis added.) Finally, Government Code section 19849, subdivision (a) authorizes CalHR "to adopt rules governing working hours and overtime compensation." (AA, Vol. 13, p. AA003624.)

Based on the authority granted to it by the Legislature pursuant to these statutes, CalHR adopted regulations in 1983 pertaining to salary ranges, workweek groups, hours worked, and when overtime would be compensable. (See Cal. Code Regs., tit. 2, §§ 599.702 [overtime must be authorized in advance and confirmed in writing], 599.704 [to be compensable it must be "ordered overtime"]; Statement of Decision pp. 12-13.) At the same time, CalHR exercised the authority granted it by the Legislature to "establish and adjust workweek groups and [to] assign each class or position to a workweek group" (Gov. Code § 19843, subd. (a)) by adopting the California Pay Scales Manual ("Pay Scales Manual"). (AA, Vols. 11-13, p. AA002794, *et seq.*)

At trial, David Gilb, the former CalHR Director, testified that the State's labor relations with unrepresented employees are governed by authority delegated to CalHR through these code sections. (RT, Vol. 4, 451:2-10.) Based on his personal knowledge as former CalHR Director, Mr. Gilb testified the Legislature has charged CalHR with administering these statutes and that, as CalHR's Director, he understood these statutes to delegate to CalHR the legislative prerogative to establish terms and conditions of employment for unrepresented employees. (RT, Vol. 4, 455:2-19; 458:22-459:8; 464:1-15; 464:24-465:17; 465:22-466:10.)

Pursuant to the authority delegated it by the Legislature, Mr. Gilb testified CalHR developed and adopted the Pay Scales Manual. (RT, Vol. 4, 467:9-468:5 (Gilb); AA, Vols. 11-13, AA p. 002794, *et seq.*) This manual documents the salary ranges for each employee class in the state civil service. (*Ibid.*) At trial, Mr. Gilb testified that each of the job classifications within the Unrepresented Employee subclass is designated as Work Week Group 2. (See generally, RT, Vol. 4, 474:22-485:25 (Gilb).) Mr. Gilb identified each of the job classifications in the Unrepresented Employee subclass in the appendix to the Pay Scale Manual, which lists those job classifications within Work Week Group 2. (*Ibid.*)

Section 10 of the Pay Scale Manual is entitled, "Work Week Groups Established Under The Fair Labor Standards Act." (AA, Vol. 11, pp. AA002996-2999.) Subsection (f) of Section 10 of the Pay Scale Manual

provides that "[t]he provisions of Work Week Group 2 are made applicable to all classes *which are determined by the Director of the Department of Personnel Administration to include positions subject to the FLSA*." (*Id.* at AA002997, emphasis added.) Mr. Gilb testified he and his predecessors determined that the positions in the Unrepresented Employee subclass, all of which are included in Work Week Group 2, are subject to the FLSA. (RT, Vol. 4, 472:17-473:15.)

B. Procedural History.

1. Class Certification and Pretrial Proceedings.

This proceeding involves three coordinated class actions. Following the trial court's certification of the plaintiff class and the parties' stipulation to divide that class into two subclasses of Represented and Unrepresented Employees, the parties stipulated to try the case in successive phases. Phase 1, as agreed, consisted of a bench trial addressing several legal issues, including the following issues pertinent to this Petition: (1) Whether California's "control" standard or the FLSA standard ("first principal activity of the day") applies for determining the compensability of the disputed PPWA and (2) whether plaintiffs could pursue a common law breach of contract claim.

2. Trial Court Judgment.

Following the Phase 1 trial, the trial court ruled in favor of Petitioners. With respect to the applicable legal standard for determining the

compensability of PPWA, the trial court found CalHR had acted within its legislatively delegated authority in applying the FLSA definition of hours worked to the Unrepresented Employee subclass. (AA, Vol. 20, p. AA005431.) With respect to the breach of common law contract claim, the trial court ruled plaintiffs failed to adduce evidence at trial establishing the existence of a contract that would support the obligation to pay overtime. (AA, Vol. 20, p. AA005434.) Accordingly, based on the controlling law and substantial evidence in the record, the trial court entered judgment for Petitioners.

3. The Court Of Appeal Decision.

The plaintiff class appealed to the First District Court of Appeal, arguing the legislative authority delegated to CalHR could not, and did not, supersede Wage Order 4 or its definition of "hours worked." Plaintiffs further argued they had established the requisite elements for their common law breach of contract claim. In a published decision dated August 31, 2017, the First Appellate District affirmed the trial court's judgment against the Represented Employee subclass but reversed the judgment as to the Unrepresented Employee subclass. As discussed in greater detail below, the Court of Appeal held that IWC Wage Order No. 4 applies to public employees not subject to the Dills Act and establishes the standard for determining the compensability for hours worked. The Court of Appeal further held that the Unrepresented Employee subclass may proceed with

their claim for common law breach of contract "based on the overtime policies in effect at the time they performed that work." The Court of Appeal's decision became final on September 30, 2017.

IV.

ARGUMENT

A. Review Should be Granted In This Action To Settle Important Questions Of Law And To Ensure Uniformity of Decision On Issues of Statewide Importance.

This Court's review is necessary to settle important questions of law and to ensure uniformity of decision on issues of statewide importance. (Cal. Rules of Court, Rule 8.500, subd. (b)(1).) Since the 1980's, the State of California's labor relations with unrepresented employees has been governed by authority delegated to CalHR by the California Legislature through a series of Government Code sections. (RT Vol. 4, 451:2-10.) Among those Government Code sections delegating this authority to CalHR, Government Code section 19843 authorizes the department to set pay scales and organize job classifications into "workweek groups." (See Gov. Code § 19843; Cal. Code Regs., tit. 2, § 599.701, et seq.) Based on this delegated authority, CalHR has implemented the Pay Scale Manual, which establishes the salary ranges for each employee class in the state civil service. (AA Vols. 11-13, pp. AA002794, et seq.; RT. Vol. 4, 467:9-468:5.) For unrepresented employees, Section 10 of the Pay Scale Manual defines compensable hours of work in a manner consistent with the legal standards established by the

federal Fair Labor Standards Act. ("FLSA," 29 U.S.C. § 201, et seq.)[3] The Court of Appeal's decision to reverse that part of the trial court's judgment finding in favor of Petitioners and against the Unrepresented Employee subclass threatens to upend that system, not only for the subclass of Unrepresented Employees in this action, but for unrepresented state employees statewide. These issues are of great public importance because they involve novel legal questions regarding the Petitioners' authority that affect former, current, and future employees and their conditions of employment, including the compensation of hours worked and overtime, all of which could result in unforeseen damages against the State. Accordingly, the issues presented by this Petition have statewide impact on the state and its employees.

Moreover, the issue of whether Petitioners have or can rely on the authority delegated to CalHR by the Legislature to set the conditions of employment will continue to be litigated in the lower courts, potentially resulting in inconsistent adjudications of these issues. A definitive ruling by this Court on the issues presented in this Petition will provide needed

---

[3] In fact, Section 10 of the Pay Scales Manual is entitled, "Work Week Groups Established Under the Fair Labor Standards Act," which the record in this case establishes includes all of the employees in the Unrepresented Employee subclass in this case. (AA, Vol 11, pp. AA002996-2999.)

guidance to the state in its current and future management of employment conditions, including hours worked and overtime.

Finally, review is necessary here to address the Court of Appeal's erroneous conclusion that the Unrepresented Employee subclass can proceed with its claim for breach of common law contract. The Court of Appeal's decision threatens to mutate statewide wage and hour policies into contractual obligations without the showing of any intent by the state to be contractually bound by those policies. The Court of Appeal's decision is contrary to this Court's holding in *Retired Employees Association of Orange County v. County of Orange*, *supra*, 52 Cal.4th 1171, and, therefore, this Court should grant review to settle this important question of law.

B. The Court of Appeal Erred In Holding That The Definition Of "Hours Worked" Found In IWC Wage Order No. 4 Applies To The Unrepresented Employee Subclass.

In its decision, the Court of Appeal held that the definition of "hours worked" found in IWC Wage Order No. 4 governs the determination of whether the disputed PPWA in this case is compensable. This holding is in error. It is contrary to the Legislature's delegation of authority to CalHR to utilize the FLSA to establish hours worked for state employees and is contrary to the evidence in the case that the state has utilized the FLSA standard pursuant to that legislative delegation since the mid-1980's. Contrary to the Court of Appeal's assertion, its decision does not harmonize Wage Order No. 4 with the Pay Scales Manual, but instead creates an

untenable conflict in the methodology for compensating unrepresented employees in the State of California. Accordingly, the Court of Appeal's decision should be reversed.

1. Pursuant To The Legislature's Delegation Of Authority, CalHR Has Adopted Specific Rules And Regulations Establishing The FLSA As The Controlling Legal Standard For Determining Compensable Hours Worked Of Unrepresented Employees.

CalHR has used its legislatively-delegated authority to apply the FLSA as the controlling legal standard for determining the compensability of Unrepresented Employees' hours worked since the mid 1980's. (RT, Vol. 4, 467:9-468:5; AA, Vols. 11-13, p. AA002794, *et seq.*) As David Gilb testified at trial, the Pay Scale Manual establishes the salary ranges for each class of employees in the state civil service. (*Ibid.*) Mr. Gilb identified each of the job classifications in the Unrepresented Employee subclass in the appendix to the Pay Scales Manual and noted that each of those job classifications had been designated Work Week Group 2 (WWG 2). (See generally, RT, Vol. 4, 474:22-485:25.)

The Pay Scales Manual establishes the terms and conditions of employment for employees designated WWG 2, including Unrepresented Employees here, are subject to the FLSA. Section 10 of the Pay Scale Manual is entitled, "Work Week Groups Established Under The Fair Labor Standards Act." (AA, Vol. 11, pp. AA002996-2999.) That section states, in part, "[t]he provisions of [WWG] are made applicable to all classes which

are determined by the Director of the Department of Personnel Administration to include positions *subject to the FLSA*." (*Ibid.*, emphasis added.) Section 10 of the Pay Scales Manual further provides that "[t]he beginning of a work week may be changed if the change is intended to be permanent and it is not intended to evade the overtime provisions *of the FLSA*." (*Ibid.*, emphasis added.) Subsection (f) of Section 10 of the Pay Scale Manual specifically provides that "[t]he provisions of Work Week Group 2 are made applicable to all classes which are determined by the Director of the Department of Personnel Administration to include positions subject to the FLSA." (*Id.*, at p. AA002997.) Mr. Gilb testified that both he and his predecessors have determined that the positions in the Unrepresented Employee subclass, all of which are included in Work Week Group 2, are subject to the FLSA. (RT, Vol. 4, 472:17-473:15.)

The Court of Appeal ignored this evidence in reaching its decision that the "hours worked" standard in IWC Wage Order No. 4, rather than the FLSA standard adopted by CalHR, is determinative with respect to whether the disputed PPWA is compensable. In reaching this conclusion, the Court of Appeal found that in contrast to the IWC's wage orders, which it notes are entitled to "extraordinary deference, both in upholding their validity and in enforcing their specific terms" (see Slip Opn, p. 10, citing, *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1027), the Pay Scale Manual "is not a legislative enactment" (Slip Opn., p. 19) and,

therefore, not entitled to the same deference. This distinction misses the point entirely. The Pay Scale Manual, and its adoption by CalHR, is a direct outgrowth of the Legislature's delegation of authority to establish the terms and conditions of state employment, a delegation the Court of Appeal expressly recognized in its decision. (Slip Opn., p. 18, citing, *California Assn. of Professional Scientists v. Department of Finance*, *supra*, 195 Cal.App.4th 1228, 1232 ["[t]he Legislature has delegated to DPA [CalHR's predecessor] the authority to set salaries of state employees excluded from collective bargaining"].) The Court of Appeal fails to explain in its decision how it can at once recognize that CalHR has the legislatively delegated authority to establish wages and hours of unrepresented state employees but that its exercise of that authority is not entitled to any deference, or at least not to the same deference due the IWC's wage orders. This position is particularly difficult to understand when, as here, CalHR has exercised its legislatively delegated authority in a manner expressly authorized by the Legislature.

As noted above, CalHR derives its authority to establish the wages and hours of unrepresented state employees through a series of legislative enactments found in the Government Code. One statute, in particular, is noteworthy in addressing the disconnect between the Court of Appeal's decision and the Legislatures grant of authority to CalHR to establish the

wages and hours of work of unrepresented employees. Government Code section 19845, subdivision (a) reads simply:

> Notwithstanding any other provision of this chapter, the department [CalHR] is authorized to provide for overtime payments *as prescribed by the Federal Fair Labor Standards Act* to state employees. (Emphasis added.)

Intrinsic in the concept of providing for overtime payments "as prescribed the Federal Fair Labor Standards Act" is reliance on the FLSA's definition of hours worked. The federal Department of Labor's (DOL) interpretive statements regarding the FLSA make that point abundantly clear. Those interpretive statements provide that the FLSA concept of "hours worked," as that term is used in the act, as well the manner in which that term has been interpreted in judicial decisions, is inherent in the determination of overtime obligations under the act. (See e.g., 29 C.F.R. § 785.5-785.7.) In other words, when the Legislature expressly authorized CalHR to prescribe rules for overtime payment consistent with the FLSA, it implicitly, if not explicitly, authorized CalHR to utilize the FLSA standard for hours worked because that standard is inseparable from the FLSA's overtime provisions. Thus, the Court of Appeal's decision that the definition of "hours worked" contained in Wage Order No. 4 applies to Unrepresented Employees effectively nullifies the Legislature's grant of authority to CalHR to establish rules for overtime in a manner consistent with the FLSA because establishing overtime rules consistent with the FLSA necessarily includes application of

the definition of "hours worked" contained in that act. As a result, review of the Court of Appeal's decision is necessary to avoid nullifying an express delegation of authority by the Legislature, the body with the constitutional authority to establish or revise the terms and conditions of state employment through legislative enactments.…" (*Professional Engineers in California Government v. Schwarzenegger, supra*, 50 Cal.4th 989, 1015-1016), to CalHR.

2. Contrary To the Court Of Appeal's Conclusion, Its Decision Does Not Harmonize The Pay Scale Manual And Wage Order No. 4.

The Court of Appeal claims its decision harmonizes the Pay Scales Manual with Wage Order No. 4. (Slip Opn., p. 21.) It does not. To hold that CalHR has legislatively delegated authority to set the wages and hours of work for unrepresented employees, and that this delegation specifically includes the authority to establish overtime rules in a manner consistent with the FLSA (see Slip Opn., p. 19), but simultaneously to find that CalHR must follow the definition of hours worked found in IWC Wage Order No. 4, a standard the Court of Appeal acknowledges is broader than the FLSA (see Slip Opn., p. 24), is a contradictory proposition lacking internal consistency or logic. The Court of Appeal's statement that "[w]e may reasonably construe the regulatory schemes to mean that entitlement to overtime compensation is controlled by the FLSA but that the meaning of 'hours worked' is governed by Wage Order No. 4" (Slip Opn., p. 21) is a study in

contradiction. As noted above, the FLSA overtime provisions intrinsically include the FLSA concept of hours worked. A system by which "hours worked" is defined by the California "control" test, but overtime is administered pursuant to FLSA standards is the proverbial "mixing apples and oranges."

Moreover, the basis on which the Court of Appeal concludes the Pay Scales Manual and Wage Order No. 4 may be harmonized is based on an erroneous interpretation of both the Pay Scales Manual and the FLSA. At page 20 of its decision, the Court of Appeal notes the Pay Scale Manual provides that "only the time spent which is *controlled or required* by the State and pursued for the benefit of the State need be counted." (Slip Opn., p. 20, emphasis in original.) The Court of Appeal concludes that this language establishes a basis on which the Pay Scale Manual and Wage Order No. 4 can be harmonized.

The Court of Appeal makes the same error as the plaintiff class did at trial, an error squarely addressed by the trial court in its Statement of Decision. As the trial court concluded,

> To begin with, the quoted sentence makes clear that the definition of hours worked contained in the Pay Scales Manual is "under the provisions of the FLSA." Contrary to plaintiffs' assertion, the concept of 'control' is not antithetical to the determination of compensable hours worked under the FLSA. As noted in the Code of Federal Regulations, the United States Supreme Court has interpreted the FLSA as requiring

> compensation 'for all time spent in "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."' 29 C.F.R. § 785.7 (*quoting Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944)). That language from *Tennessee Coal* case is identical to that found in section 10(a) of the Pay Scales Manual and further confirms defendants' intention to apply the FLSA concept of hours worked to employee who are subject to that section of the Manual.

(AA, Vol. 20, p. AA005431.) The Court of Appeal's decision fails to address this finding by the trial court or the authorities on which the trial court relied.

Far from harmonizing the Pay Scales Manual and Wage Order No. 4, the Court of Appeal's decision violates two important maxims of construction. It is well established that "[a] court must, where reasonably possible, harmonize statutes, reconcile seeming inconsistencies in them, and construe them to give force and effect to all of their provisions." (*State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 955–956, internal citations omitted.) As noted by this Court in *State Dept. of Public Health*, when harmonizing seemingly conflicting statutes, "[a]ll presumptions are against a repeal by implication." (*Ibid.* ["Absent an express declaration of legislative intent, we will find an implied repeal only when there is no rational basis for harmonizing the two potentially conflicting statutes, and the statutes are irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation."] Internal citations omitted.) Here,

the Court of Appeal's decision violates these maxims in that it effectively repeals, among others, Government Code section 19845. As already discussed, FLSA overtime rules include the FLSA's definition of "hours worked." Thus, when the Court of Appeal held that the compensability of Unrepresented Employees' hours worked must be evaluated pursuant to California's state standard as contained in IWC Wage Order No. 4, the Court of Appeal effectively repealed Government Code section 19845 and the legislative delegation of authority to CalHR to establish overtime rules based on the FLSA.

In addition, the Court of Appeal's decision violates the maxim that a more specific expression by the Legislature controls over a more general one. (*Cumero v. Public Employment Relations Bd.* (1989) 49 Cal.3d 575, 587; *Bailey v. Superior Court* (1977) 19 Cal.3d 970, 976–977, fn. 8.) Here, section 10 of the Pay Scales Manual was adopted by CalHR through the exercise of its delegated authority to establish, among other things, overtime standards pursuant to the FLSA. Thus, the Pay Scales Manual comprises a specific set of standards applicable to unrepresented employees falling in WorkWeek Group 2 in response to a specific expression of legislative intent to establish overtime rules for such employees consistent with the FLSA. On the other hand, IWC Wage Order No. 4 is a general enactment establishing wage and hour standards for private and public employees statewide. Accordingly, the Court of Appeal should have extended the greater deference

to CalHR's Pay Scales Manual, as specifically applied to the Unrepresented Employee subclass, than to the general provisions of Wage Order No. 4.

In sum, the Court of Appeal's effort to "harmonize" the Pay Scales Manual and Wage Order No. 4 is based on faulty logic that does not survive a careful examination. Petitioners request that this Court undertake that careful examination and in so doing reverse the erroneous decision by the Court of Appeal.

C. This Court Should Grant Review Of The Court Of Appeal's Erroneous Conclusion That The Unrepresented Employee Subclass May Pursue A Common Law Breach Of Contract Claim.

The Court of Appeal's holding that the Unrepresented Employee subclass may assert a common law breach of contract claim is in direct conflict with this Court's decision in *Retired Employees, supra* 52 Cal.4th 1171, 1187-98. The First Appellate District erroneously failed to apply *Retired Employees* to this case, and its decision allows any policy of a public employer to morph into a contract without the requisite showing of intent to create any contractual obligation.

1. The Court of Appeal's Decision Is Inconsistent With This Court's Decision In *Retired Employees.*

In *Retired Employees*, this Court addressed a certified question from the Ninth Circuit Court of Appeals asking whether, as a matter of California law, a county and its employees, who were subject to a memorandum of understanding, could form an implied term of a contract that confers vested

rights to health benefits for retired county employees. (*Retired Employees*, *supra*, 52 Cal.4th at 1187.) This Court answered that question in the affirmative, but placed narrow limits on the ability of public employees to state implied contract theories.

This Court's analysis of the Ninth Circuit's question in *Retired Employees* Court began with the well-established principle that, "it is presumed a statutory scheme is not intended to create private contractual rights or vested rights and a person who asserts the creation of a contract with the state has the burden of overcoming that presumption. [Citations]" (*Id.* at 1186.) "[T]o construe laws as contracts when the obligation is not clearly and unequivocally expressed … limit[s] drastically the essential powers of the legislative body. [Citations]" (*Id.* at 1185.) However, under certain circumstances, "[w]here the relationship *is* governed by a contract, a county may be bound by an implied contract (or by implied terms of a written contract)" if there is no legislative prohibition against such arrangements, such as a statute or ordinance. (*Id.* at 1183, emphasis in original.) In "deciding whether private contractual rights should be implied from legislation," this Court warned lower courts to " 'proceed cautiously both in identifying a contract within the language of a . . . statute and in defining the contours of any contractual obligation.' [Citation] The requirement of a 'clear showing' that legislation was intended to create the asserted

contractual obligation . . . should ensure that neither the governing body nor the public will be blindsided by unexpected obligations." (*Id.* at 1188-89.)

In this case, the Unrepresented Employee subclass did not argue to the trial or appellate court that an express contract existed granting them the right to recover overtime. As such, any breach of contract claim must be based on implied terms. Yet, the Court of Appeal erred in finding the Unrepresented Employee subclass had made a sufficient showing to proceed on an implied contract theory. Neither the Unrepresented Employee subclass at trial, nor the Court of Appeal in its decision, identifies a specific policy that either the text of which, the circumstances surrounding its adoption, "clearly evince an intent to contract, as opposed to an intent to make policy." (*Retired Employees*, *supra*, at 1189.) In reaching its decision on this issue, the Court of Appeal simply ignored the trial court's determination that the Unrepresented Employee subclass had failed to adduce evidence at trial establishing the existence of a contract to pay overtime. (AA, Vol. 20, p. AA005434.) Moreover, the Court of Appeal disregarded the trial court's factual determination regarding CalHR's intent to compensate hours worked and overtime pursuant to the FLSA standard. (*Id.* at p. AA 005431; see *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 677 [intent of parties to form implied contract is question of fact]; *Caron v. Andrew* (1955) 133 Cal.App.2d 412, 416 [existence of implied contract is question of fact for

trial court and the appellate court must draw all reasonable inferences in favor of trial court's judgment].)

The Court of Appeal's decision disregards the element of intent as required by *Retired Employees*. As such, the Court of Appeal's decision is in error and should be reversed by this Court.

2. The First Appellate District Erred In Holding That A Breach Of Contract Claim Necessarily Exists Because Wages Were Earned And Unpaid.

The Court of Appeal erroneously relied on three decisions to hold that an implied contract necessarily exists because wages were earned but unpaid. (*Madera Police Officers Ass'n v. City of Madera* (1984) 36 Cal.3d 403 ("*Madera*"); *White v. Davis* (2003) 30 Cal.4th 528 ("*White*"); and *Sheppard v. North Orange County Regional Occupational Program* (2011) 191 Cal.App.4th 289 ("*Sheppard*").) Each of these decisions is distinguishable from the present case.

In *Madera*, after the court ruled that time spent during meal periods was compensable work time, the issue was whether the plaintiffs could recover for such time pursuant to the city's regulations, which mandated overtime pay for work performed in excess of the normal eight-hour day and 40-hour week. (*Madera* at 406-07.) The *Madera* court ruled that under the city's overtime regulation, the plaintiffs could recover payments for unpaid overtime. (*Id*. at 413-414.) In the present case, the Court of Appeal did not identify a similar regulation authorizing the payment of overtime, nor could

it have, because the trial court found the Unrepresented Employee subclass "failed to persuasively establish at trial the existence of any agreement to pay overtime." (AA, Vol. 20, p. AA005435.) Thus, the record before the Court of Appeal lacked evidence of a policy on which contractual obligations could be founded and based upon such a record the Court of Appeal should have found that the Unrepresented Employee subclass' claim for breach of common law contract could not proceed.

In *White*, the issue was whether state employees should be considered volunteers, as opposed to employees, during a budget impasse and whether they should be compensated for the time worked during the impasse. (*White, supra,* 30 Cal.4th at 434.) It is within this context that this Court held "state employees who work during a budget impasse obtain the right, protected by the contract clauses of the federal and state Constitutions, to the state's ultimate payment of their full salary for work performed during the budget impasse." (*Id.* at 435.) The present case does not involve the constitutional considerations inherent in the type of Contracts Clause analysis at issue in *White*. That case simply is inapposite to the present one and does not support the conclusion the Unrepresented Employee subclass may proceed with a claim for breach of common law contract on the record that was before the appellate court. As such, *White* does not support the Court of Appeal's conclusions.

In *Sheppard*, an employee of a regional occupational program sought compensation for unpaid preparation time by asserting a claim for violation of California's state minimum wage law, pursuant to the wage order, and breach of contract. (*Sheppard, supra,* 191 Cal.App.4th at 293-94.) The trial court sustained the employer's demurrer on the narrow ground that public employees are prohibited from maintaining a breach of contract claim. (*Id*. at 311.) While *Sheppard* held the breach of contract claim by a public employee was not per se prohibited, it did not decide whether the claim was viable. (*Id*. 312-13.)

In addition, the *Sheppard* court relied on this Court's decision in *Miller v. State of California* (1977) 18 Cal.3d 808, 811, 814, affirming a trial court's denial of a petition for writ of mandate and for order to recover damages for breach of contract. In *Miller*, this Court held that legislative provisions controlling the terms and conditions of civil service employment cannot be circumvented by any contractual obligation. (*Miller v. State of California*, *supra*, 18 Cal.3d at 813-18.) Consequently, *Sheppard* and *Miller* do not save the Court of Appeal's faulty rationale. In fact, considered in context, *Miller* supports Petitioners. (*Miller, supra,* at 814 ["the power of the Legislature to reduce the tenure of plaintiff's civil service position . . . was not and could not be limited by any contractual obligation"].) As in *Miller*, the power of the Legislature to grant CalHR the authority to set the terms and conditions of employment for the Unrepresented Employee subclass

pursuant to the FLSA, and CalHR's exercise of such authority, cannot be limited by any purportedly contrary implied contract, particularly when, as here, the record is silent with respect to any source for such implied contractual obligations.

In sum, the Court of Appeal failed to engage in the analysis required by *Retired Employees* and relied on authority that is not on point, errors which should be reviewed by this Court. The Court of Appeal also erred by ignoring the trial court's factual determination that the plaintiff class failed to adduce evidence at trial establishing the existence of a contract from which the implied obligation to pay overtime may be derived. Finally, the Court of Appeal's decision that the Unrepresented Employee subclass may proceed with its claim for breach of common law contract is based on the faulty predicate that IWC Wage Order No. 4, rather than the FLSA, establishes the controlling standard for determining compensable hours of work. For all these reasons, this Court should grant review of this action to correct the errors committed by the Court of Appeal and to resolve these important questions of law.

/ / /

/ / /

/ / /

/ / /

/ / /

V.

CONCLUSION

Petitioners respectfully request this Court grant review of the Court of Appeal's August 31, 2017 Order, holding Wage Order 4 applies to the Unrepresented Employee subclass as the standard for compensability of hours worked. This holding is contrary to the Legislature's delegation of authority to CalHR to establish wages and working hours in a manner consistent with the FLSA. The holding also creates an irreconcilable conflict between CalHR's Pay Scales Manual and Wage Order No. 4.

Petitioners further respectfully request that this Court grant review of the Court of Appeal's holding that the Unrepresented Employee subclass may assert a claim for breach of contract "based on the overtime policies in effect at the time they performed that work." The Court of Appeal erred by failing to identify the contract from which such an obligation may derive, which is contrary to this Court's guidance in *Retired Employees*, and disregards the trial court's finding that the Unrepresented Employee subclass failed to adduce evidence during trial of the existence of a specific policy from which implied contractual obligations derived.

The Court of Appeal's decision has significant negative implications on the method by which unrepresented state employees are compensated. Accordingly, this Court should grant review to settle important issues of law

of statewide significance and to ensure uniformity of decision on these important questions.

DATED: October 9, 2017

KRONICK, MOSKOVITZ,
TIEDEMANN & GIRARD
A Professional Corporation

By: /s/ David W. Tyra
David W. Tyra
Attorneys for State of California, Department of Human Resources, California Department of Corrections and Rehabilitation and California Deparment of State Hospitals

CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA RULES OF COURT RULE 8.504(d)(1)

Pursuant to California Rules of Court Rule 8.504(d)(1), I certify that according to Microsoft Word the attached brief is proportionally spaced, has a typeface of 13 points and contains 7,672 words.

DATED: October 9, 2017

KRONICK, MOSKOVITZ,
TIEDEMANN & GIRARD
A Professional Corporation

By: /s/ David W. Tyra
David W. Tyra
Attorneys for State of California, Department of Human Resources, California Department of Corrections and Rehabilitation and California Deparment of State Hospitals

Attachment 1

Filed 8/31/17

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

KURT STOETZL ET AL.,

Plaintiffs and Appellants,

v.

STATE OF CALIFORNIA, DEPARTMENT OF HUMAN RESOURCES ET AL.,

Defendants and Respondents.

A142832

(San Francisco County
Super. Ct. No. CJC11004661)

Plaintiffs are current and former correctional peace officers who work or worked at various state correctional facilities. They brought these coordinated class actions alleging they were improperly denied pay for time they spent under their employer's control before and after their work shifts. Ruling that plaintiffs' entitlement to overtime pay is controlled by federal, rather than California, law, the trial court entered judgment for defendants.[1] We shall reverse the judgment in part as to the subclass of unrepresented employees and affirm as to the subclass of represented employees.

[1] The three coordinated actions are *Stoetzl et al. v. State of California*, CGC-08-474096, filed in the San Francisco County Superior Court (the *Stoetzl* action); *Shaw et al. v. State of California*, 10C0081, filed in the Kings County Superior Court (the *Shaw* action); and *Kuhn et al. v. State of California*, BC450446, filed in the Los Angeles County Superior Court (the *Kuhn* action). Defendants are the State of California, the California Department of Corrections and Rehabilitation (CDCR), the California Department of Mental Health, and the California Department of Personnel Administration (DPA). We shall refer to defendants collectively as "the State."

I. BACKGROUND

A. The Actions

Plaintiffs alleged they were not paid for all the time they spent at the correctional institutions under defendants' control. Specifically, they were expected to sign in and sign out on time sheets that reflected only their officially assigned work day. Plaintiffs were required to be at their assigned posts at the beginning of their official shifts. However, the sign-in and sign-out locations were often significantly removed from plaintiffs' actual work posts, and they were not compensated for the time it took to travel from those locations to their work posts after signing in or to return to those locations to sign out at the end of a shift. Second, plaintiffs alleged that they were required to spend time before checking in and after checking out on such activities as being briefed before a shift, briefing relief staff at work posts after a shift, checking out and checking in mandated safety equipment, putting on and removing mandated safety equipment, waiting in lines, submitting to searches at security checkpoints, and taking inventories of weapons, ammunition, and other equipment. Plaintiffs were either not allowed to or were discouraged from adjusting their time logs to reflect these additional tasks. Plaintiffs alleged causes of action for failure to pay contractual overtime (Lab. Code,[2] §§ 222, 223) (first cause of action), failure to pay the California minimum wage (§§ 1182.11, 1182.12, 1194; 8 Cal. Code Regs. § 11000 et seq.) (second cause of action), failure to keep accurate records of hours worked (§ 1174) (third cause of action), and failure to pay overtime in breach of common law contractual obligations (fourth cause of action). They sought unpaid overtime wages, unpaid California minimum wages, liquidated damages, and injunctive relief.

In the *Stoetzl* action, the trial court certified a class of "[a]ll persons who are or who have been employed as Correctional Officers, Correctional Sergeants, Correctional Lieutenants, Medical Technical Assistants, Senior Medical Technical Assistants,

---

[2] All undesignated statutory references are to the Labor Code. All rule references are to the California Rules of Court.

Correctional Counselors I, Correctional Counselors II, Youth Correctional Officers, and/or Youth Correctional Counselors to work at adult and/or youth correctional institutions within the [CDCR] in the period commencing April 9, 2005 until the notice of pendency of this class action is given." The *Stoetzl*, *Shaw*, and *Kuhn* actions were later coordinated. (Code Civ. Proc., § 404 et seq.; rule 3.501 et seq.) The court granted class certification in the *Shaw* and *Kuhn* actions and, by stipulation, certified two subclasses for the three coordinated cases, one of unrepresented supervisory employees (consisting of Senior Medical Technical Assistants, some subclassifications of Correctional Officer II's, Correctional Sergeants, and Correctional Lieutenants) and one of represented employees (consisting of the remaining job classifications).[3]

B. Judgment on the Pleadings

The State moved for judgment on the pleadings. The trial court granted the motion without leave to amend as to the causes of action for failure to pay overtime in violation of sections 222 and 223 and failure to keep accurate records of hours worked, and denied the motion as to the remaining causes of action.

C. Trial

1. Threshold Legal Issues

The parties stipulated that the trial would be bifurcated into multiple phases. In Phase I, several threshold legal issues would be tried to the court. The issues were: "Compensability [¶] (a) Whether the California state law standard of compensability (the 'control standard') or the [federal Fair Labor Standards Act of 1938, 29 U.S.C. § 201 et seq. (FLSA)] standard of compensability ('first principal activity of the day') establishes the standard for determining plaintiffs' compensable hours worked; as to Represented Employees: During the relevant time period, did the parties agree the FLSA would constitute the controlling legal standard for determining represented employees' compensable hours worked? [¶] Minimum Wage [¶] (b) Whether Labor Code sections

[3] Employees in the job classification of Correctional Counselor II (Supervisor) were later excluded from the class of unrepresented employees and dismissed from the action.

1182.11, 1182.12, 1194 and 8 CCR section 11000 *et seq.* and/or the Wage Orders apply to the state employer for purposes of establishing the minimum wage applicable to plaintiffs. [¶] (c) Represented Employees: During the relevant time period, did the parties contractually agree to apply the federal minimum wage instead of the California minimum wage and, if so, is such an agreement enforceable? [¶] Breach of Contract Claims [¶] (d) Is there any legal prohibition, including but not limited to, the Ralph C. Dills Act (Govt. Code § 3512, *et seq.*) for represented employees and the Bill of Rights for State Excluded Employees (Govt. Code § 3525, *et seq.*) for unrepresented employees, against stating a claim for breach of common law contract regarding the terms and conditions of employment against the state, or against an employee receiving overtime for hours worked beyond their regular work schedules? [¶] (e) For represented employees, what contractually enforceable overtime policies existed when (1) the 2001-2006 MOU was in effect, including by operation of Government Code § 3517.8 until September 18, 2007, (2) the State's Implemented Terms were in effect, and (3) once the 2011-2013 MOU took effect? [¶] (f) Assuming represented employees can state a common law contract claim, were represented employees required to exhaust contractual grievance procedures and/or other administrative remedies prior to bringing a civil breach of contract action? [¶] (g) Assuming unrepresented employees can state a common law contract claim, what contractually enforceable overtime policies existed during the class period?"

2. *Stipulations and Evidence at Trial*[4]

a. Represented Employees

The California Correctional Peace Officers' Association (CCPOA) is the exclusive collective bargaining representative for members of the subclass of represented employees. Labor relations between CCPOA and the State are governed by the Ralph C. Dills Act (Gov. Code, § 3512 et seq.) (the Dills Act), which provides for collective

[4] The parties stipulated to certain facts and legal conclusions for purposes of the Phase I trial, and additional evidence was admitted at trial.

bargaining over wages, hours, and other terms and conditions of employment. The Department of Human Resources (CalHR, formerly known as the Department of Personnel Administration or DPA) represents the Governor of California as the state employer for purposes of collective bargaining with the CCPOA. The Dills Act allows parties to agree to a memorandum of understanding (MOU) to supersede certain provisions of law. (Gov. Code, § 3517.61.) After the parties reach an agreement, they submit a joint MOU to the Legislature, when appropriate, for approval. (Gov. Code, § 3517.5.)

The FLSA establishes overtime pay requirements for hours worked in excess of 40 per week. (29 U.S.C. § 207(a).) An exemption from this requirement exists for peace officers: An employer may establish a regular work period of up to 171 hours in a 28-day period, and must pay overtime only after the employee works more than 171 hours in the work period. This is known as the "7k Exemption." (See 29 U.S.C. § 207(k); see also 29 C.F.R. §§ 553.201, 553.230.)

The State, through CalHR, and CCPOA have negotiated multiple MOU's since 1982 on behalf of the represented plaintiffs' collective bargaining unit, State Bargaining Unit 6. Before 1998, the MOU's generally provided for a 40-hour workweek. The MOU in effect from July 1, 1998 to June 30, 1999 contained a section entitled "7k Exemption," which began, "CCPOA and the State agree that the employees listed below are working under the provisions of Section 207k of the Fair Labor Standards Act (FLSA) and the parties acknowledge that the employer is declaring a specific exemption for these employees under the provisions specified herein." It provided for a "7k schedule" of 168 hours in a 28-day work period for certain job classifications and defined "overtime" as hours worked in excess of 168 hours. For Correctional Officers, Medical Technical Assistants, Youth Correctional Officers, and Youth Correctional Counselors, the 168 compensated hours consisted of 160 hours of regular posted duty, four hours for pre- and post-work activities, and four hours for training. Section 11.12 of the 1998-1999 MOU stated that "CCPOA agrees that generally this is sufficient time for all pre and post work activities during each work period, and that the compensation allotted for these activities

under this provision is full compensation for all of these activities," that "[t]he State and CCPOA agree that they have made a good faith attempt to comply with all requirements of the FLSA in negotiating this provision. If any court of competent jurisdiction declares that any provision or application of this Agreement is not in conformance with the FLSA, the parties agree to Meet and Confer immediately . . . ," and that "CCPOA agrees that neither it nor any of its employees acting on their own behalf or in conjunction with other law firms shall bring any suit in court challenging the validity of this provision under the FLSA."

The State's chief negotiator for the 1998-1999 MOU, David Gilb, testified that the 7k schedule was designed to address the question of whether employees' work started when they picked up their equipment or when they reported to their posts. During negotiations, he defined pre- and post-work activities as work that began when employees picked up their tools in the central control area. The work could include walking from the control area to the post and participating in a brief pre-shift meeting. The State took the position that under the FLSA, it was not obligated to compensate employees for time they spent between entering the institution and picking up their equipment or the time after the equipment was returned, and CCPOA's negotiators understood this was the State's position. During the course of the negotiations, there was no discussion of whether the State would have to comply with California wage and hour laws. A member of the CCPOA's negotiating team, David Lewis, testified that he did not believe California law applied to the 7k schedule and that he did not raise the subject of California law because the parties were negotiating under federal law. The Legislature approved the 1998-1999 MOU, and it was signed by the Governor and chaptered into law by the Secretary of State. (Stats. 1998, ch. 820, § 2, p. 5135.)

The MOU in effect from July 1, 1999 to July 2, 2001 continued the relevant provisions of the 1998-1999 MOU. CCPOA's negotiators understood that when a provision was "rolled over" from one MOU to the next, the bargaining history was rolled over as well. This MOU was approved by the Legislature, signed by the Governor, and chaptered into law. (Stats. 1999, ch. 778, § 6(b), p. 5613.)

The MOU in effect from July 1, 2001 to July 2, 2006 provided for a 7k schedule of 164 compensated hours in a 28-day work period, four of which were for pre- and post-work activities for represented Correctional Officers, Medical Technical Assistants, Youth Correctional Officers, and Youth Correctional Counselors. Correctional Counselor I and Correctional Counselor II Specialists also had a 164-hour schedule. "Overtime" was defined as any hours worked in excess of that schedule, and required pay at one and a half times the regular rate of pay. The MOU provided, "CCPOA agrees that generally this is sufficient time for all pre and post work activities during each work period, and that the compensation allotted for these activities under this provision is full compensation for all of these activities. This section shall not result in changes to the shift start/stop times." It included provisions identical to those in the earlier MOU's reciting that the parties had made a good faith attempt to comply with the FLSA and that CCPOA would not bring an action challenging the validity of the 7k schedule under the FLSA. Like its predecessors, the 2001-2006 MOU was approved by the Legislature, signed by the Governor, and chaptered into law. (Stats. 2002, ch. 1, § 2, p. 3.)

CCPOA and the State continued to give effect to these provisions from July 2, 2006 to September 18, 2007, as the parties negotiated unsuccessfully for a new MOU to succeed the 2001-2006 MOU. (See Gov. Code, § 3517.8, subd. (a).) On September 18, 2007, the State imposed on CCPOA and the represented employees the terms of its "last[,] best[,] and final offer," without substantive modification to the provisions discussed above. (See Gov. Code, § 3517.8, subd. (b).) The Legislature did not approve or ratify these terms.

The State and CCPOA entered into a new MOU on May 16, 2011, which was set to expire July 2, 2013. The 2011-2013 MOU recited that the parties were working under the provisions of section 207(k) of the FLSA (29 U.S.C. § 207(k)), continued the 164-hour, 28-day work period for represented employees, consisting of 160 hours for posted duty and four hours for pre- and post-work activities, and defined "overtime" as any hours worked in excess of that schedule. It did not include the language found in the earlier MOU's providing that four hours constituted sufficient compensation for pre- and

post-work activities. In a side letter, the parties agreed that no changes to the MOU's language would have a prejudicial effect on either side's arguments in the *Stoetzl* action.

At all times relevant to this action, it has been the State's practice to pay represented employees overtime compensation, at one and a half times the regular rate of pay, for all reported time worked in excess of 164 hours in a 28-day work period.

b. Unrepresented Employees

Labor relations between the unrepresented employees are governed by the Bill of Rights for State Excluded Employees (Gov. Code, § 3525 et seq.), which does not permit collective bargaining. No MOU governs their hours, wages, or other terms and conditions of employment. Their regular working schedule was 40 hours of regular compensated duty during each work week. Correctional Sergeants, Correctional Lieutenants, and Senior Medical Technical Assistants were paid overtime at one and a half times the regular rate of pay for reported time in excess of that. Unrepresented employees did not receive the four hours of block pay for pre- and post-work activities that some represented employees received.

CalHR used the California Pay Scale Manual to document the salaries for state employees. The Pay Scale Manual established "Work Week Groups" under the FLSA.[5] The unrepresented workers are members of Work Week Group 2. The manual provided: "Overtime for employees in classes not eligible for exemption under Section 7K of the FLSA is defined as all hours worked in excess of 40 hours in a period of 168 hours or seven consecutive 24-hour periods." Under the heading, "Hours Worked," it stated, "For

---

[5] Government Code section 19843, subdivision (a) provides: "For each class or position for which a monthly or annual salary range is established by the department [i.e., CalHR, see Gov. Code, § 19815, subd. (a)], the department shall establish and adjust workweek groups and shall assign each class or position to a workweek group. The department, after considering the needs of the state service and prevailing overtime compensation practices, may establish workweek groups of different lengths or of the same length but requiring different methods of recognizing or providing compensation for overtime. The department may also provide for the payment of overtime in designated classes for work performed after the normal scheduled workday or normal scheduled workweek."

the purpose of identifying hours worked under the provisions of the FLSA, only the time spent which is controlled or required by the State and pursued for the benefit of the State need be counted. . . ."

Under the heading, "Determination of Coverage under FLSA," the Pay Scale Manual provided: "The provisions of Work Week Group 2 are made applicable to all classes which are determined by the Director of the Department of Personnel Administration to include positions subject to the FLSA." The DPA had determined that all the job classifications included in the Unrepresented Employees subclass were subject to the FLSA.

3. Trial Court's Ruling

The trial court ruled in favor of the State on all issues at the Phase I trial. As to represented employees, it concluded the legal standard for determining what constituted compensable hours worked was the "first principal activity" test of the FLSA rather than California's "control test." It based this conclusion on the language of the MOU's, which it found "unambiguously establishes that the parties agreed that the FLSA's first principal activity test is the controlling legal standard"; evidence that the parties understood they were negotiating under federal law and agreed to adopt the FLSA's test; and the fact that the MOU's were approved by the Legislature and chaptered into law. As to the unrepresented employees, the trial court concluded CalHR had acted within its legislatively delegated authority in applying the FLSA as the standard for measuring compensable hours. As to plaintiffs' claim for common law breach of contract, the court ruled that this claim was subject to the general rule that the terms and conditions of public employment are controlled by statute and ordinance, rather than contract, and that, in any case, plaintiffs had not established the existence of an agreement between the State and plaintiffs to pay overtime.

II. DISCUSSION

A. Statutory and Regulatory Scheme Governing California Minimum Wage

"The IWC is a five-member appointive board initially established by the Legislature in 1913. For the first 60 years of its existence, the IWC's mission was to

regulate the wages, hours and conditions of employment of *women and children* employed in this state, in furtherance of such employees' 'health and welfare.' To this end, the commission—beginning in 1916—promulgated a series of industry- and occupation-wide 'wage orders,' prescribing various minimum requirements with respect to wages, hours and working conditions to protect the health and welfare of women and child laborers. . . . [¶] . . . [T]he California Legislature in 1972 and 1973 amended the applicable provisions of the Labor Code to authorize the IWC to establish minimum wages, maximum hours and standard conditions of employment for *all* employees in the state, men as well as women. [Citations.] The constitutionality of this legislative expansion of the IWC's jurisdiction to all California workers is explicitly confirmed by article XIV section 1 of the California Constitution which declares: 'The Legislature may provide for minimum wages and for the general welfare of employees and for those purposes may confer on a commission legislative, executive and judicial powers." (*Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 700-701, fn. omitted.) "Today 18 wage orders are in effect, 16 covering specific industries and occupations, one covering all employees not covered by an industry or occupation order, and a general minimum wage order amending all others to conform to the amount of the minimum wage currently set by statute." (*Martinez v. Combs* (2010) 49 Cal.4th 35, 57, fns. omitted (*Martinez*).)

"[T]he IWC's wage orders are entitled to 'extraordinary deference, both in upholding their validity and in enforcing their specific terms.' [Citation.] . . . [¶] 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. [Citation.]" (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1027 (*Brinker*).)

Under section 1197, " '[t]he minimum wage for employees fixed by the commission is the minimum wage to be paid to employees, and the payment of a [lower]

wage than the minimum so fixed is unlawful.' Under section 1194, 'any employee receiving less than the legal minimum wage . . . applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage . . .' (*id.*, subd. (a)). Accordingly, today, as under the 1913 act, specific employers and employees become subject to the minimum wage only under the terms of an applicable wage order, and an employee who sues to recover unpaid minimum wages actually and necessarily sues to enforce the wage order." (*Martinez*, *supra*, 49 Cal.4th at pp. 56-57.)

California's general minimum wage order (Cal. Code Regs., tit. 8, § 11000, Order No. MW-2001) requires employers to pay wages of at least the minimum wage for "all hours worked." Wage Order 4-2001 (Cal. Code Regs., tit. 8, § 11040) (Wage Order 4), applicable to those employed in professional, technical, clerical, mechanical, and similar occupations,[6] likewise requires an employer to pay each employee wages of at least the minimum wage for "all hours worked." It 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. Within the health care industry, the term 'hours worked' means the time during which an employee is suffered or permitted to work for the employer, whether or not required to do so, as interpreted in accordance with the provisions of the Fair Labor Standards Act." (*Id.*, subds. (2)(K), (4)(A).)

B. Standard of Review

"We independently review the construction of statutes [citation] and begin with the text. If it 'is clear and unambiguous our inquiry ends.' [Citation.] Wage and hours laws are 'to be construed so as to promote employee protection.' [Citations.] These principles apply equally to the construction of wage orders. [Citation.]" (*Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833, 840 (*Mendiola*).) Where the relevant facts are not in dispute, we face a question of law and are not bound by the trial court's

[6] There is no dispute that plaintiffs' job classifications fall within the ambit of wage order 4.

findings. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799; *Mendiola*, 60 Cal.4th at p. 840.) When factual findings are challenged on appeal, we review the findings for substantial evidence, viewing the evidence in the light most favorable to the prevailing party, and upholding the findings if the record contains any substantial evidence, contradicted or uncontradicted, to support them. (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053.)

C. Failure to Pay Minimum Wage

Plaintiffs contend the State violated California's minimum wage law by failing to pay them for all hours they worked, specifically, for uncompensated pre- and post-work activity.[7]

1. Represented Employees

The Dills Act requires the State to meet and confer in good faith with representatives of recognized employee organizations regarding wages, hours, and other terms and conditions of employment. (Gov. Code, § 3517.) If they reach agreement, they must prepare an MOU to present to the Legislature for approval, where appropriate. (Gov. Code, § 3517.5.) "The circumstances are 'appropriate' '[i]f any provision of the memorandum of understanding requires the expenditure of funds . . .' or if 'legislative action to permit its implementation' is required." (*Service Employees Internat. Union, Local 1000 v. Brown* (2011) 197 Cal.App.4th 252, 263, fn. 6; see Gov. Code, § 3517.61.) Under this statutory scheme, " 'virtually all salary agreements are subject to prior legislative approval. [¶] The act further provides that, except with respect to a number of specific statutes which the Legislature has expressly determined may be superseded by a memorandum of understanding, any provision of a memorandum of understanding in conflict with a statutory mandate shall not be effective unless approved by the Legislature.' " (*Department of Personnel Administration v. Superior Court* (1992)

---

[7] This includes the time spent travelling between their sign-in and sign-out locations and their work posts, briefing and being briefed, checking equipment in and out, putting on and removing safety equipment, submitting to searches, and taking inventories of equipment.

5 Cal.App.4th 155, 181 [citing Gov. Code, § 3517.6]; see also *White v. Davis* (2003) 30 Cal.4th 528, 572 (*White*) [provision of MOU embodying a salary agreement "obviously" requires expenditure of funds].) The MOU then governs the terms and conditions of employment. (Gov. Code, § 3517.61; *Professional Engineers in California Government v. Schwarzenegger* (2010) 50 Cal.4th 989, 1040 ["[O]nce approved by the Legislature[,] . . . [the MOU] governs the wages and hours of the state employees covered by the MOU"].)

Under the federal Portal-to-Portal Act (29 U.S.C. § 251 et seq.), an employer is not subject to liability under the FLSA for failure to pay an employee for "walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform" or "activities which are preliminary to or postliminary to said principal activity or activities, [¶] which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." (29 U.S.C. § 254(a).) Title 29, part 553.221(a) of the Code of Federal Regulations provides: "The general rules on compensable hours of work are set forth in 29 CFR part 785 which is applicable to employees for whom the 7(k) exemption is claimed." And Title 29, part 553.221(b) of the Code of Federal Regulations, which is contained in Part 785, entitled "Hours Worked," provides that the Portal-to-Portal Act eliminates from the working day certain " 'preliminary' and 'postliminary' activities . . . that are not made compensable by contract, custom, or practice," and that, "[w]ith respect to time spent in any 'preliminary' or 'postliminary' activity compensable by contract, custom, or practice, the Portal-to-Portal Act requires that such time must also be counted for purposes of the Fair Labor Standards Act. . . . *[O]nly the amount of time allowed by the contract or under the custom or practice is required to be counted.* If, for example, the time allowed is 15 minutes but the activity takes 25 minutes, the time to be added to other working time would be limited to 15 minutes." (Italics added.)

California law, as embodied in various wage orders, including Wage Order 4, applies a broader standard, requiring compensation when an employee is subject to the

control of an employer. (*Mendiola*, *supra*, 60 Cal.4th at pp. 839-840; *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 578-579, 588-594 (*Morillion*).) Plaintiffs contend they are subject to California's broader rule, not the more restrictive federal rule, and that they are entitled to compensation for the time they spent subject to defendants' control between signing in and beginning their work shifts and between the end of their work shifts and when signing out.[8]

A necessary premise to plaintiffs' argument is that public employees are governed by California wage and hour laws. For this proposition, they rely upon *Guerrero v. Superior Court* (2013) 213 Cal.App.4th 912 (*Guerrero*) and *Sheppard v. North Orange County Regional Occupational Program* (2010) 191 Cal.App.4th 289 (*Sheppard*). The court in *Guerrero* concluded that public agencies were not exempt from the provisions of Wage Order No. 15-2001, which applied to persons employed in household occupations. (*Guerrero*, 213 Cal.App.4th at p. 946, fn. 26.) The court noted that 14 of the 17 industry, occupation, and miscellaneous wage orders expressly exempted public employees from their provisions and, because Wage Order No. 15-2001 did not contain language exempting public agencies or political subdivisions from its coverage, concluded that the IWC did not intend to exempt such political entities from its coverage. (*Id.* at pp. 954-955.) The court relied on *Sheppard*, which construed Wage Order 4. (*Id.* at p. 953.) In *Sheppard*, a threshold question was whether the employee of a school district was covered by the minimum wage section of Wage Order 4. The court reviewed the introductory language of the wage order, which provided that *except* for specific sections—including the section on minimum wage—the order did not apply to employees of the state or political subdivisions. The court therefore concluded the order should be interpreted, "by its terms, to impose the minimum wage provision as to all employees in

---

[8] "It is settled that the FLSA does not preempt state regulation of wages, hours, and working conditions. [Citations.]" (*California Correctional Peace Officers Assn. v. State of California* (2010) 189 Cal.App.4th 849, 861.) As our high court has explained, "state law may provide employees greater protection than the FLSA." (*Morillion*, 22 Cal.4th at p. 592.)

the occupations described therein, including employees directly employed by the state or any political subdivision of the state." (*Sheppard*, at pp. 300-301.)[9] Plaintiffs' premise, therefore, is correct as far as it goes.

Plaintiffs also argue, however, that the protections of California minimum wage law may never be "waived." (§§ 1194, 1197; *Hoover v. American Income Life Ins. Co.* (2012) 206 Cal.App.4th 1193, 1208 [rights accorded by section 1194 "may not be subject to negotiation or waiver"]; see also *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 324 (*Armenta*) ["A review of our labor statutes reveals a clear legislative intent to protect the minimum wage rights of California employees to a greater extent than federally. . . . [¶] . . . California's labor statutes reflect a strong public policy in favor of full payment of wages for all hours worked"].) Any agreement to bargain away that protection, they contend, was void, and the Legislature could not ratify it. Therefore, according to plaintiffs, they are entitled to the benefit of the "control" test of Wage Order 4.

The flaw in plaintiffs' argument is that the MOU's were not only negotiated by CCPOA and the State, but they were also approved by the Legislature, signed by the Governor, and chaptered into law. They are thus not simply agreements between the parties, but laws specifically governing the terms and conditions of plaintiffs' employment. And, it is well established, "the more specific provision [citation] takes precedence over the more general one [citation]. [Citations.] To the extent a specific statute is inconsistent with a general statute potentially covering the same subject matter, the specific statute must be read as an exception to the more general statute. [Citations.]" (*Salazar v. Eastin* (1995) 9 Cal.4th 836, 857.) It is clear to us that the MOU's are more specific than the wage orders of general application promulgated by the IWC.

---

[9] *Sheppard* also explained that Wage Order 4's predecessor, Wage Order 4-2000, exempted public employers more broadly, providing: " 'The provisions of this Order shall not apply to employees directly employed by the State or any county, incorporated city or town or other municipal corporation, or to outside salespersons.' (Cal. Code Regs, tit. 8, § 11040, former subd. 1(B).)" (*Sheppard, supra*, 191 Cal.App.4th at p. 300, fn. 7.)

The fact that the MOU was approved by the Legislature and enacted into law distinguishes this case from *Grier v. Alameda-Contra Costa Transit Dist.* (1976) 55 Cal.App.3d 325 (*Grier*), upon which plaintiffs rely. The plaintiff bus drivers and defendant transit district in *Grier* had negotiated a collective bargaining agreement providing that drivers who were late for work without a satisfactory excuse would serve "penalty point" duty under which they would wait in the dispatching area, without pay, until released for the day or assigned to a run. (*Id.* at p. 329.) The trial court concluded the transit district's labor relations were governed only by the Transit District Law applicable to the counties of Alameda and Contra Costa, which empowered the transit district to administer a personnel system adopted by the board of the district and to negotiate with a collective bargaining unit regarding wages, hours, and working conditions. (*Id.* at pp. 331-332; Pub. Util. Code, § 24501 et seq.) This division of the First Appellate District disagreed. While statutes governing other transit districts contained language that the districts' bargaining powers were not "limited or restricted by the provisions of . . . other laws or statutes" (*Grier*, 55 Cal.App.3d at p. 332, italics omitted), the Legislature omitted this language from the provisions governing the Alameda-Contra Costa County Transit District. The court therefore concluded the Legislature did not intend the district's labor relations to be governed *only* by the applicable Public Utility Code provisions, but rather, that the district's rules and regulations, "including those adopted by a resolution approving a collective bargaining agreement, must themselves be promulgated *subject to* the limitations and restrictions of other applicable laws." (*Id.* at p. 333.) *Grier* does not stand for the proposition that a labor agreement approved by the *Legislature* is subject to inconsistent labor laws of general application.

Plaintiffs argue that even if the parties *could* have bargained away the protection of Wage Order 4, they in fact *did not* agree to have the represented plaintiffs' compensable time measured by federal, rather than state, law. Both the language of the MOU's and the circumstances of their negotiation demonstrate otherwise. Each MOU contained a section entitled "7K Exemption," which recited that the employees were

working under the provisions of Section 207(k) of the FLSA and that the State was declaring a specific exemption for them, and established a 164-hour, 28-day work period consisting of 160 hours for posted duty and four hours for pre- and post-work activities. In each of the MOU's except that formed in 2011, CCPOA and the State agreed that four hours was generally sufficient for all such activities, that they had "made a good faith attempt to comply with *all requirements of the FLSA* in negotiating this provision," and that "[i]f any court of competent jurisdiction declares that any provision or application of this Agreement is not in conformance with the FLSA, the parties agree to [m]eet and [c]onfer immediately."[10] (Italics added.) And, as we have explained, the regulations governing compensable hours of work for employees subject to a 7k exemption provide that only the amount of time allowed by a contract or under the custom or practice need be counted. (29 C.F.R. §§ 553.221(a), 875.9(a).) Plaintiffs cannot now rewrite their agreement to include hours worked that are not contained in the MOU's.

The evidence also supports the trial court's finding that, when negotiating the 1998-1999 MOU, the parties understood they were proceeding under the FLSA's standards and employees would not be entitled to compensation for the time they spent between entering the institution and picking up their equipment or the time after the equipment was returned. This agreed-upon schedule continued for all succeeding MOU's.[11] The trial court properly concluded, as both a factual and legal matter, that the FLSA, not California's minimum wage law, governed plaintiffs' claims as to the represented employees.

2. Unrepresented Employees

The trial court concluded the FLSA also provided the legal standard for measuring the compensable hours worked by the subclass of unrepresented employees. The court

---

[10] The 2011 MOU omitted these terms, but the parties agreed any changes would not prejudice their positions in this litigation.

[11] Plaintiffs make no contention that we should reach a different result for later periods at issue here than for the earlier periods.

reasoned that CalHR had established work week groups detailed in the California Pay Scale Manual, that all the job classifications in the subclass were contained in Work Week Group 2, and that CalHR had determined that Work Week Group 2 positions were subject to the FLSA. The "Work Week Group Definitions" in the Pay Scale Manual included a section describing "Work Week Groups Established Under [FLSA]." A subsection entitled "Hours Worked" provided that, "For the purpose of identifying hours worked under the provisions of the FLSA, only the time spent which is controlled or required by the State and pursued for the benefit of the State need be counted." In a subsection entitled "Determination of Coverage under FLSA," the document stated that "provisions of Work Week Group 2 are made applicable to all classes which are determined by the Director of the Department of Personnel Administration to include positions subject to the FLSA." A subsection entitled "Work Periods" provided that "The beginning of a work week may be changed if the change is intended to be permanent and it is not designed to evade the overtime provision of the FLSA." The subsection entitled "Overtime Compensations" establishes standards for "FLSA overtime worked."[12] After reviewing these provisions, the court concluded, "At all relevant times and consistent with its legislatively delegated authority, CalHR has applied the FLSA as the standard for measuring plaintiffs' compensable hours worked. It follows that, as applied here, the FLSA standard of compensability constitutes state law."

Plaintiffs challenge this conclusion, arguing that CalHR could not, and did not, supersede Wage Order 4, which defines "hours worked" to mean "the time during which an employee is subject to the control of an employer." (Cal. Code Regs., tit. 8, § 11040, subd. (2)(K).)

Defendants, on the other hand, contend that CalHR, using its delegated authority to set salaries for unrepresented employees, fixed the FLSA as the controlling legal

---

[12] Government Code section 19845, subdivision (a) provides: "Notwithstanding any other provision of this chapter, the department is authorized to provide for overtime payments as prescribed by the Federal Fair Labor Standards Act. . . ."

standard for compensable hours worked by virtue of the definition of Work Week Group 2 found in the California Pay Scale Manual. (See *California Assn. of Professional Scientists v. Department of Finance* (2011) 195 Cal.App.4th 1228, 1232 ["[t]he Legislature has delegated to DPA the authority to set salaries for state employees excluded from collective bargaining"]; see also Gov. Code §§ 19843, subd. (a) ["The [DPA], after considering the needs of the state service and prevailing overtime practices, may establish workweek groups of different lengths or of the same length but requiring different methods of recognizing or providing compensation for overtime"], 19849, subd. (a) ["[t]he department shall adopt rules governing hours of work and overtime compensation . . ."].) And Government Code section 19845 authorizes CalHR "to provide for overtime payments as prescribed by the Federal Fair Labor Standards Act to state employees." (Gov. Code, § 19845, subd. (a).)

On this record, we agree with plaintiffs. We have already concluded that plaintiffs' premise—that (unless superseded) the minimum wage provisions of Wage Order 4 apply to state employees—is correct. The question, then, is whether the Pay Scale Manual, like the MOU, displaces the state standard. As we shall explain, while the question is a close one, we conclude the answer is no.

There is at least some tension between Wage Order 4 and CalHR's definition of Work Week Group 2, which relies upon the FLSA. But our Supreme Court has explained that wage orders are entitled to " 'extraordinary deference,' " and have "the same dignity as statutes." (*Brinker*, *supra*, 53 Cal.4th at p. 1027.) 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. [Citation.]" (*Ibid.*; see also *Flowers v. Los Angeles County Metropolitan Transportation Authority* (2015) 243 Cal.App.4th 66, 82 [construing statute so as not to conflict with wage order].)

We first note that, unlike the MOU's, the Pay Scale Manual is not a legislative enactment. Moreover, the manual itself uses language parallel to Wage Order 4

regarding the definition of "hours worked." Wage Order 4 defines "hours worked" as "the time during which an employee is subject to the control of an employer."[13] Similarly, the manual provides that "only the time spent which is *controlled or required* by the State and pursued for the benefit of the State need be counted."[14] And, unlike the federal Portal-to-Portal Act, this provision of the Pay Scale Manual includes no language excluding time spent on pre- and post-work activities. (See 29 U.S.C. § 254(a).)[15]

---

[13] This definition goes on to provide, "*Within the health care industry*, the term 'hours worked' means the time during which an employee is suffered or permitted to work for the employer, whether or not required to do so, *as interpreted in accordance with the provisions of the Fair Labor Standards Act*." (Cal. Code Regs., tit. 8, § 11040, subd. (2)(K), italics added.) In *Mendiola*, our high court rejected an argument that the federal standard for measuring hours worked for resident employees should be applied to security guards who were subject to Wage Order 4, noting: "[L]anguage in Wage Order 4 demonstrates that the IWC knew how to explicitly incorporate federal law and regulations when it wished to do so. For example, the wage order provides that, *within the health care industry*, hours worked should be interpreted in accordance with the FLSA. (Wage Order 4, subd. 2(K).) But the order makes *no* reference to federal law applying in the case of guards. The language chosen by the IWC does not support [defendant's] argument that a broad importation [of federal rules] was intended. Indeed, it supports the contrary conclusion: *The IWC intended to import federal rules only in those circumstances to which the IWC made specific reference*." (*Mendiola*, *supra*, 60 Cal.4th at p. 843, italics added.)

[14] As the trial court noted, this mirrors the language of 29 Code of Federal Regulations Part 785.7, which states: "The United States Supreme Court originally stated that employees subject to the act must be paid for all time spent in '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.' [Citation.] Subsequently, the Court ruled that there need be no exertion at all and that all hours are hours worked which the employee is required to give his employer, that 'an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. . . .' [Citations.] The workweek ordinarily includes 'all the time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place'. [Citation.] The Portal-to-Portal Act did not change the rule *except to provide an exception for preliminary and postliminary activities*. See § 785.34." (Italics added.)

[15] We do not opine on whether Wage Order 4 *can* be supplanted by the Pay Scale Manual, but conclude that, in its current iteration, the Manual does not do so.

We conclude it is possible to harmonize the California Pay Scale Manual and Wage Order 4, as we must seek to do under *Brinker*. (*Brinker*, *supra*, 53 Cal.4th at p. 1027.) The manual does not expressly state that law enforcement employees are not subject to the provisions of the wage orders applicable to their job classifications, nor does it contain any provisions concerning compensation for pre- and post-work activities. Wage Order 4, on the other hand, explicitly provides that its "Definitions" (section 2) and "Minimum Wages" (section 4) provisions apply to employees of the State. (Cal. Code Regs., tit. 8, § 11040, subd. 1(B).) The section related to "Hours and Days of Work," which governs "Daily Overtime" and "Alternative Workweek Schedules," does *not* apply to state employees. (*Id.*, subds. (1)(B), (3).) We may reasonably construe the regulatory schemes to mean that entitlement to overtime compensation is controlled by the FLSA but that the meaning of "hours worked" is governed by Wage Order 4. Such a construction does violence to neither regulatory scheme.

Accordingly, we conclude the unrepresented employees are entitled to pay for all hours worked under the applicable California standard rather than the FLSA's standard. We shall therefore remand the matter to the trial court for further proceedings, in which it will determine whether, and to what extent, the unrepresented employees were not compensated for their work.

D. Breach of Contract

The trial court ruled against plaintiffs on their cause of action for failure to pay overtime in breach of their common law contractual obligation. As to the subclass of represented employees, the court concluded "[t]he comprehensive and exclusive nature of the MOUs forecloses the Represented Employees from asserting common law claims for overtime." As to the unrepresented employees, the court stated, "the terms of their employment are established by CalHR pursuant to the Government Code. CalHR has established specific rules addressing the subject of overtime pay, thereby foreclosing plaintiffs' common law claims. [¶] Moreover, plaintiffs failed to persuasively establish at trial the existence of any agreement to pay overtime to the Unrepresented Employees. [Citation.] The Court finds and concludes that there was no such agreement." Plaintiffs

argue this ruling was error, and that they have the contractual right to overtime pay on the performance of work.

Plaintiffs rely primarily on *Madera Police Officers Assn. v. City of Madera* (1984) 36 Cal.3d 403 (*Madera*) and *White*, *supra*, 30 Cal.4th 528. The issue in *Madera* was whether the constraints placed on the activities of city police officers during their mealtime break were so restrictive that the breaks constituted work time, entitling them to overtime pay. (*Madera*, 36 Cal.3d at p. 406.) After ruling that the meal periods constituted work time, our high court concluded that the city's ordinances and regulations mandated overtime pay for work performed in excess of the normal eight-hour day and 40-hour week. (*Id.* at pp. 409-413.) The court went on to explain: " '[T]o the extent services are rendered under statutes or ordinances then providing mandatory compensation for authorized overtime, the right to compensation vests upon performance of the overtime work, ripens into a contractual obligation of the employer and cannot thereafter be destroyed or withdrawn without impairing the employee's contractual right.' [Citation.] The [meal period] time of the sergeants, officers and dispatchers was work in excess of the eight-hour day, and the employees' right to overtime compensation, mandated by the city regulations, vested upon performance." (*Id.* at pp. 413-414; see also *Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 22 ["A claim for compensation owed by an employer for services already performed is contractual . . ."].) In *White*, our high court concluded that, although employees who worked during a budget impasse had no right to the immediate payment of salary in the absence of a duly enacted appropriation, "employees who work during a budget impasse obtain a right, *protected by the contract clause*, to the ultimate payment of salary that has been earned." (*White*, *supra*, 30 Cal.4th at pp. 570-571.)

The court in *Sheppard* reached a similar conclusion. The plaintiff there, a part-time instructor for a program created by four public school districts, was required to spend 20 minutes of unpaid time preparing for every hour he spent teaching. Among the claims he asserted was one for breach of contract, and the trial court sustained the defendant's demurrer, which was made on the ground that " 'public employees hold their

positions by statute and are prohibited from maintaining a cause of action for breach of contract . . . ' " (*Sheppard, supra*, 191 Cal.App.4th at pp. 293-294, 311.) The appellate court reversed. Noting that the breach of contract claim was directed solely at recovering earned but unpaid wages, the court concluded that under Supreme Court authority, the plaintiff had a contractual right to such wages, protected by the contract clause of the state Constitution, and that his contract claim was not defeated by his status as a public employee. (*Id.* at pp. 311-313, citing *White, supra*, 30 Cal.4th 528, *Miller v. State of California* (1977) 18 Cal.3d 808, 814 [public employee pension laws establish contractual rights], and *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 853 [right of public employee to payment of earned salary protected by contract clause of Constitution].)

Also of note, our Supreme Court has concluded that "contractual rights may be implied from an ordinance or resolution when the language or circumstances accompanying its passage clearly evince a legislative intent to create private rights of a contractual nature enforceable against [a] county." (*Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, 1177 (*Retired Employees*).) In *Retired Employees*, at the request of the United States Court of Appeals for the Ninth Circuit, the court considered the abstract question of whether, under state law, a California county and its employees can form an implied contract that confers on retired employees vested rights to health benefits. (*Id.* at p. 1176.) The court answered that question in the affirmative, so long as there was no legislative prohibition against such an arrangement such as a statute or ordinance. (*Id.* at pp. 1176, 1194.) In doing so, it noted that a contract may be express or implied, and that even a written contract may contain implied terms. (*Id.* at pp. 1178-1179.) However, " 'the law does not recognize implied contract terms that are at variance with the terms of the contract *as expressly agreed or as prescribed by statute*.' [Citations.]" (*Id.* at p. 1181, italics added; see also *Sonoma County Ass'n of Retired Employees v. Sonoma* (9th Cir. 2013) 708 F.3d 1109, 1114 [following *White* and stating "an ordinance or resolution can create a contract when the

legislation's text or the 'circumstances accompanying its passage' clearly evince an intent to contract, as opposed to an intent to make policy"].)[16]

With respect to the subclass of represented employees, we agree with the trial court that plaintiffs have not established a contract that would support their claim. We have already concluded that the State and CCPOA agreed to have their compensable time measured by federal, rather than state, law. Each MOU provided that it "set[] forth the full and entire understanding of the parties regarding the matters contained herein . . ." And each was approved by the Legislature. There is no basis to conclude that either the parties or the Legislature intended to create an implied right to compensation in addition to that agreed to in the MOU's. (See *Retired Employees*, *supra*, 52 Cal.4th at p. 1177; *Chisom v. Board of Retirement of Fresno County Employees' Retirement Assn.* (2013) 218 Cal.App.4th 400, 415 ["an implied term may not be found where it would contradict the express terms of the contract"].)

We reach a different result as to the subclass of unrepresented employees. We have already concluded they are entitled to compensation for all hours worked under California's broader standard. And *Madera*, *White*, and *Sheppard* teach that a breach of contract claim may be based on earned but unpaid wages. (*Madera*, *supra*, 36 Cal.3d at pp. 413-414; *White*, *supra*, 30 Cal.4th at pp. 570-571, *Sheppard*, *supra*, 191 Cal.App.4th at pp. 311-313.) To the extent the unrepresented employees are entitled to additional compensation for hours worked, based on the overtime policies in effect at the time they performed that work, they may assert those claims in a cause of action for breach of contract.

---

[16] The court also noted that "[a] contractual right can be implied from legislation in appropriate circumstances. [Citation.] Where, for example, the legislation is itself the ratification or approval of a contract, the intent to make a contract is clearly shown." (*Retired Employees*, *supra*, 52 Cal.4th at p. 1187.)

E. Violation of Sections 222 and 223

Plaintiffs' final challenge is to the trial court's grant of judgment on the pleadings as to their cause of action for failure to pay contractual overtime in violation of sections 222 and 223.

Section 222 provides: "It shall be unlawful, in case of any wage agreement arrived at through collective bargaining, either willfully or unlawfully or with intent to defraud an employee, a competitor, or any other person, to withhold from said employee any part of the wage agreed upon." Section 223 provides: "Where any statute or contract requires an employer to maintain a designated wage scale, it shall be unlawful to secretly pay a lower wage while purporting to pay the wage designated by statute or by contract." The trial court concluded that these statutes are not applicable to public employers and that, in addition, plaintiffs had not alleged facts sufficient to state a claim for violation of section 223 because they did not allege secret deductions or "kickbacks."

We agree with the trial court that plaintiffs cannot maintain this cause of action. As to the subclass of *represented* plaintiffs, we have already concluded that they agreed to have their hours worked measured by federal law and that the Legislature approved this arrangement. Their causes of action for violations of sections 222 and 223 necessarily fail. The subclass of *unrepresented* plaintiffs has no cause of action for a violation of section 222, since that statute, by its terms, applies only to parties to a collective bargaining agreement.

We also agree with the trial court that the unrepresented employees may not maintain their cause of action for violation of section 223. Our high court has explained that "[t]he use of the device of deductions creates the danger that the employer, because of his superior position, may defraud or coerce the employee by deducting improper amounts. . . . [I]t was the utilization of secret deductions or 'kick-backs' to make it appear that an employer paid the wage provided by a collective bargaining contract or by a statute, although in fact he paid less, that led to the enactment of Labor Code sections 221-223 in 1937. These sections, this court said in *Sublett v. Henry's etc. Lunch*[(1942)] 21 Cal.2d 273, 274, 'are declarative of an underlying policy in the law which is opposed

to fraud and deceit.' " (*Kerr's Catering Service v. Department of Industrial Relations* (1962) 57 Cal.2d 319, 328-329; see also *Brown v. Superior Court* (2011) 199 Cal.App.4th 971, 991 [section 223 " 'was enacted to address the problem of employers taking secret deductions or "kickbacks" from their employees' "], citing *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1205.) Plaintiffs did not allege any facts demonstrating that the State used secret deductions or deceived them in any way.

Plaintiffs argue, however, that a violation of section 223 may be found even in the absence of a secret agreement. They draw our attention to *Armenta, supra*, 135 Cal.App.4th at p. 323 and *Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36, 48-50 (*Gonzalez*). In *Armenta*, the plaintiffs, employees of a business that maintained utility poles, alleged they were not paid for time they spent carrying out such tasks as loading equipment and supplies, traveling to their work site in company vehicles, and preparing paperwork, and they asserted a minimum wage claim for those hours. (*Armenta*, 135 Cal.App.4th at p. 317.) The company contended it did not violate California's minimum wage law because the employees were compensated weekly at an amount greater than the total hours worked multiplied by the minimum wage; that is, the employees' *average* hourly rate was higher than California's minimum wage. (*Id.* at p. 319.) The appellate court rejected this argument, noting as it did so that sections 221,[17] 222, and 223 "articulate the principal that all hours must be paid at the statutory or agreed rate and no part of this rate may be used as a credit against a minimum wage obligation." (*Armenta*, 135 Cal.App.4th at p. 323.) The employees in *Gonzalez*, service technicians at an automobile dealership, were paid on a "piece-rate" basis, under which they were paid at a flat rate for each task they performed on automobiles. While they were not repairing vehicles, they sometimes had to perform other tasks. The employer tracked all the time the technicians were at the worksite and supplemented their pay if the amount the

[17] Section 221 provides: "It shall be unlawful for any employer to collect or receive from an employee any part of wages theretofore paid by said employer to said employee."

technicians earned for their piece-rate tasks was less than the amount they would have earned if they were paid the minimum wage for all their hours "on the clock." (*Gonzalez*, 215 Cal.App.4th at pp. 41-42.) The technicians brought an action claiming the employer had failed to pay the minimum wage during the time they were not performing repairs. (*Id.* at p. 42.) The appellate court concluded this method of pay violated Wage Order 4. In the course of doing so, it applied the reasoning of *Armenta*, noting that sections 221, 222, and 223 govern an employer's obligation to pay wages, and that the employer's method of averaging wages would result in some technicians not receiving pay for all their nonproductive time. (*Gonzalez*, at p. 50.)

Neither *Armenta* nor *Gonzalez* presents the situation we face here: Plaintiffs are not using sections 221, 222, and 223 to support a minimum wage claim, but instead assert a stand-alone cause of action for violation of section 223, which by its terms applies to an employer who "*secretly* pay[s] a lower wage while purporting to pay the wage designated by statute or by contract." (Italics added.)[18] While the term "secretly" may reasonably be applied where an employer seeks to average the total pay for both compensated and uncompensated time, it would stretch the meaning of the word beyond all recognition to apply it here, where the only issue is a bona fide dispute about whether the time the employees spent on pre- and post-work activities constituted hours worked.

We conclude, therefore, that the trial court properly granted judgment on the pleadings as to the causes of action for violations of sections 222 and 223. We need not address the additional question of whether public entities are subject to those statutory provisions.

---

[18] Noting that section 225 makes it a misdemeanor to violate section 223 and that section 225.5 establishes civil penalties for violating that statute, a federal district court has concluded the Legislature did not intend to create a private right of action for violation of section 223. (*Calop Bus. Sys. v. City of Los Angeles* (C.D.Cal. 2013) 984 F.Supp.2d 981, 1015; accord *Johnson v. Hewlett-Packard Co.* (N.D.Cal. 2011) 809 F.Supp.2d 1114, 1136, affd. 2013 U.S. App. Lexis 18497.) The parties have not raised this issue, and we need not consider it.

III. DISPOSITION

The judgment as to the subclass of unrepresented employees is reversed as to the second and fourth causes of action, and the matter is remanded to the trial court for further proceedings not inconsistent with this opinion. In all other respects, the judgment is affirmed.

Rivera, J.

We concur:

Ruvolo, P.J.

Reardon, J.

Trial Court:	San Francisco County Superior Court
Trial Judge:	Honorable John E. Munter
Counsel for Plaintiffs and Appellants:	Carroll, Burdick & McDonough LLP, Jack T. Friedman, Jonathan D. Yank, Laurie J. Hepler, and David M. Rice; Messing Adam & Jasmine LLP, Gregg McLean Adam; and Goyette and Associates, Inc., Gary G. Goyette.
Counsel for Defendants and Respondents:	Kronick, Moskovitz, Tiedemann & Girard, David W. Tyra and Kristianne T. Seargeant; California Department of Human Resources, Joan A. Markoff, Chief Counsel, Frolan R. Aguiling, Deputy Chief Counsel, Christopher E. Thomas, Labor Relations Counsel, and David D. King, Labor Relations Counsel.

PROOF OF SERVICE

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Sacramento, State of California. My business address is 400 Capitol Mall, 27th Floor, Sacramento, CA 95814.

On October 9, 2017, I served true copies of the following document(s) described as **PETITION FOR REVIEW** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Kronick, Moskovitz, Tiedemann & Girard for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at Sacramento, California.

BY CM/ECF NOTICE OF ELECTRONIC FILING: I electronically filed the document(s) with the Clerk of the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Participants in the case who are not registered CM/ECF users will be served by mail or by other means permitted by the court rules.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on October 9, 2017, at Sacramento, California.

/s/ May Marlowe

May Marlowe

SERVICE LIST

Attorneys for Lead Plaintiffs' Class Counsel and Respondents

David M. Rice
Squire Patton Boggs
275 Battery Street, Suite 2600
San Francisco, CA 94111
Telephone: (415) 954-0200
Facsimile: (415) 393-9887
Email: david.rice@squirepb.com

Attorneys for Plaintiffs in Shaw, et al. and Kuhn, et al and Respondents

Gary G. Goyette
Goyette & Associates, Inc.
2366 Gold Meadow Way, #200
Gold River, CA 95670
Telephone: (916) 851-1900
Facsimile: (916) 851-1995
Email: goyette@goyette-assoc.com

Attorneys for Lead Plaintiffs' Class Counsel and Respondents

Gregg McLean Adam
Messing Adam & Jasmine
235 Montgomery Street, # 828
San Francisco, CA 94104
Telephone: (415) 266-1800
Facsimile: (415) 266-1128
Email: gregg@majlabor.com

Court of Appeal

Court of Appeal
First Appellate District
350 McAllister Street
San Francisco, CA 94102

San Francisco Superior Court

(Via U.S. Mail)
Honorable John E. Munter
San Francisco Superior Court
400 McAllister Street
San Francisco, CA 94102

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **Kurt Stoetzl, et al. v. State of California, Department of Human Resources, et al.**
Case Number: **TEMP-6H0B8692**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **dtyra@kmtg.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
PETITION FOR REVIEW	Petition for Review

Service Recipients:

Person Served	Email Address	Type	Date / Time
David Tyra Kronick, Moskovitz, Tiedemann & Girard 116218	dtyra@kmtg.com	e-Service	10-09-2017 7:52:45 PM
David Rice Additional Service Recipients	david.rice@squirepb.com	e-Service	10-09-2017 7:52:45 PM
Frolan Aguiling Additional Service Recipients	Frolan.Aguiling@calhr.ca.gov	e-Service	10-09-2017 7:52:45 PM
Gary Goyette Additional Service Recipients	goyetteg@goyette-assoc.com	e-Service	10-09-2017 7:52:45 PM
Gregg Adam Additional Service Recipients	gregg@majlabor.com	e-Service	10-09-2017 7:52:45 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

10-09-2017
Date

/s/David Tyra
Signature

Tyra, David (116218)
Last Name, First Name (PNum)

Kronick, Moskovitz, Tiedemann & Girard
Law Firm