S253677

Case No. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KENNEDY DONOHUE,
Plaintiff-Appellant and Petitioner,

v.

AMN SERVICES, LLC,
Defendant and Respondent

After a Published Decision by the Court of Appeal,
Fourth Appellate District, Division One, Case No. D071865
San Diego Superior Court Case No. 37-2014-00012605-CU-OE-CTL
Hon. Joel Pressman, Judge

PETITION FOR REVIEW

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PETITION FOR REVIEW

TO THE CHIEF JUSTICE TANI CANTIL-SAKAUYE AND THE ASSOCIATE JUSTICES:

Per California Rules of Court, rule 8.500, class representative and plaintiff-appellant Kennedy Donohue (Donohue) petitions for review of the published decision of the Court of Appeal for the Fourth Appellate District, Division One, affirming summary judgment on all class and representative claims in defendant's favor. (*Donohue v. AMN Services, LLC* (2018) 29 Cal.App.4th 1068, 241 Cal.Rptr.3d 111 (filed 11/21/18, order pub. 12/10/2018 (*Donohue*).) Attached as Appendix A is a copy of the *Donohue* opinion.

I.
ISSUES PRESENTED FOR REVIEW

This petition raises two issues about meal period protections whose uniform development is of widespread importance to millions of employees and their employers across this State.

1. Can employers use practices upheld in the overtime context to round employees' time to shorten or delay meal periods, despite the clear statutory mandate that they give employees a meal period of "not less than 30 minutes" that starts "no later than the end of an employee's fifth hour of work?"

a. Is there a distinction between the purpose of (i) overtime statutes protecting employees' fiscal interest by ensuring fair compensation for a full eight-or-more-hour work day, and (ii) meal period laws ensuring employees' health and well-being with 30-minute meal periods every five hours to let them rest and recharge?

b. Can the fact that rounding may, in the long run, pay employees for the time they were actually on break nullify the denial of a timely or full meal period, which also affords employees the statutory right to an extra one-hour of pay?

2. Does *Donohue* conflict with other California cases adopting the framework that non-compliant time records create a rebuttable presumption of meal period violations?

a. Is *Donohue* correct that this presumption applies only at the class certification stage?

b. Does this Court's de-publication of cases declining to adopt, limiting the application of, or ignoring the meal period "rebuttable presumption" make this issue ripe for review by this Court?

II.

WHY REVIEW SHOULD BE GRANTED

Review should be granted under California Rules of Court, Rule 8.500(b)(1) to settle an important issue of law related to employee meal period protections, and to secure the uniformity of appellate decisions throughout the State in this arena.

A. Review Should Be Granted to Decide Whether Time Rounding Can Be Applied to Meal Period Statutes Without Eroding Their Unique Intent and Purpose

Until now, there has been a bright-line rule regarding two meal period guarantees—(i) employers must provide employees with meal periods of "not less than 30 minutes" (Labor Code, § 512 subd. (a)); *and* (ii) meal periods must start "no later than the end of an employee's fifth hour of work[.]" (Indus. Welf. Comm. (IWC) Wage Order 4, § 11, codified as Title 8, § 11040, subd. 11; *Brinker Restaurant Corp. v. Superior Court (Hohnbaum)* (2012) 53 Cal.4th 1004, 1041 (*Brinker*).) In *Donohue*, an appellate court in this State has held for the first time, and in a reported decision, that employers can use "facially neutral" practices to round their employees' time up or down to the nearest ten-minute increment even if this frequently shortens the meal period to "less than 30 minutes" or delays it "later than the end of an employee's fifth hour of work."

This is jurisprudentially problematic for at least two reasons.

First, facially-neutral rounding practices have been deemed lawful *only* in the fundamentally different overtime arena, and the rationale for the acceptance in overtime cases cannot be exported to the meal period context. Whereas overtime laws guarantee fair compensation for an eight-or-more hour workday, meal period protections safeguard employees' physical and mental health, allowing them to rest and recharge. Courts cannot bless violations of meal period laws in sympathy with employers' efforts to make their practices "neutral." And even assuming that rounding practices result in monetary "net neutrality" for employees in overtime cases, *Donohue* does not address whether net neutrality in meal period cases satisfies the legislative determination that an employee's physical and mental health requires at least 30-minute meal periods in five-hour increments. In other words, a 20-minute meal period after five and a quarter hours of work on Tuesday may not be off-set, mentally or physically, by a 35-minute break after four hours of work on Wednesday.

Second, the *Donohue* Court's reasoning that rounding practices do not harm employees because, over time, they may end up getting paid for the few extra minutes when they were actually on

break overlooks a key fact. That is, the loss of a timely and full meal period comes with its own greater statutory penalty—an extra hour of pay (Labor Code, § 227.7, subd. (c))—which courts cannot substitute with pay for an extra few minutes here and there. Employees are entitled to be made whole through remedies deemed sufficient by the Legislature, not those created ad hoc by courts ill-equipped to weigh competing interests and to make policy determinations. Under the statutory scheme, if employers violate meal period guarantees, employees are entitled to the extra-hour pay penalty *in addition to* the pay they earned by working during their breaks.

By creating a new exception to meal period guarantees that is contrary to the Labor Code, relevant IWC Wage Orders, existing jurisprudence in this arena, and the legislative intent behind protecting employee's meal periods, *Donohue* sets a dangerous precedent that carries grave potential for employees to be exploited. Review is therefore necessary to settle this important issue of law.

B. Review Should Be Granted to Provide Guidance on Whether and When Employers' Own Time Records Constitute Presumptive Evidence of Statutory Violations

In her concurring opinion in *Brinker*, Justice Werdegar proposed that, if employer's time records showed missing,

shortened, or delayed meal periods, there should be a "rebuttable presumption" that a meal period violation did, in fact, occur. (53 Cal.4th at p. 1053 [Werdegar, J., conc.].) Since then, several courts have adopted this "time record presumption" as law. (*E.g., ABM Indus. Overtime Cases* (2017) 19 Cal.App.5th 277, 311; *Lubin v. Wackenhut Corp.* (2016) 5 Cal.App.5th 926, 951; *Safeway, Inc. v. Superior Court of Los Angeles County* (2015) 238 Cal.App.4th 1138, 1159.) Also, this Court has de-published several opinions where courts have declined to adopt or limited the time record presumption. (*E.g., In re Walgreen Co. Overtime Cases* (2014) 231 Cal.App.4th 437 [de-published Feb. 18, 2015]; *Hernandez v. Chipotle Mexican Grill* (2012) 208 Cal.App.4th 1487, n.7 [de-published Dec. 12, 2012].)

However, at least one published appellate opinion, besides *Donohue*, has directly rejected the time-record presumption as a means to establish meal period violations. (*Serrano v. Aerotek, Inc.* (2018) 21 Cal.App.5th 773, 778.) Displaying its own confusion, the Fourth District, Division One, in *Donohue* declined to apply the presumption, reasoning that it is confined to the class certification stage, yet it separately affirmed judgment for employees after a trial based on time records, in conjunction with other evidence, in

another case issued shortly after *Donohue*. (*Compare Donohue, supra,* 241 Cal.Rptr.3d at pp. 130–131 *with Carrington v. Starbucks Corp.,* No. D072392, 2018 WL 6695970, at *13 (Cal. Ct. App., order pub. 12/19/18).)

Review on this issue is needed to resolve conflicts regarding, provide clear guidance on, and secure uniform development of the law in, this important area of labor law.

III.
STATEMENT OF THE CASE

Defendant-Respondent AMN Services, LLC (AMN) is a health care and staffing company that recruits nurses for temporary contract assignments. (*Donohue, supra*, 241 Cal.Rptr, 3d at p. 118.) Plaintiff-Appellant Kennedy Donohue worked as a non-exempt nurse recruiter for AMN, which required its employees to punch in and out for their shifts and their meal breaks on a computer-based timekeeping program. (*Ibid*.) The program rounded recruiters' punch times up or down to the nearest 10-minute increment, and AMN then used the rounded time—not the actual time—to calculate the hours worked and compensation owed. (*Ibid*). AMN also used the rounded time, not actual time, to calculate whether timely meal breaks were taken, whether they lasted the full thirty minutes, and whether employees were entitled to penalty pay for statutory meal

period violations. (*Id*. at p. 119.)

On April 23, 2014, Plaintiff-filed a putative class action and representative action against AMN for various violations of the California Labor Code, including delayed and shortened meal periods. (AA Vol. I 6-63.) On October 13, 2015, the trial court granted class certification on five separate issues, including Plaintiff's claim that Defendant failed to provide class members with legally compliant meal periods. (AA Vol. IV 1013-1019.)

On September 23, 2016, AMN filed a motion for summary judgment. That same day, Plaintiff filed her own motion for summary adjudication directed at the meal period issue and certain AMN defenses. (AA Vol. VII 1955; Vol. IX 2277.) These two motions were heard and ruled on concurrently. On November 28, 2016, the trial court denied Plaintiff's motion and granted Defendant's motion in its entirety, rejecting evidence that, for example, class members were not paid for a total of 2,631.583 hours recorded on their time records as a result of shortened or delayed meal periods. (AA Vol. IX 2408 at ¶ 33; *Donohue, supra*, 241 Cal.Rptr.3d at p. 133 & fn. 29.) Judgement was entered for AMN, and Plaintiff filed an appeal.

On November 21, 2018, the Court of Appeal, Division One, Fourth District, issued its unpublished decision in *Donohue*,

affirming the judgment that, among other things, AMN's rounding practices were legal and the rebuttable presumption of meal period violations did not apply. (*Donohue, supra*, 241 Cal.Rptr.3d at pp. 126-134 & fn. 25.) Following two amicus requests, the Court of Appeal ordered the *Donohue* decision published on December 10, 2018. (*Ibid.*) An order modifying the opinion, with no change in judgment, was issued on December 28, 2018. (*Ibid.*) No petition for rehearing was filed in the Court of Appeal.

The *Donohue* opinion, publication order, and modification order are attached to this petition as Appendix A.

IV.
LEGAL DISCUSSION

A. REVIEW IS NEEDED TO CLARIFY WHETHER EMPLOYERS MAY APPLY TIME ROUNDING TO SHORTEN AND DELAY EMPLOYEE MEAL PERIODS

The term "rounding" comes from the Federal Code of Regulations, which describes it as the practice "of recording the employees' starting time and stopping time to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour." (29 C.F.R. § 785.48(b).) Even though this can cause as much as fifteen-minute rounding intervals, the rationale is that "this arrangement averages out so that the employees are fully compensated for all the time they

actually work." (*Ibid.*)

Federal and state courts in California have upheld rounding as a valid form of calculating employee's *total hours worked* and *wages owed* under this federal regulation, so long as rounding is applied in a "neutral" manner. (*E.g., Corbin v. Time Warner Entertainment–Advance/Newhouse Partnership* (9th Cir. 2016) 821 F.3d 1069, 1076 [upholding rounding to nearest quarter hour under federal and California state labor laws to calculate compensation for time worked]; *See's Candy Shops, Inc. v. Superior Court (Silva)* (2010) 210 Cal.App.4th 889, 907 (*See's Candy I*) [to *calculate wages due*, employer may round work time to the nearest tenth of an hour if policy is facially fair and neutral, and does not systematically favor over- or under-payment].) This Court recently confirmed that "*See's Candy* rested its holding on its determination that the rounding policy was consistent with the core statutory and regulatory purpose that employees *be paid for all time worked*." (*Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829, 833 (*Troester*); emphasis added.)

Consistent with this, there is no mention of meal periods in provisions on "rounding" as a tool to calculate hours worked in the California Division of Labor Standards Enforcement's Enforcement Policies and Interpretations Manual (DLSE Manual). (DLSE Manual

§§ 47, 47.3, updated April 2017). Nor do any of the several sections in the DLSE Manual devoted to meal period obligations and rights—which mirror the Labor Code and IWC Requirements on meal period laws—mention, discuss or contemplate rounding. (DLSE Manual, § 45-1, updated April 2017.)

Going well beyond this judicial and statutory landscape, the Court in *Donohue* became the first to announce that rounding may be exported from the overtime context and used to comply with California's separate meal period laws. (*Donohue*, *supra*, 241 Cal.Rptr.3d at pp. 127–128.) Neither of two rationales articulated in *Donohue* justify this conclusion on an issue that, even letters supporting publication of the *Donohue* opinion admit, has widespread implications for (1) employees and the "[n]umerous employers" who use rounding across the state (See Request for Publication of *Donohue* by Amicus California Employment Law Council, Dec. 3, 2018); (2) "California lawyers, the bench and the bar, with respect to these recurring issues;" (*ibid.; accord* Request for Publication of *Donohue* by Amicus Employers Group, Dec. 6, 2018).

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1. Because Overtime Laws Protect Employees' Fiscal Interests While Meal Period Laws Safeguard Their Health and Well-Being, Rounding Cannot be Exported from One Arena to the Other

The *Donohue* Court cited *See's Candy I* and *Troester* to support applying facially neutral rounding practices to meal period violations, explaining that rounding is "a wage and hour procedure that has been accepted in California since at least 2012" and "cited approvingly by our Supreme Court as recently as earlier this year." (*Donohue*, *supra*, 241 Cal.Rptr.3d at pp. 130–131; citations omitted.) But the court in *Donohue* failed to appreciate that *See's Candy I* only considered, and *Troester* only approved, rounding as a permissible manner of calculating total time worked for purposes of issuing pay. Neither considered the impact of this practice on evaluating and remedying meal period violations, which protect wholly different employee interests.

Whereas fair compensation for an eight-hour day, plus overtime pay for additional work, protects an employee's financial interests, the guarantee of a full 30-minute meal period before the end of the fifth hour of work protects an employee's physical and mental health. (*See, e.g., Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244, 1255 [meal period requirement is "*not* aimed at protecting or providing employees' wages," but instead is

concerned with "ensuring the health and welfare of employees"; emphasis added]; *Murphy v. Kenneth Cole Prods., Inc.* (2007) 40 Cal.4th 1094, 1113 ["health and safety considerations . . . are what motivated the IWC to adopt mandatory meal and rest periods in the first place"]; *Cal. Mfrs. Ass'n. v. Indus. Welfare Comm.* (1980) 109 Cal.App.3d 95, 115 [meal period provisions address some of "the most basic demands of an employee's health and welfare"].)

While plaintiff-petitioner stressed the fundamental employee protective nature of meal period laws (see Appellant's Reply Brief at p. 14, citing *Brinker*), it does not appear the *Donohue* Court considered this health and welfare distinction in its decision to apply rounding in this new context of meal periods.

Allowing already short meal periods to be "rounded" therefore nullifies the longstanding legislative protections unique to meal periods alone. (*Lazarin v. Superior Court (Total Western, Inc.)* (2010) 188 Cal.App.4th 1560, 1571 [Industrial Welfare Commission was meant to adopt or amend working condition orders with respect to break periods, meal periods, and days of rest "consistent with the health and welfare of those workers"]; *Cardenas v. McLane FoodServices, Inc.* (C.D. Cal. 2011) 796 F.Supp.2d 1246, 1257

[legislative history indicates that a "meal period is necessary for the welfare for employees" and that the "general health and welfare of employees requires periods of rest during long stretches of physical and/or mental exertion"; citation omitted].)

If the *Donohue* result is allowed to stand, rounding practices will be used to erode the important health and welfare right to a timely and full, 30-minute meal period within the first five hours.

2. Rounding Practices That Compensate Employees for Actual Time Worked Do Not Nullify Meal Period Violations or Substitute for Accompanying Premium Pay Penalties

The Court in *Donohue* also reasoned that the meal period violations did not harm employees because, over time, rounding practices would properly compensate employees for time actually worked, and in fact, lead sometimes to them being paid when they were actually on break. (*Donohue, supra*, 241 Cal.Rptr.3d at pp. 131–133.) Concluding that this made the rounding policy "neutral," the *Donohue* Court dismissed plaintiff's concern that such practices "would quickly eviscerate employee[s'] statutory right to full 30-minute meal periods, especially in the context of rounding to the nearest quarter hour." (*Id.* at p. 133.) But the Court is mistaken.

While calculations to determine the total hours worked can be

"rounded" in a neutral manner, resulting in fair pay for actual time worked over time, there is no reason to believe the same is true in the meal period context. Ample evidence established that rounding shortens a full 30-minute meal period and delays it beyond the fifth hour of work, as demonstrated by the examples below:

SHORTENED MEAL PERIODS

Day	Actual Lunch Punch IN	Actual Lunch Punch OUT	***Real Total***	Rounded in	Rounded out	False Total
Mon.	12:07	12:23	***16 min***	12:00	12:30	30 min
Tues.	12:05	12:25	***20 min***	12:00	12:30	30 min
Wed.	12:03	12:35	***32 min***	12:00	12:30	30 min

Though the above employee is provided only a 16-minute or a 20-minute meal period as a result of rounding on Monday and Tuesday, respectively, rounded times will falsely show a full 30-minute lunch, depriving the employee of the one-hour extra pay penalty for these violations. (Labor Code, § 227.7, subd. (c).) Meanwhile, the fact that this employee "gained" a 32-minute meal period due to rounding on Wednesday does not nullify the violations earlier in the week, or confer anything other than a de minimis benefit.

There is even less of an argument to be made for "neutrality"

with respect to delayed meal periods. Where meal periods are delayed past the fifth hour of work due to rounding, an employee loses both (1) the right to a meal period within the first five hours of work and (2) the right to a meal period penalty for a late meal period, as illustrated below:

DELAYED MEAL PERIODS

Day	Actual Start of Day Punch In	Actual Lunch Punch OUT	***Real Total***	Rounded in	Rounded out	False Total of Lunch Start
Mon.	7:53	1:07	***5 hr. 14 mins***	8:00	1:00	5 hr
Tues.	8:00	1:05	***5 hr. 5 mins***	8:00	1:00	5 hr
Wed.	7:55	1:05	***5 hr. 10 mins***	8:00	1:00	5 hr

This is not a purely hypothetical issue. In this case the record contained evidence of how rounding meal periods detrimentally effected plaintiff and similarly-situated class members, with more than 46,000 shortened and delayed meal periods documented and no meal period premium penalties paid. (AA Vol. IX 2404-2405 at ¶ 14-15.) The employer in *Donohue* saved more than $800,000 from the determination that no meal period violations occurred in those

instances. (AA Vol. IX 2406 at ¶ 24). The class of employees in this case was of a very modest size. Should rounding of meal periods remain lawful, these numbers would be exponentially magnified with a larger employer.

The *Donohue* Court's substitution of the existing legislative remedy for a shortened or delayed period—one extra hour pay penalty (Labor Code, § 227.7, subd. (c))—with the new judicial remedy of pay for a few extra minutes of time is wholly inadequate and misguided. (*Murphy v. Kenneth Cole Prods., Inc.* (2007) 40 Cal.4th 1094, 1104 [an employee forced to forgo a meal period "loses a benefit to which the law entitles him or her," and "[w]hile the employee is paid for the 30 minutes of work, the employee has been deprived of the right to be free of the employer's control during the meal period"].)

Additionally, other appellate courts have held that, in addition to recovering an hour of premium pay, employees who get shortened or delayed meal periods are *also* entitled to recover wages for the three to five minutes they were required to work during their meal periods. (*Kaanaana v. Barrett Bus. Servs., Inc.* (2018) 29 Cal.App.5th 778, 240 Cal.Rptr.3d 636, 650, 658 (Ct. App. 2018),

review filed Jan. 9, 2019); *accord Safeway Inc. v. Superior Court* (2015) 238 Cal.App.4th 1138, 1160 [an "employer must still compensate the employee for the time worked" during the meal period].)

Regardless, employees are entitled to be made whole through remedies deemed sufficient by the Legislature, not those created ad hoc by courts which are generally ill-equipped to weigh competing remedies and determine policy. (*Cf. Roper v. Simmons* (2005) 543 U.S. 551, 618 [legislatures are "better qualified" than courts to weigh and evaluate which view of science is better]; *Wisconsin v. Yoder* (1972) 406 U.S. 205, 234—235 [recognizing "obvious fact" that not being school boards or legislatures, courts are ill-equipped to determine necessity of discrete aspects of state's compulsory education program]; *Wells Fargo Bank v. Superior Court (Wertz)* (1991) 53 Cal.3d 1082, 1099 [it is not the judiciary's role to second-guess the wisdom of the Legislature's choices]; *accord Citizens for Parental Rights v. San Mateo Cty. Bd. of Educ.* (1975) 51 Cal. App. 3d 1, 32].)

Further, the *Donohue* Court's endorsement of rounding in the meal period context allows for greater mischief and exploitation in

other contexts. As an illustration, California law permits the use of rounding actual punch times to the nearest quarter hour or fifteen-minute increment (not just the ten-minute increments involved here). (*See's Candy I, supra,* 148 Cal.Rptr.3d at 700; citing additional authorities).

With rounding to the nearest 15 minutes, an actual punch in time of 8:07 a.m., is rounded back to 8:00 a.m., while an actual punch in time of 8:08 a.m. is rounded forward to 8:15 a.m.

In the meal period context, an employer may instruct (or provide) its employee to punch out for a meal period at 1:07 p.m., knowing the time is rounded back to 1:00 p.m. The employer can then instruct the employee to punch back in for work by no later than 1:23 p.m., which will be rounded forward to 1:30 p.m. While the rounded times will show a 30-minute meal period, the employee actually only got a 16-minute lunch, deemed legal under *Donohue*.

As another example, an employer could line ups its shifts so employees always had to start the day at 8:00 a.m. The employer can then instruct employees to clock out no later 1:05 p.m. Per rounding under *Donohue*, the employee would have worked over five hours, but does not have to be provided a 30-minute meal period for this

shift, losing a paid, full 30-minute meal period *and* the right to a penalty payment for the lack of a meal period.

If *Donohue* is permitted to stand, it will greatly infringe upon employee meal period rights, contrary to the plain language of the Labor Code, longstanding "remedial legislative enactments" and intent, and binding case law, all of which favor scrupulously protecting employees. (*Brinker*, 53 Cal.4th at pp. 1026-1027 [labor laws are to "be liberally construed with an eye to promoting" their purpose to protect and benefit employees"; quoting cases].)

B. REVIEW IS NECESSARY TO RESOLVE CONFUSION OVER WHETHER AND WHEN AN EMPLOYER'S TIME RECORDS ESTABLISH A "REBUTTABLE PRESUMPTION" OF LABOR CODE VIOLATIONS

California has long required employers to retain accurate employee time records that, among other things, reflect the time spent on meal periods. (Labor Code, §§ 226, subd. (a) & 1174, subd. (d) [accurate records of hours worked daily]; IWC Wage Order 4-2001, Cal. Code Regs., tit. 8, §§ 11040, subd. (7)(A), 7(A)(3) & 11(A) [accurate information when employee begins and ends each work period, meal periods, split shift intervals and total daily hours worked].) Given this statutory duty to retain accurate time records, Justice Werdegar proposed in her concurrence in *Brinker* that

evidence of Labor Code violations within those time records (*i.e.*, missing, shortened or delayed meal periods), should give rise to a "rebuttable presumption" of a meal period violation. (*Brinker, supra*, 53 Cal.4th at p. 1053 [noting that presumption is consistent with policy underlying meal period recording requirement].) Admittedly, this concurrence, joined only by Justice Liu, is not binding.

But perhaps because it is a common-sense, bright-line rule analogous to the presumption adopted unanimously in *Brinker* with respect to off-the-clock work, many courts began to adopt the rule that an employer's time records can be used to establish evidence of Labor Code violations. *(E.g., ABM Indus. Overtime Cases* (2017) 19 Cal.App.5th 277, 311 (*ABM*); *Lubin v. Wackenhut Corp.* (2016) 5 Cal.App.5th 926, 951 (*Lubin*), *review denied* March 15, 2017); *Safeway, Inc. v. Superior Court of Los Angeles County* (2015) 238 Cal.App.4th 1138, 1159 (*Safeway*), *review denied* Oct. 21, 2015).)

More recently, however, other California appellate courts have divided over whether, when, and how this presumption should be interpreted and applied. (*Compare*, *e.g.*, *Faulkinbury v. Boyd & Assocs., Inc.* (2013) 216 Cal.App.4th 220, 230 [adopting

presumption] *with Serrano v. Aerotek, Inc.* (2018) 21 Cal.App.5th 773, 781 [time records showing late and missed meal periods did not create presumption of violations].) While de-publication has no precedential value and is generally not considered as a trustworthy indicator of this Court's position on issues, many employee-rights advocates have taken heart in the Court's de-publication of other decisions refusing to recognize the presumption.

A grant of review can ensure a halt to further confusion, and promote a more uniform development of the law in this area.

1. Contrary to the *Donohue* Court's Conclusion, the Rebuttable Presumption Need Not be Confined Only to Class Certification, or Inapplicable to, for Example, the Summary Judgment Stage

Donohue, like other some courts, rejected the rebuttable presumption on the ground that it only makes sense during the class certification inquiry. (*Donohue, supra*, 241 Cal.Rptr.3d at p. 130 & fn. 25; *Silva v. See's Candy Shops, Inc.,* (2016) 7 Cal.App.5th 235, 254 (*See's II*), *review denied* Mar. 22, 2017.) Though several cases have, indeed adopted the presumption only during the class certification inquiry, they did not do so because of this procedural happenstance, but based on the duty California places on employers to maintain accurate time records. (*E.g.*, *ABM, supra,* 19 Cal.App.5th

at p. 311 [since employers have a duty to record their employees' meal periods, "[i]f an employer's records show no meal period for a given shift over five hours, a rebuttable presumption arises that the employee was not relieved of duty and no meal period was provided"]; *Safeway, supra*, 238 Cal.App.4th at pp. 1159–1160 [time records kept by employer, as required, that showed lack of lawful meal periods created a presumption that meal period violations existed, shifting the burden to the employer that it did relieve employee of duty but employee waived meal period]; *Lubin, supra*, 5 Cal.App.5th at p. 951 [spreadsheet generated by employer can be used to show which employees had a paid on-duty meal period given employers' duty to record their employees' meal period].)

While the class certification inquiry is different than the merits inquiry at summary judgment or trial, the employers' duty to maintain accurate time records—which is the foundation of the presumption—remains the same. (*Bradley v. Networkers Internat., LLC (*2012) 211 Cal.App.4th 1129, 1144–1145.) In some recognition of this, six days after deciding *Donohue*, the Fourth District, Division One, approved using the presumption, when used in conjunction with other evidence at trial, to affirm liability and damages for meal

break violations. (*Carrington v. Starbucks Corp.*, No. D072392, 2018 WL 6695970, at p. *9 (Cal. Ct. App. Dec. 19, 2018).)

This confusion has already reached federal and state trial courts confronted with the issue. (*See, e.g., Torres v. Goodwill Indus. of San Diego Cnty.* (July 18, 2018) Case No. D072271, (Not Reported in Cal.Rptr.) 2018 WL 3454932, at pp. *10–*11 [approving of the trial court declining to apply time record presumption because it came from a concurring opinion]; *Manigo v. Time Warner Cable, Inc.* (C.D. Cal. Oct. 17, 2017) No. CV 16 06722 JFW (PLA), 2017 WL 5054368, at p. * 4 [concluding that time records alone are insufficient to create triable issue of fact regarding meal period compliance]; *Roth v. CHA Hollywood Med. Ctr., L.P.* (C.D. Cal. Oct. 25, 2013), No. 2:12 CV 07559 (ODW), 2013 WL 5775129, at p. *5 [denying class certification under federal rules for lack of common questions where plaintiff contended missed breaks could be determined from employment records]; *Rojas Cifuentes v. ACX Pac. Northwest Inc.* (E.D. Cal. 2018), Case No. 2:14-cv-00697-JAM-CKD, 2018 WL 2264264, at p. *9 [collecting cases where the *Brinker* time record "presumption has been applied as persuasive authority" by other Federal Courts]; *Seckler v. Kindred Healthcare Operating*

Grp., Inc., (C.D. Cal. Mar. 5, 2013) No. SACV 10 01188 DDP, 2013 WL 812656 at p. *8 [indicating "agreement with Justices Werdegar and Liu that if a meal period is not taken by the employee, the burden falls on the employer to rebut the presumption that meal periods were not adequately provided."].) Review and clarification from this Court is badly needed before the confusion progresses much further.

2. This Court's De-Publication of Cases Rejecting, Limiting, or Ignoring the Presumption Further Signals that the Time for Review is Now

Notably, this Court has ordered de-publication of a series of cases refusing to apply, limiting the use of, or otherwise ignoring the *Brinker* concurrence's rebuttable presumption. (*See, e.g, In re Walgreen Co. Overtime Cases* (2014) 231 Cal.App.4th 437 [de-published February 18, 2015, after trial and appellate courts declined to apply *Brinker* concurrence when denying certification of a proposed meal period class]; *Hernandez v. Chipotle Mexican Grill* (2012) 208 Cal.App.4th 1487, n.7 [review denied and ordered de-published December 12, 2012 where Second District Court of Appeal rejected plaintiffs' argument that employer could not rely on the inaccuracy of its own records to defeat certification of a meal period

and rest period class]; *Lamps Plus Overtime* Cases (2012) 209 Cal.App.4th 35, n.8 [review denied and de-published December 12, 2012 where Second District Court of Appeal rejected plaintiff's argument based on the *Brinker* concurrence that employer's failure to keep accurate time records creates a rebuttable presumption that violations occurred, and supports class certification.)

As a result, the only published case left standing to reject the *Brinker* concurrence, besides *Donohue and See's II*, is *Serrano v. Aerotek, Inc.* (2018) 21 Cal.App.5th 773, in which the First District Court of Appeal rejected the argument that time records showing late and missed meal periods created a presumption of violations because the employer is only required to provide compliant meal periods, not ensure the employee takes them. (*Id.* at p. 778.)

In short, appellate courts considering the time record presumption have shown extreme variance as to whether an employer's time records constitute "rebuttable evidence" of meal period violations, and this Court's de-publication of some of these opinions has not helped matters. Reviewing *Donohue* is necessary to uniformly develop rules governing whether the rebuttable presumption applies or can be ignored as a concurrence, whether it

should only be used at the class certification stage and why, and whether it can be used effectively at summary judgment and how.

V.
CONCLUSION

Donohue upends meal period guarantees, and adds to the confusion over whether, when, and how the time record rebuttable presumption should be applied. Ms. Donohue therefore requests review on behalf of herself and as class representative, and employees throughout California.

Dated: January 22, 2019 SULLIVAN LAW GROUP, APC

By: /s/ Eric K. Yaeckel, Esq.
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CERTIFICATE OF COMPLIANCE WITH WORD COUNT REQUIREMENT

Pursuant to Rule of Court 8.504(d)(1), the undersigned hereby certifies that the computer program used to generate this brief indicates that it does not exceed 8,400 words (including footnotes and excluding the parts identified in Rule 8.504(d)(3).

Dated: January 22, 2019

/s/Eric K. Yaeckel
Eric K. Yaeckel

APPENDIX A

Filed 11/21/18

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

KENNEDY DONOHUE, Plaintiff and Appellant, v. AMN SERVICES, LLC, Defendant and Respondent.	D071865 (Super. Ct. No. 37-2014-00012605-CU-OE-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Joel M. Pressman, Judge. Affirmed.

Sullivan Law Group, William B. Sullivan, Eric K. Yaeckel and Clint S. Engleson for Plaintiff and Appellant.

DLA Piper, Mary Dollarhide and Betsey Boutelle for Defendant and Respondent.

In this wage and hour class and representative action, the trial court granted a motion for summary judgment brought by defendant AMN Services, LLC (AMN), and denied motions for summary adjudication of one cause of action and one affirmative defense brought by plaintiff Kennedy Donohue, individually and on behalf of five

certified plaintiff classes she represents (together Plaintiffs). In her appeal from the judgment, Donohue challenges the grant of AMN's motion for summary judgment and the denial of her motion for summary adjudication of one of the causes of action. On appeal, Donohue also challenges what she characterizes as the trial court's "fail[ure] to hear a proper motion for reconsideration" of the summary judgment and summary adjudication rulings.

As we explain, we lack jurisdiction to review the postjudgment order that resulted in the court's decision not to hear Donohue's motion for reconsideration, and in our de novo review of the summary judgment and summary adjudication rulings, we conclude that Donohue did not meet her burden of establishing reversible error. Accordingly, we affirm the judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

" 'Because this case comes before us after the trial court granted a motion for summary judgment, we take the facts from the record that was before the trial court when it ruled on that motion.' " (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 716-717.) We consider all the evidence in the moving and opposing papers, liberally construing and reasonably deducing inferences from Donohue's evidence, resolving any doubts in the evidence in Donohue's favor. (*Id.* at p. 717; Code Civ. Proc., § 437c, subd. (c).) For the most part, the relevant facts are not in dispute.

A. *The Parties*

AMN, a healthcare services and staffing company, recruits nurses for temporary contract assignments. AMN employed Donohue as a nurse recruiter in its San Diego

office between September 2012 and February 2014. Donohue earned a base hourly rate plus commissions, bonuses, and other forms of nondiscretionary performance-based pay.

B. *AMN's Timekeeping System & Policies*

During the time AMN employed Donohue, AMN used a computer-based timekeeping system known as "Team Time" for all nonexempt employees, which included nurse recruiters. Recruiters like Donohue used Team Time at their desktop computers by clicking on an icon to open the program each day, after which they usually made four entries: Recruiters would "punch in" for the day, "punch out" when they took a meal break, punch back in when they returned from their meal break, and punch out at the end of the day.

Team Time rounded recruiters' punch times—both punch in and punch out—to the nearest 10-minute increment.[1] To establish the proper hourly compensation, AMN would convert each 10-minute increment to a decimal (to the nearest hundredth of a minute),[2] total the number of hours (to the nearest hundredth of a minute), and multiply the total hours by the recruiter's hourly rate.

If a recruiter believed that a recorded punch time was inaccurate—e.g., the recruiter may have worked while not clocked in or forgotten to punch in or out—AMN's

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1 For example, all punch times between 7:55 a.m. and 8:04 a.m. would record as 8:00 a.m., and all punch times between 8:05 a.m. and 8:14 a.m. would record as 8:10 a.m.

2 For example, 20 minutes would be .33$\overline{3}$ hours, which would convert to .33 hours; and 40 minutes would be .66$\overline{6}$ hours, which would convert to .67 hours. At times, we refer to this format as "decimal hours."

written policy allowed the recruiter to contact his or her manager, who would then notify the recruiter that his or her computer timecard had been unlocked and opened for correction by the recruiter.

Recruiters did not have predetermined times during which they were required to take meal or rest breaks, but AMN had a written policy by which recruiters were: "provided meal breaks and authorized and permitted rest breaks in accordance with California law;"[3] "expected to take meal breaks as provided and rest breaks as authorized and permitted and in accordance with this policy"; and "required to accurately record their meal breaks on their time cards and to report to the Company if they are not provided with a meal break or authorized and permitted a rest break or do not otherwise take a meal break." More specifically, this written policy provided: "[Recruiters] who work more than five hours per day are provided an uninterrupted 30 minute meal period no later than the end of the [recruiter]'s fifth hour of work. If a [recruiter] works more

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3 "An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes . . . ." (Lab. Code, § 512, subd. (a).) (Further undesignated statutory references are to the Labor Code.)

In general, California employers are required to provide rest periods of a specified minimum duration—e.g., 10 minutes of paid rest for every four hours worked; and for shifts of less than four hours, a 10-minute rest period after three and a half hours. (Cal. Code Regs., tit. 8, §§ 11010-11150, subd. (12)(A) & § 11160, subd. (11)(A).) (Further undesignated regulation references (tit. 8) are to the California Code of Regulations.)

"An employer shall not require an employee to work during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable regulation . . . ." (§ 226.7, subd. (b).)

than five but no more than six (6) hours in a workday, the meal period may be waived by mutual consent of the Company and [the recruiter]."

Whenever there was noncompliance with the meal period requirements—e.g., if the recruiter did not punch out to take a meal period before the end of the fifth hour of work, or if the meal period was less than 30 minutes—AMN had a policy in place to ensure what it considered an appropriate remedy. During the first few weeks of Donohue's employment in September 2012, for any noncompliant meal period, Team Time assumed a Labor Code violation, and the recruiter automatically received the full statutory meal period penalty payment.[4] At all relevant times after mid-September 2012, if a recruiter's meal period was missed, shortened, or delayed, Team Time automatically provided a drop-down menu that required the recruiter's response. If the recruiter indicated that he or she chose not to take a timely 30-minute meal period, then AMN did not pay a meal period penalty; however, if the recruiter indicated that he or she was not provided the opportunity to take a timely 30-minute meal period, then AMN paid the recruiter the full statutory meal period penalty.[5] We note that *Brinker Restaurant Corp.*

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4 During Donohue's first two weeks of employment by AMN, her time entries triggered one such meal period violation, and AMN paid Donohue the appropriate penalty.

5 After mid-September 2012, once Team Time required the recruiter to complete the drop-down menu for any noncompliant meal period, on 31 occasions, Donohue selected the option stating that she had been provided the opportunity, but chose not, to take a nonworking 30-minute meal period before the end of the fifth hour of work. Donohue never selected the option stating that AMN did not provide a compliant meal period.

v. Superior Court (2012) 53 Cal.4th 1004 (*Brinker*) became final in May 2012 and that AMN changed its policy to provide the drop-down menu in September 2012. We infer that AMN effected the change in an effort to comply with the holding in *Brinker*, where the Supreme Court concluded that, although "an employer's obligation is to relieve its employee of all duty" during a meal period, "the employer need not ensure that no work is done"; rather, "the employee [is] thereafter at liberty to use the meal period for whatever purpose he or she desires." (*Id.* at p. 1017.)

AMN's written policy directed recruiters to "accurately record their meal breaks every day" as follows: "[Recruiters] should 'clock out' on their timesheet at the start of their meal period and 'clock in' when they return to work. Meal breaks are unpaid. [Recruiters] who are not provided a meal period as defined above will receive payment for hours worked and an additional hour's pay. [Recruiters] who waive a meal period as permitted by this policy, or who otherwise do not take a meal period which was provided as defined above, are paid for hours worked. [Recruiters] who do not take a full and timely meal period for any reason must report this on their time sheets and must also report if they were provided or not provided, as defined in this policy, with the meal period. [Recruiters] who report that they were provided a timely and full meal break but did not take it, took a shorter break or a later break are representing that he/she did so voluntarily."

In addition to hourly compensation, AMN also paid nurse recruiters like Donohue "different types of non-discretionary commissions, performance bonuses, and other

incentive pay."[6] These bonuses, which may be earned monthly or quarterly, are often due and calculable only after the pay period during which the work was performed; and in the event additional overtime must be paid on such amounts, it is calculated by a complex formula. These bonus-related overtime adjustments—*which are not tied to the recruiter's hourly wage* but rather are "the mathematical equivalent of calculating the bonus into the [recruiter's] regular rate of pay"—are denoted as "Flsa Ot" on the recruiter's wage statement.[7]

C. *The Litigation*

Donohue filed the underlying wage and hour action in April 2014. The operative second amended complaint (complaint), filed on behalf of Donohue individually and a class of similarly situated AMN employees and former employees, contains allegations in support of the following seven causes of action: (1) failure to provide meal and rest periods in violation of sections 226.7 and 1197.1; (2) failure to pay overtime and minimum wage in violation of sections 510 and 1197.1; (3) improper wage statements in violation of section 226; (4) unreimbursed business expenses in violation of section 2802; (5) waiting time penalties in violation of sections 201-203; (6) unfair business practices in violation of Business and Professions Code section 17200; and (7) civil penalties

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6 The details of these incentives are contained in formal publications from AMN, copies of which were included as exhibits in support of AMN's summary judgment motion.

7 At times, AMN refers to the bonus-related retroactive overtime adjustment as a "true-up."

authorized by the Labor Code Private Attorneys General Act of 2004 (PAGA), section 2698 et seq.

In October 2015, the trial court certified five classes of nonexempt AMN employees with the title of "Recruiter": (1) the overtime class; (2) the meal period class; (3) the rest period policy class; (4) the itemized wage statement class; and (5) the ex-employee class (of former AMN employees who are entitled to relief based on violations proven to the four prior classes of current AMN employees). The court denied class certification to Donohue's claims related to unreimbursed business expenses, which were based on an employee's use of a personal cell phone for AMN business.

Almost a year later, in September 2016, the parties filed cross-motions: AMN sought summary judgment, or in the alternative, summary adjudication of eight individual issues (which, if granted as to each issue, would result in summary judgment);[8] and Donohue sought summary adjudication of two issues. AMN and Donohue filed numerous pleadings in support of their respective motions; AMN and Donohue filed numerous pleadings in opposition to their adversary's motion; AMN and Donohue filed replies to their adversary's oppositions; AMN and Donohue filed objections to specified evidence submitted by their adversary; and AMN and Donohue responded to the evidentiary objections of their adversary. Following oral argument, the court took the matter under submission, ultimately granting AMN's motion for summary

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8 In an amended notice and motion filed a month later, AMN sought essentially the same relief, relying exclusively on the supporting documentation filed in support of the September 2016 motion.

judgment and denying Donohue's motion for summary adjudication. More specifically, the court sustained certain evidentiary objections, overruled other evidentiary objections, granted summary adjudication of all eight issues in AMN's motion—thereby resulting in the grant of summary judgment—and denied summary adjudication of the two issues raised in Donohue's motion.

In December 2016, Donohue filed a motion for reconsideration of the order granting AMN's motion for summary judgment and denying Donohue's motion for summary adjudication.

Two days later, on December 14, 2016, the trial court filed its judgment in favor of AMN and against Donohue, based on the grant of AMN's motion for summary judgment and the denial of Donohue's motion for summary adjudication.

In January 2017, Donohue filed an ex parte application for an order striking the filing of the judgment (so that the court could hear her pending motion for reconsideration of the order granting AMN's motion for summary judgment and denying Donohue's motion for summary adjudication) and allowing her to file a supplemental brief in support of her motion for reconsideration. The court denied the application and "vacated" Donohue's pending motion for reconsideration.

Donohue timely appealed from the judgment in February 2017.

II. STANDARDS OF APPELLATE REVIEW

Because the trial court's judgment is presumed correct, Donohue (as the appellant) has the burden of establishing reversible error. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 (*Denham*); *Demara v. The Raymond Corp.* (2017) 13 Cal.App.5th 545, 552 (*Demara*) [appeal from defense summary judgment].)

A. *Summary Proceedings Under Code of Civil Procedure Section 437c.*

In both summary judgment and summary adjudication proceedings, with exceptions inapplicable here, the pleadings—i.e., the complaint and the answer—determine the scope of the relevant issues. (*Port Medical Wellness, Inc. v. Connecticut General Life Ins. Co.* (2018) 24 Cal.App.5th 153, 169.)

A defendant's motion for summary judgment asks the court to determine, as a matter of law, that the entire action has no merit. (Code Civ. Proc., § 437c, subd. (a).) A cause of action "has no merit" if one or more of the elements of the cause of action cannot be established or an affirmative defense to the cause of action can be established. (Code Civ. Proc., § 437c, subd. (o).) As applicable here, a defendant's motion for summary adjudication may ask the court to determine, as a matter of law, that one or more causes of action or one or more claims for damages have no merit. (Code Civ. Proc., § 437c, subd. (f)(1).)

A plaintiff's motion for summary judgment asks the court to determine, as a matter of law, that the defendant has no defense to the action. (Code Civ. Proc., § 437c, subd. (a).) A successful motion for summary judgment terminates the action without a trial. (*Ibid.*) As applicable here, a plaintiff's motion for summary adjudication asks the

court to determine, as a matter of law, that there are no affirmative defenses to one or more causes of action or to one or more claims for damages. (Code Civ. Proc., § 437c, subd. (f)(1).)

To be successful, a summary adjudication motion must completely dispose of the entire cause of action, defense, damages claim, or duty to which the motion is directed. (Code Civ. Proc., § 437c, subd. (f)(1).) A successful motion for summary adjudication eliminates the need to prove or disprove a particular claim, leaving the remainder of the case to go to trial—after which one judgment is entered covering the issues decided in the motion and the trial. (Code Civ. Proc., § 437c, subds. (k), (n).) A summary adjudication motion "proceed[s] in all procedural respects as a motion for summary judgment." (Code Civ. Proc., § 437c, subd. (f)(2).)

We review de novo the trial court's order granting or denying summary judgment or summary adjudication. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860 (*Aguilar*) [summary judgment]; *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, 273 [summary adjudication].) As a practical matter, " ' "we assume the role of a trial court and apply the same rules and standards" ' " which govern the trial court's determination of the motion in the first instance. (*Demara, supra*, 13 Cal.App.5th at p. 552.)

B. *Standards Applicable to the Grant of AMN's Motion for Summary Judgment*

A moving defendant has the ultimate burden of *persuasion* that one or more elements of the cause of action at issue "cannot be established" or that "there is a complete defense to the cause of action." (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar, supra*, 25 Cal.4th at pp. 849, 850, 853-854.) In attempting to achieve this goal, the

defendant has the initial burden of *production* to make a prima facie showing of the nonexistence of any triable issue of material fact. (*Aguilar*, at pp. 850-851.) If the defendant meets this burden, then the burden of *production* shifts to the plaintiff to establish the existence of a triable issue of material fact. (*Ibid.*)

Applying these concepts in our de novo review of the grant of summary judgment here, therefore, we first must determine whether AMN's initial showing establishes an entitlement to judgment in AMN's favor. (*Aguilar*, *supra*, 25 Cal.4th at pp. 850-851; *Demara, supra*, 13 Cal.App.5th at p. 552.) If so, we then determine whether Donohue's responsive showing establishes a triable issue of material fact. (*Aguilar*, at pp. 850-851; *Demara*, at p. 552.)

C. *Standards Applicable to the Denial of Donohue's Motion for Summary Adjudication*

A moving plaintiff has the ultimate burden of *persuasion* that "there is no defense to a cause of action," but only after that plaintiff first "has proved each element of the cause of action entitling the party to judgment." (Code Civ. Proc., § 437c, subd. (p)(1); *Aguilar, supra*, 25 Cal.4th at pp. 849, 850.) In attempting to achieve this goal, the plaintiff has the initial burden of *production* to make a prima facie showing of the nonexistence of any triable issue of material fact. (*Aguilar*, at pp. 850-851.) If the plaintiff meets this burden, then the burden of *production* shifts to the defendant to establish the existence of a triable issue of material fact. (*Ibid.*)

Applying these concepts in our de novo review of the denial of summary adjudication here, therefore, we first must determine whether Donohue's initial showing

establishes an entitlement to judgment in her favor on the particular cause of action or defense. (*Aguilar*, *supra*, 25 Cal.4th at pp. 850-851.) If so, we then determine whether AMN's responsive showing establishes a triable issue of material fact either as to an element of Donohue's cause of action or as to an applicable affirmative defense of AMN. (*Aguilar*, at pp. 850-851.)

III. DISCUSSION

We begin with the recognition, understanding, and appreciation that the purpose of the California statutes governing the employment relationship is "the protection of employees"; and, for that reason, we " 'liberally construe the Labor Code and wage orders[9] to favor the protection of the employees.' " (*Troester, supra*, 5 Cal.5th at p. 839; accord, *Prachasaisoradej v. Ralphs Grocery Co., Inc.* (2007) 42 Cal.4th 217, 227 [because statutes governing the employer/employee relationship are "remedial in nature," they must be liberally construed "with an eye to promoting the worker protections they were intended to provide"].)

AMN's motion for summary judgment, or in the alternative, summary adjudication, is comprised of motions for summary adjudication of the following eight issues:

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9 The Industrial Welfare Commission is the state agency "empowered to promulgate wage orders, which are legislative regulations specifying minimum requirements with respect to wages, hours, and working conditions." (*Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257, 281, fn. 5.) The wage orders that the commission adopts " 'are to be accorded the same dignity as statutes' . . . [and] take precedence over the common law to the extent they conflict." (*Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829, 839 (*Troester*).)

- AMN Issue No. 1—"AMN is entitled to summary adjudication on Plaintiffs' certified overtime claim because AMN's methods of calculating and paying overtime compensation are lawful."

- AMN Issue No. 2—"AMN is entitled to summary adjudication on Plaintiffs' certified meal period claim because there is no evidence of a uniform policy or practice to deny meal periods, and because Plaintiffs' theory that the rounding practice resulted in meal period violations is not pled in the operative Complaint."

- AMN Issue No. 3—"AMN is entitled to summary adjudication on Plaintiffs' certified rest period claim because there is no evidence of a uniform policy or practice to deny rest periods."

- AMN Issue No. 4—"AMN is entitled to summary adjudication on Plaintiffs' certified claims for wage statement violations because the format of AMN's wage statements is lawful, and because Plaintiffs' wage-statement claims are otherwise derivative of their other claims under the California Labor Code, which also fail."

- AMN Issue No. 5—"AMN is entitled to summary adjudication on Plaintiffs' certified claim for waiting time penalties because it is derivative of Plaintiffs' other claims under the California Labor Code, which also fail."[10]

- AMN Issue No. 6—"AMN is entitled to summary adjudication of Plaintiffs' claim for violations of Business and Professions Code section 17200 because Plaintiffs have identified no 'unlawful, unfair, or fraudulent' conduct that could support this claim as a matter of law."[11]

- AMN Issue No. 7—"AMN is entitled to summary adjudication on Plaintiff Donohue's claim for penalties under [PAGA, section]2698 *et seq.*, because this

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10 Donohue does not mention this issue in her appellate briefs. Thus, she has forfeited appellate review of the ruling granting the motion. (*Atempa v. Pedrazzani* (2018) 27 Cal.App.5th 809, 830 (*Atempa*) [citing Cal. Rules of Court, rule 8.204(a)(1)(B)]; *Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956 (*Cahill*) [when appellant fails to provide " ' "reasoned argument and citations to authority, we treat the point as waived" ' "].) Accordingly, we affirm the trial court's ruling as to AMN Issue No. 5.

11 Donohue does not mention this issue in her appellate briefs. Thus, she has forfeited appellate review of the ruling granting the motion. (*Atempa, supra*, 27 Cal.App.5th at p. 830; *Cahill, supra*, 194 Cal.App.4th at p. 956.) Accordingly, we affirm the trial court's ruling as to AMN Issue No. 6.

claim is derivative of Plaintiffs' other claims under the California Labor Code, which also fail, and because Donohue has failed to exhaust her administrative remedies."

- AMN Issue No. 8—"AMN is entitled to summary adjudication on Plaintiff Donohue's individual claim for unreimbursed business expenses because she cannot meet her burden to show that she actually incurred such expenses."[12]

In support of its alternative motion, AMN argued that, if each of the eight issues is summarily adjudicated in its favor, then there is no triable issue of material fact in the complaint, and AMN is entitled to summary judgment as a matter of law.

In her motion, Donohue sought summary adjudication of the following two issues:

- Donohue Issue No. 1—"[AMN] possessed a standard time system in place for all members of the certified class which improperly alters the recorded meal periods. This policy violates California law in multiple ways. . . ."

- Donohue Issue No. 2—"[AMN's] 40th Affirmative Defense regarding 'Make Up Time,' pursuant to [section]513, cannot be established as a matter of law . . . ."[13]

On appeal, Donohue contends that, if the trial court had not erroneously denied summary adjudication of Donohue Issue No. 1, she and the meal period class would be entitled to $802,077.07 in meal period penalties—presumably based on the first cause of action for failure to provide meal and rest periods.

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12 On appeal, Donohue affirmatively states that she is not challenging the court's ruling granting AMN's motion as to this issue (unreimbursed business expenses). Accordingly, we affirm the trial court's ruling as to AMN Issue No. 8.

13 On appeal, Donohue raises no argument as to the denial of the motion as to Donohue Issue No. 2. Thus, she has forfeited appellate review of this ruling. (*Atempa, supra*, 27 Cal.App.5th at p. 830); *Cahill, supra*, 194 Cal.App.4th at p. 956.) Accordingly, we affirm the trial court's ruling as to Donohue Issue No. 2, although we do mention it further at part III.E., *post*.

Donohue does not present her arguments on appeal in a format by which we might review each motion for summary adjudication or each cause of action in the complaint. As a result, we are required to discuss each of Donohue's issues as Donohue presents them in her opening brief in the context of the parties' motions in the trial court and the trial court's rulings. As we explain, because Donohue did not meet her burden of establishing reversible error on appeal, we affirm the judgment.

First, however, we explain why this court lacks jurisdiction to consider the trial court's January 2017 postjudgment order denying Donohue's ex parte application.

A. *The Court Lacks Jurisdiction to Consider the January 2017 Postjudgment Order*

In this appeal, the parties briefed issues related to the postjudgment minute order denying Donohue's ex parte application to strike entry of the judgment (to allow the court to hear Donohue's motion for reconsideration) and to allow Donohue to file a supplemental brief in support of her motion for reconsideration. The briefing did not include a mention of jurisdiction to review this order, and we requested and received supplement briefing.

As a postjudgment order that denies a motion to "strike" the entry of a document or to file a supplemental brief, the January 2017 minute order was final and appealable. (Code Civ. Proc., § 904.1, subd. (a)(2).) However, in her written notice, Donohue appealed *only* from the "judgment . . . entered on December 14, 2016." She did not appeal from the postjudgment order, and "if an order is appealable, [an] appeal must be taken or the right to appellate review is forfeited." (*In re Baycol Cases I & II* (2011) 51 Cal.4th 751, 761, fn. 8; accord *Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270,

1315-1316 [" ' "[i]f a judgment or order is appealable, an aggrieved party must file a timely appeal or forever lose the opportunity to obtain appellate review" ' "].) This is a jurisdictional principle; an appellate court lacks the power to review an appealable order if a timely appeal is not taken.[14] (*Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc*. (1997) 15 Cal.4th 51, 56; see Code Civ. Proc., § 906.)

Alternatively, to the extent the January 2017 postjudgment order can be considered a denial of a nonstatutory motion to vacate (as oppose to strike) the judgment, such an order is not appealable. (*Scognamillo v. Herrick* (2003) 106 Cal.App.4th 1139, 1146 [to hold otherwise would authorize two appeals from the same decision; any assertions of error in the judgment can be reviewed on appeal from the judgment itself[15]]; *Forman v. Knapp Press* (1985) 173 Cal.App.3d 200, 203 [nonstatutory motion to vacate a summary judgment is "akin to a motion for new trial," the denial of which is not appealable].)

Donohue argues that she was not required to separately appeal from the postjudgment order. Despite the express language of the written order (denying the

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14 At the outside, the time to appeal from the January 2017 postjudgment order was 180 days after entry of the order (Cal. Rules of Court, rule 8.104(a)(1)(C))—which, in this case expired in July 2017.

15 Indeed, at part III.G., *post*, based on Donohue's argument in support of her appeal *from the judgment*, we will consider the principal argument Donohue presented in her motion for reconsideration.

application to strike entry of the judgment and to allow supplemental briefing on her then-pending motion for reconsideration of the order granting summary judgment), Donohue tells us that the order "actually ***denied*** the pending motion for reconsideration without a hearing." (Original italics and bolding.) She then suggests that, even though she did not appeal from the postjudgment order, Code of Civil Procedure section 1008 allows for appellate review, because, under subdivision (g), although an order denying a motion for reconsideration is generally not appealable, "if the order that was the subject of a motion for reconsideration is appealable, the denial of the motion for reconsideration is reviewable as part of an appeal from that order." There are at least two independent problems with Donohue's position.

First, the present appeal is from the judgment, not from the order granting AMN's motion for summary judgment; nor could it be, since an order granting summary judgment is not appealable (*Dang v. Maruichi American Corp.* (2016) 3 Cal.App.5th 604, 608, fn. 1). Thus, subdivision (g) of Code of Civil Procedure section 1008 is inapplicable.

Moreover, contrary to Donohue's presentation in her supplement brief, the order denying Donohue's ex parte application did not *deny* her then-pending motion for reconsideration; the order denied Donohue's request to file an additional brief in support of the then-pending motion for reconsideration and then "vacate[d]" the motion and the hearing on the motion. The record is consistent: (1) In her application, Donohue requested an order "Striking the Court's entry of judgment as premature" and "Allowing [Donohue] to file a brief supplement to her [pending] Motion for Reconsideration"; (2) in

support of the application, Donohue's attorney testified that the relief being sought in the application was "an order striking the entry of judgment as premature and seeking permission to file a supplement to the motion for reconsideration"; and, (3) in its written order denying Donohue's request, the court described the proceeding as Donohue's "application for an order striking judgment and allow[ing Donohue] to supplement [her] motion for reconsideration."

For the foregoing reasons, we lack jurisdiction to consider the January 2017 postjudgment order and express no opinion on the merits of the ruling(s) in the order.

B. *The Trial Court Did Not Err in Ruling That, for Purposes of the Cross-Motions, AMN's Rounding Policy Complies with California Law*

At least three of the parties' motions for summary adjudication required the trial court to determine whether AMN's timekeeping system for recruiter employees—in particular, AMN's rounding policy—complied with California law.[16] Thus, we analyze this issue first and, as we explain, conclude that, based on the record in this appeal, the rounding policy is compliant.

In California, the rule is that an employer is entitled to use a rounding policy "if the rounding policy is fair and neutral on its face and 'it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.' " (*See's Candy Shops, Inc. v. Superior Court* (2012) 210 Cal.App.4th 889, 907 (*See's Candy I*), quoting 29 C.F.R. § 785.48(b)

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16 These motions include: AMN Issue No. 1; AMN Issue No. 2; and Donohue Issue No. 1. (See pts. III.D., III.B.1. & III.B.2., respectively, *post*.)

(2012)[17] and citing Division of Labor Standards Enforcement (DLSE) Enforcement Policies and Interpretations Manual (2002 rev.) §§ 47.1, 47.2 (DLSE Manual)[18].)

Under this standard, an employer's rounding policy is "fair and neutral" if " 'on average, [it] favors neither overpayment nor underpayment' "; but such a policy is

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17 The United States Department of Labor adopted a regulation (29 C.F.R. § 785.48) under the federal Fair Labor Standards Act (FLSA; 29 U.S.C. § 201 et seq.) which permits employers to use time-rounding policies in certain circumstances. (*See's Candy I*, *supra*, 210 Cal.App.4th at p. 901.) In full, 29 Code of Federal Regulations section 785.48(b) is entitled " 'Rounding' practices" and provides: "It has been found that in some industries, particularly where time clocks are used, there has been the practice for many years of recording the employees' starting time and stopping time to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour. Presumably, this arrangement averages out so that the employees are fully compensated for all the time they actually work. For enforcement purposes this practice of computing working time will be accepted, provided that *it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked*." (Italics added.)

18 The DLSE is the California state agency charged with enforcing wage and hour laws. (*See's Candy I*, *supra*, 210 Cal.App.4th at p. 902.) Statements in the DLSE Manual are not binding on the courts, but merely persuasive. (*Id.* at pp. 902-903.) The DLSE has adopted the federal standard set forth at 29 C.F.R. section 785.48(b), quoted at footnote 17, *ante*: "The [DLSE] utilizes the practice of the U.S. Department of Labor of 'rounding' employee's hours to the nearest five minutes, one-tenth or quarter hour for purposes of calculating the number of hours worked pursuant to certain restrictions." (DLSE Manual, *supra*, § 47.1, quoted in *See's Candy I*, *supra*, 210 Cal.App.4th at p. 902.) Further relying on this federal standard, *See's Candy I* also quoted as follows from section 47.2 of the DLSE Manual: " 'There has been [a] practice in industry for many years to follow this practice, recording the employees' starting time and stopping time to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour. Presumably, this arrangement averages out so that the employees are fully compensated for all the time they actually work. For enforcement purposes this practice of computing working time will be accepted by DLSE, *provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked*.' " (*See's Candy I*, at p. 902, italics added.)

unacceptable if it " 'systematically undercompensate[s] employees' " because it " 'encompasses only rounding down.' " (*See's Candy I, supra*, 140 Cal.App.4th at pp. 901-902, 907.) In *See's Candy I*, we reasoned that if an employer's rounding policy "is neutral, both facially and as applied, the practice is proper under California law because its net effect is to permit employers to efficiently calculate hours worked without imposing any burden on employees." (*Id.* at p. 903.) Federal and state appellate courts have applied this standard to California employers consistently since *See's Candy I*, *supra*, 210 Cal.App.4th 889, in 2012. (E.g., *AHMC Healthcare, Inc. v. Superior Court* (2018) 24 Cal.App.5th 1014, 1023-1024 (*AHMC Healthcare*) [rounding to nearest quarter hour]; *Silva v. See's Candy Shops, Inc.* (2016) 7 Cal.App.5th 235, 249 (*See's Candy II*) [rounding to nearest 10th of an hour]; *Corbin v. Time Warner Entertainment–Advance/Newhouse Partnership* (9th Cir. 2016) 821 F.3d 1069, 1076 (*Corbin*) [rounding to nearest quarter hour].) Indeed, earlier this year, in *Troester, supra*, 5 Cal.5th 829, our Supreme Court approvingly cited the *See's Candy I* rule and analysis set forth above (*Troester,* at pp. 846-847)—although the court did not apply *See's Candy I*, because the issue in *Troester* was whether "the de minimis doctrine found in the FLSA," not the *See's Candy I* rounding standard, applied to the facts in that case (*Troester,* at p. 848).

In the present case, in support of its motion and in opposition to Donohue's motion, AMN submitted evidence in the form of expert testimony from a labor economist who analyzed AMN's recruiter employees' time records from April 23, 2010, through April 26, 2015 (rounding period). He explained that, under AMN's time entry system,

the records contain two entries for each employee "punch"—(1) the actual time that the employee clocked in or out, and (2) the nearest 10-minute increment *up or down*. (See fn. 1, *ante*.) AMN paid its employees on the basis of the rounded, not actual, times clocking in and out.

With regard to Donohue and the nurse recruiters, AMN's expert analyzed the time records during the rounding period logged by 311 recruiters—time records that reflected more than 500,000 work-hours. Based on his detailed analysis, the expert testified that AMN's practice of rounding punch times to the nearest 10-minute increment resulted overall in "a *net surplus* of 1,929 work hours in paid time for the Nurse Recruiter class as a whole."[19] (Italics added.)

As to the ultimate issues, the expert opined: "The ten-minute rounding rule is thus *neutral*; in the long run, neither the employer nor the employee benefits from this policy. [¶] . . . [¶] . . . AMN's practice of rounding employee punch times to the nearest ten-minute increment did not result in any failure, over time, to properly compensate the Nurse Recruiters as a class for all time they actually worked." (Italics added.) By this evidence and the related evidence and argument that it paid all wages due based on its calculation of the hours its recruiters worked, on this record AMN met its initial burden of establishing that AMN's rounding policy is lawful.

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19 With regard to Donohue personally, during the rounding period, AMN's practice of rounding punch times to the nearest 10-minute increment resulted in a *net surplus* of 9.82 hours—which is an *overpayment* of approximately $151.03 based on Donohue's hourly wage.

In an effort to meet her responsive burden, Donohue relied on the expert testimony of a statistics professor.[20] In her response to AMN's separate statement, Donohue disputed AMN's evidence set forth above as follows: "[Donohue's] expert . . . found that the Team Time system resulted in AMN failing to pay its employees for 2,631.583 hours of actual time worked. This amounted to $47,959.30 in unpaid compensation owed to the class." However, as the trial court correctly ruled, this evidence from Donohue did not establish the existence of a triable issue of fact as to whether AMN's rounding policy was lawful, because Donohue's expert only considered the recruiters' uncompensated time as a result of " 'Short Lunches' " and " 'Delayed Lunches.' "[21] Because he did not consider evidence that Plaintiffs may have *gained* (and, in fact, did gain) compensable work time by the rounding policy, he necessarily did not offset the amounts of uncompensated time

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20 Actually, Donohue submitted the expert's declaration in support of *her motion for summary adjudication* with no mention of the declaration in her brief in *her opposition to AMN's motion*. Donohue did cite to the declaration in her *response to AMN's separate statement*, which the trial court considered in ruling on AMN's motion; and AMN responded to this evidence in its appellate brief on this issue. Therefore, we consider this evidence on appeal as well. We begin by noting that, in her opening brief on appeal, Donohue does not once mention AMN's expert—or even the fact that AMN presented expert testimony—let alone discuss the expert evidence or attempt to apply it to the procedural (summary judgment law) or substantive (wage and hour law) issues in the appeal.

21 At oral argument, counsel for Donohue stated more than once that the trial court erred by not considering Donohue's expert's testimony. The record does not support counsel's statement. The court considered and rejected the expert's opinions as to the neutrality of AMN's rounding policy, expressly explaining its reasoning in its order granting AMN's motion.

by amounts of time for which Plaintiffs were compensated but not working.[22] Accordingly, Donohue did not meet her responsive burden of establishing a triable issue of material fact *under the applicable legal standard* for determining whether AMN's rounding policy complied with California law.[23] (See *Aguilar, supra*, 25 Cal.4th at pp. 850-851.)

On this record, therefore, for purposes of AMN's motion, AMN established that AMN's rounding policy during the rounding period was—in the language of *See's Candy I*, *supra*, 210 Cal.App.4th at page 907—"fair and neutral on its face and . . . 'used in such a manner that it [did] not result, over a period of time, in failure to compensate the [recruiter] employees properly for all the time they have actually

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22 For example, assume that the deadline for offering a recruiter a timely meal period is 1:00 p.m. (i.e., before the end of the fifth hour of work), but that the recruiter is not offered the meal period until 1:04 p.m. Under AMN's rounding policy, the meal period is timely because the actual punch of 1:04 p.m. is considered 1:00 p.m. Donohue's expert's testimony is that, in this example, AMN's rounding policy results in *at least one* violation (i.e., no meal break before the end of the fifth hour of work) and *potentially* second violation (i.e., if the recruiter punches back in at any time between 1:25 p.m. and 1:33 p.m., since such a punch is considered 1:30 p.m., yet the actual time of the meal period is less than 30 minutes). However, in forming his opinions, Donohue's expert failed to consider the situation where 1:00 p.m. is the deadline for a timely meal period, where the recruiter takes a meal period break at 12:55 p.m. (which is considered 1:00 p.m.) or punches back in at 1:34 p.m. (which is considered 1:30 p.m.). In both of these hypotheticals, the recruiter received credit for work and payment of wages for time during which the recruiter was on a meal period break.

23 To the extent Donohue attempted to prove, *as part of her motion*, that AMN's rounding policy violated California law, Donohue's showing (described in the text, *ante*) was insufficient to meet her initial burden; i.e., the burden never shifted to AMN to establish the existence of a triable issue of material fact under *Aguilar, supra*, 25 Cal.4th at pages 850-851.

worked.' " We apply this conclusion, as appropriate, to various arguments Donohue raises in her appeal.

C. *The Trial Court Did Not Err in Deciding Issues Related to the Meal Period Claims*

In general, California law requires that an employee who works a shift of more than five hours at one time must be allowed "a meal period of not less than 30 minutes." (§ 512, subd. (a); tit. 8, § 11040, subd. 11(A).) If an employer fails to provide an employee with such a meal period, then the employer must pay the employee one additional hour of pay for each workday that the meal period is not provided. (§ 226.7, subd. (c); tit. 8, § 11040, subd. 11(B).)

1. *The Trial Court Did Not Err in Granting AMN's Motion for Summary Adjudication AMN Issue No. 2*

The trial court granted AMN's motion for summary adjudication of AMN Issue No. 2, which was directed to Donohue's meal period claim on two independent grounds: (1) There was no evidence of a uniform policy or practice to deny meal periods; and (2) Donohue did not plead in the complaint that the rounding practice resulted in meal period violations.

Donohue contends that "time record evidence can establish meal period violations," citing and quoting from *Safeway, Inc. v. Superior Court* (2015) 238 Cal.App.4th 1138, 1159-1160 (*Safeway*), and *Lubin v. The Wackenhut Corp.* (2016) 5 Cal.App.5th 926, 951 (*Lubin*). Based on those authorities, Donohue then argues that, because she provided evidence of "over 45,000 shortened and delayed meal periods" directly from recruiters' time records (some capitalization and bolding omitted), the trial

court erred in granting AMN's motion directed to Donohue's meal period claim. More specifically, Donohue relies on the evidence from her expert who testified that, based on the *actual times* the recruiters punched out and in for their meal periods during the rounding period, there were 40,110 " 'short' meal periods" (i.e., less than 30 minutes) and 6,651 " 'delayed' meal periods" (i.e., not offered until after the end of the fifth hour). According to Donohue, *any* time records that establish a meal period violation " 'immediately' " entitle the recruiter to a premium wage penalty payment. (Bolding omitted.)

As we explained at part III.B. and footnote 22, *ante*, however, because Donohue's expert based his testimony on the *actual times* the recruiters punched out and in for their meal period, he neither considered nor accounted for an application of *AMN's rounding policy* to the *actual* meal period punches. Thus, in response to AMN's evidence that AMN's rounding policy was fair and neutral on its face and used in such a manner that, over time, recruiters were compensated properly for the time they worked, Donohue's evidence did not raise the existence of a triable issue of material fact as to the effect of the rounding policy on the recruiters' actual punches when taking and returning from meal periods.

Instead, Donohue argues that a rounding policy should *never* be applied to meal period time punches, because application of such a policy "is contrary to the plain language of the Labor Code [and a wage order.]" (Bolding and some initial capitalization omitted.) Quoting from section 512 and title 8, section 11040, subdivision 11, Donohue argues that, because the express terms of both the statute and regulation "*require* that

employees be provided 'with a meal period of not less than 30 minutes,' "[24] any meal period of less than 30 actual minutes is a per se violation of law. (Italics added.) As a result of each such violation in the present case, Donohue's argument continues, AMN owes each affected recruiter compensation for both the time worked during the 30-minute break period and the related penalty. We reject Donohue's suggestion that the court blindly apply section 512, subdivision (a), and title 8, section 11040, subdivision 11(A), without consideration of rounding—a wage and hour procedure that has been accepted in California since at least 2012 (*See's Candy I*, *supra*, 210 Cal.App.4th at p. 907) and cited approvingly by our Supreme Court as recently as earlier this year (*Troester, supra*, 5 Cal.5th at pp. 846-847).

Initially, Donohue's reliance on *Safeway, supra*, 238 Cal.App.4th 1138, and *Lubin, supra*, 5 Cal.App.5th 926, is misplaced. In each of those cases, the appellate court was reviewing a ruling on class certification, not on the merits of the plaintiff class's claims. (*Safeway, supra*, 238 Cal.App.4th at p. 1144; *Lubin, supra*, 5 Cal.App.5th at p. 931.) Likewise, *ABM Industries Overtime Cases* (2017) 19 Cal.App.5th 277 (*ABM*), quoted by Donohue in her reply brief, was an appeal following class certification procedures. (*Id.* at pp. 283-284.) This distinction is significant. As *Brinker* explains: " 'The certification question is "essentially a procedural one that does not ask whether an action is legally or factually meritorious." ' . . . ' "In determining the propriety of a class action, the question

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24 Actually, Donohue cited *subdivision 10* of title 8, section 11040. We assume that she meant *subdivision 11*.

is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of [class certification] are met." ' . . . [R]esolution of disputes over the merits of a case generally must be postponed until after class certification has been decided . . . , with the court assuming for purposes of the certification motion that any claims have merit." (*Brinker, supra*, 53 Cal.4th at p. 1023, citations omitted.) During the class certification process, the court is concerned with issues of commonality and whether the class is ascertainable; and *in that context*, an employer's time records may establish a rebuttable presumption that shortened or delay meal periods reflect a section 226.7 violation. (See *Safeway,* at pp. 1159-1160; *Lubin,* at p. 951.)

The standard is different on summary judgment. We look to the evidence the employer submits in support of its initial burden; and where an employer meets this initial burden, the employer has rebutted any applicable presumption, and the burden shifts to the employee to establish a triable issue of material fact.[25] (See *See's Candy II,*

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25 Donohue correctly notes that the rebuttable presumption analysis applied in *Safeway*, *Lubin*, and *ABM* was based on Justice Werdegar's concurrence in *Brinker, supra*, 53 Cal.4th at page 1053 ("If an employer's records show no meal period for a given shift over five hours, a rebuttable presumption arises that the employee was not relieved of duty and no meal period was provided."). (*Safeway, supra*, 238 Cal.App.4th at pp. 1159-1160; *Lubin, supra*, 5 Cal.App.5th at p. 951.) However, we reject Donohue's suggestion to apply this standard here. First, as we explained in the text, *ante*, presumptions in summary judgment proceedings are different than presumptions that might arise in class certification proceedings. Moreover, although Justice Liu joined Justice Werdegar's rebuttable presumption proposal, the majority of justices did not (*Brinker,* at p. 1055 [conc. opn. of Werdegar, J.]); and "concurring opinions are not binding precedent" (*In re Marriage of Dade* (1991) 230 Cal.App.3d 621, 629).

Contrary to Donohue's suggestion, we do not read *ABM* as stating that Justice

supra, 7 Cal.App.5th at p. 254; see generally *Aguilar, supra*, 25 Cal.4th at pp. 850-851.) Indeed, in the present case, when the trial court certified the plaintiff class in 2015, the court explained that it was considering merely issues, including presumptions, related to the "ascertainability and a well-defined community of interest" of the proposed class; only later, if called on to decide *the merits of the claims*, would the court consider "whether the uniform policies in place were, in fact, unlawful."

Further, Donohue's position that AMN's rounding policy may *never* be applied to meal period time punches is insupportable on the present record.

Whenever a recruiter's rounded punch times resulted in a noncompliant meal period time (i.e., either a meal period of less than 30 minutes or no opportunity for a meal period before the beginning of the sixth hour of work), a drop-down menu appeared on the recruiter's computer screen beneath the punch times for the date in question.[26] Before the recruiter could electronically submit the time, the recruiter was required to select one of the following options: (1) the recruiter was provided the opportunity to take a compliant meal period (i.e., a 30-minute break before the end of the fifth hour of work),

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Werdegar's rebuttable presumption applies to a plaintiff's substantive proof of damages. As *ABM* explained, the burden of proof shifts to the employer in the wage and hour context *only* where " 'an employer's compensation records are so incomplete or inaccurate that an employee cannot prove his or her damages' " or " ' "the employer has failed to keep records required by statute." ' " (*ABM, supra*, 19 Cal.App.5th at p. 311.) Those facts are not present in this case.

26 Actually, AMN's policy (of requiring the recruiter to select from a drop-down menu any time the rounded time indicated a noncompliant meal period) began a few weeks after Donohue began working at AMN.

"but chose not to"; (2) the recruiter was provided the opportunity to take a compliant meal period, "but chose to take a shorter/later break"; or (3) the recruiter was not provided an opportunity to take a compliant meal period. If a recruiter checked the third option, AMN automatically paid the recruiter the required section 226.7, subdivision (c) penalty. Based on this procedure, Donohue suggests that, because the drop-down menu only appeared *after* application of AMN's rounding policy, the policy masked or covered up meal period violations.

However, there is no basis on which to deny application of AMN's California-compliant rounding policy to a recruiter's meal period.

First, contrary to the premise to Donohue's argument—namely, that *any* noncompliant meal period entitles an employee to a penalty (and perhaps additional wages)—by providing the employee the above-described three choices in the drop-down menu, AMN's policy at issue complied with *Brinker, supra*, 53 Cal.4th at page 1017 (Although "an employer's obligation is to relieve its employee of all duty" during a meal period, "the employer need not ensure that no work is done"; rather, "the employee [is] thereafter at liberty to use the meal period for whatever purpose he or she desires.").

More to the point, in the present appeal, we are tasked with determining whether AMN's rounding policy "is neutral, both facially and as applied." (*See's Candy I, supra*, 210 Cal.App.4th at p. 903; accord, *AHMC Healthcare, supra*, 24 Cal.App.5th at pp. 1023-1024; *See's Candy II, supra*, 7 Cal.App.5th at p. 249; *Corbin, supra*, 821 F.3d at p. 1076; see also *Troester, supra*, 5 Cal.5th at pp. 846-847) This standard contains no

limitation to suggest it does not apply (or should not be applied) to meal periods.[27] Neither Donohue's briefs nor our independent research has disclosed any such limitation, and the policy that we considered, applied, and resulted in our decision in *See's Candy I*, *supra*, 210 Cal.App.4th at page 903—namely, "recogni[tion] that time-rounding is a practical method for calculating worktime and can be a neutral calculation tool for providing full payment to employees"—applies to the timekeeping of meal periods as well as to timekeeping of the beginning of an employee's shift as in *See's Candy I*.

Donohue contends that a rounding policy should *never* be applied to meal periods because to do so "would quickly eviscerate employee[s'] statutory right to full 30 minute meal periods," especially in the context of rounding to the nearest quarter hour.[28] However, Donohue's hypothetical is insufficient to rebut—i.e., to raise a triable issue of fact regarding—the *evidence* AMN submitted in support of its motion. This evidence indicates that, over time, AMN did not fail to properly compensate the recruiters, as a class, for all the time they worked based on the rounding policy in effect.[29] As such,

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27 Donohue argues that "rounding *always* negatively impacted employees' meal periods." We disagree. The neutrality of AMN's rounding policy is demonstrated by the following illustration: If the recruiter punched out at 12:55 p.m. and punched back in at 1:24 p.m., the recruiter would have had a *39 minute meal period*—which complies with both section 512, subdivision (a) and title 8, section 1104, subdivision 11(A)—*and also* would have been paid for nine minutes of this time, since rounding would show a punch out at 1:00 p.m. and a punch back in at 1:30 p.m.

28 This case does not involve rounding to the nearest quarter of an hour.

29 In her opening brief on appeal, Donohue relies on evidence from her expert regarding the effect of the application of AMN's rounding policy to meal periods. According to Donohue, this evidence "caused class members to not be paid for a total of

Donohue did not establish that Plaintiffs were entitled either to additional wages or penalties.

Donohue next complains that AMN's rounding policy is not "neutral" because the rounded time never results in the issuance of a meal period penalty when the actual time does not reflect a violation (i.e., when the recruiter receives a 30-minute meal period before the sixth hour of work). Donohue misconstrues the concept of neutrality in this context. The same argument could be made about shift hours—i.e., rounded time will never result in the issuance of a penalty when the actual time does not reflect a violation—but the neutrality of a rounding policy does not depend on the frequency of penalties. Under the *See's Candy I* test, the court is to look at how often the application of the rounding policy results in rounding up and rounding down, not the number of times penalties are assessed or avoided as a result of rounding up and down. (*See's Candy I*, *supra*, 210 Cal.App.4th at p. 902 [a rounding policy that " 'encompasses only rounding down' " is unacceptable].)

2,631.583 hours recorded on their time records as a result of 'short' and 'delayed' meal periods." First, this evidence does not support Donohue's theory that any recruiter's right to a statutory meal period was "eviscerate[d]" as a result of AMN's rounding policy. In addition, as we explained at part III.B., *ante*, this evidence does not establish the existence of a triable issue of fact as to the validity of the rounding policy, because Donohue's expert did not consider, let alone offset these amounts by, evidence that recruiters *gained* compensable time by the rounding policy. In fact, AMN's expert testified that, for meal periods, the rounding of punch times to the nearest 10-minute increment "produced a net surplus of 85 work hours in paid time for the Nurse Recruiter class as a whole"; i.e., as a group the recruiters were "paid for more work time under the time-rounding policy than if they had been paid to the minute of their punch-in and punch-out times for meal periods."

As a final argument, Donohue relies on her deposition testimony[30] in suggesting that " 'lunches were really short' " and that she was "denied 'ample' meal periods" because of " 'downward pressures[]' from AMN . . . to constantly remain on the phones." She further testified that she " 'was routinely discouraged from taking meal and rest breaks . . . and was in fact called back to [her] desk—over the intercom—on several occasions when attempting to take meal and rest breaks.' " However, this testimony does not respond to the undisputed evidence that AMN had in place an effective complaint procedure for an employee to inform the employer of any potential violation, but Donohue failed to inform AMN of any such violation. (See fn. 5, *ante*.) Moreover, these generic comments and Donohue's related testimony do not raise a triable issue of fact given that the evidence of her specific time entries—i.e., rounded punch times—do not establish (or imply) noncompliant meal periods for which Donohue did not receive an appropriate penalty payment. Finally, we do not consider Donohue's declaration testimony in opposition to AMN's motion to be substantial evidence of the existence of a triable issue of fact, since it is inconsistent with the following certified statement that she submitted with each timesheet: "I was provided the opportunity to take all meal breaks to which I was entitled, *or, if not, I have reported on this timesheet that I was not provided the opportunity to take all such meal breaks*[.]" (Italics added.) (See *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21 [declaration from party opposing summary

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30 As we explain at part III.H., *post*, even though the trial court excluded this testimony, we have considered it in our de novo review on appeal.

judgment disregarded where testimony inconsistent with prior sworn statement (discovery responses)]; *Turley v. Familian Corp.* (2017) 18 Cal.App.5th 969, 981 [same].)

For these reasons, the trial court did not err in granting AMN's motion for summary adjudication of AMN Issue No. 2 related to alleged meal period violations. Accordingly, we affirm the trial court's ruling as to AMN Issue No. 2.

2. *The Trial Court Did Not Err in Denying Donohue's Motion for Summary Adjudication of Donohue Issue No. 1*

The trial court denied Donohue's motion for summary adjudication of Donohue Issue No. 1, which was directed to Donohue's meal period claim as follows: "[AMN] possessed a standard time system in place for all members of the certified class which improperly alters the recorded meal periods. This policy violates California law in multiple ways. . . ."

On appeal, after discussing AMN's motion for summary adjudication of the meal period claims, Donohue argues that "[*b*]*ased on the same factual record* . . . it was also error for the trial court to deny [her] motion for adjudication of the meal period issue." (Italics added.) More specifically, Donohue argues that AMN did not rebut her evidence of meal period violations. We disagree.

We, too, base our decision on the same factual record set forth above. As we just explained at parts III.B. and III.C.1., *ante*, AMN's showing established *both* that AMN's rounding policy complied with California law *and* that AMN's rounding policy applied to recruiters' meal period time punches. Accordingly, even if we assume that Donohue met

her initial burden of showing that Plaintiffs experienced shortened or delayed meal periods (which we do not decide), AMN met its responsive burden by establishing that, upon applying AMN's rounding policy, AMN has a complete defense to Donohue's claim of meal period violations contained in the first cause of action in the complaint. Contrary to Donohue's proposed issue to be summarily adjudicated, the evidence establishes that AMN's timekeeping system neither "improperly alter[ed] the recorded meal periods" nor violated California law.

For these reasons, the trial court did not err in denying Donohue's motion for summary adjudication of Donohue Issue No. 1 related to alleged meal period violations. Accordingly, we affirm the trial court's ruling as to Donohue Issue No. 1.

D. *The Trial Court Did Not Err in Summarily Adjudicating Donohue's Wage Statement Claim in Favor of AMN*

Section 226, subdivision (a) requires that employers like AMN provide "an accurate itemized statement in writing showing . . . (2) total hours worked by the employee, . . . and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee[.]" Where an "employee suffer[s] injury as a result of a knowing and intentional failure by an employer to comply with subdivision (a)[,]" section 226, subdivision (e)(1) provides for an award of damages to the employee. As applicable to the present case, a recruiter-employee will be deemed to suffer injury "if the employer fails to provide accurate and complete information as required by any one or more of items (1) to (9), inclusive, of subdivision (a) *and* the employee cannot promptly and easily determine from the wage

statement alone . . . [¶] . . . [t]he amount of the gross wages or net wages paid to the employee during the pay period or any of the other information required to be provided on the itemized wage statement pursuant to items (2) . . . and (9) of subdivision (a)." (§ 226, subd. (e)(2)(B)(i), italics added.)

In the complaint, Donohue asserted a cause of action under section 226, alleging that AMN provided wage statements that failed to state all hours Plaintiffs worked (in violation of subd. (a)(2)) and failed to identify all applicable regular and overtime rates of pay (in violation of subd. (a)(9)). In particular, Donohue alleged that these three failures in AMN's wage statements occurred "at the designation for 'Flsa Ot' "—where AMN did not provide amounts for either the hourly rate or the number of hours.

On appeal, Donohue argues first that, with regard to the line item for "Flsa Ot" payments, the AMN wage statements do not provide accurate hourly rates, total hours worked, or inclusive dates of the pay period.[31] However, Donohue forfeited appellate consideration of the arguments related to these wage statement issues, because she failed to raise them in her opposition to AMN's motion in the trial court. (*Cable Connection,*

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31 According to testimony from AMN's supervisor of corporate payroll of AMN's parent company: Recruiters like Donohue were eligible to receive "different types of non-discretionary commissions, performance bonuses, and other incentive pay" in addition to their hourly compensation; these bonuses, which may be earned monthly or quarterly, are often "due and calculable only after the pay period during which the work was performed"; in the event additional overtime must be paid on such amounts, *it is not tied to the recruiter's hourly wage*, but rather is calculated by a complex formula which is "the mathematical equivalent of calculating the bonus into the [recruiter's] regular rate of pay"; and "[*t*]*hese bonus-related overtime adjustments are denoted as 'Flsa Ot' on a* [*recruiter's*] *wage statement*" and may denote a payment that comprises multiple adjustments for multiple bonuses being paid during the same pay period. (Italics added.)

Inc. v. DIRECTV, Inc. (2008) 44 Cal.4th 1334, 1350, fn. 12 [" 'A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant.' "].) An appellate court "generally will not consider an argument 'raised in an appeal from a grant of summary judgment . . . if it was not raised below . . . .' " (*Noe v. Superior Court* (2015) 237 Cal.App.4th 316, 335; accord, *North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 28-29 [permitting a change of theory on appeal from the grant of a defense summary judgment would be "manifestly unjust to the opposing parties, unfair to the trial court, and contrary to judicial economy"].)

Donohue next contends that triable issues of fact exist as to whether recruiters could " 'promptly and easily determine' " their actual hours worked from the wage statements alone, as required by subdivisions (a)(2) and (e)(2)(B) of section 226. (Italics omitted.) In this context, " 'promptly and easily determine' means a reasonable person would be able to readily ascertain the information without reference to other documents or information.' " (§ 226, subd. (e)(2)(C).) Based on this standard, Donohue argues that AMN " 'alters' its employees' work times prior to payment, but does not explain to its employee that it is doing so." In support of this statement, Donohue cites AMN's response to Donohue's separate statement and a copy of Donohue's wage statement from a pay period in 2013. However, because a separate statement is "mere assertion" and "not itself evidence of anything" (*Stockinger v. Feather River Community College* (2003) 111 Cal.App.4th 1014, 1024 (*Stockinger*), disapproved on another ground in *Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607, 634, fn. 7), the separate

statement cannot raise a triable issue of material fact. Likewise, a wage statement without more does not raise a triable issue of material fact.

Even if we were to consider the evidence cited in the separate statement on which Donohue relies, the result is no different. Donohue's separate statement citation references the following material facts *which AMN does not dispute*: "In its Wage Statements, AMN sometimes represents 20 minutes of work-time as '.34' "; "In its Wage Statements, AMN sometimes represents 20 minutes of work-time as ".33' "; "In its Wage Statements, AMN never provides its nonexempt employees with any sort of written explanation which states that both '.33' and '.34' can mean 20 minutes of work-time"; "20 minutes is exactly one-third of 60 minutes"; and "33 is not exactly one-third of 100."[32] (Bolding and underscoring omitted.) Even if we assume that, by these statements, AMN failed to provide accurate and complete information as required by section 226, subdivision (a), Donohue forfeited appellate consideration of the issue, because she did not present argument, evidence, or authority as to how or why a recruiter is unable to "promptly and easily determine from the wage statement alone" the actual time worked—which is the required showing before an employee can be "deemed to suffer injury" according to subdivision (e)(1)(B) of section 226.[33] (Cal. Rules of Court,

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32 Donohue does not tell us which of these statements—or how any of these statements—raises a triable issue of material fact.

33 In the trial court, Donohue submitted two declarations, one in opposition to AMN's motion and one in support of her motion. She did not mention any confusion or inability to determine the time worked based on the information contained on her wage

rule 8.204(a)(1)(B) [each point in a brief must be supported "by argument and, if possible, by citation to authority"]; see *Pizarro v. Reynoso* (2017) 10 Cal.App.5th 172, 181 [failure to present coherent argument forfeits appellate review].)

In her reply brief on appeal, Donohue suggests that, because AMN converted the hours and minutes to hours and decimal hours, she or other recruiters generally were unable to promptly and easily determine the actual time worked.[34] We reject such a suggestion. First, Donohue forfeited appellate consideration of the argument, because she raised it for the first time in her reply brief on appeal. (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 295, fn. 11 ["Obvious reasons of fairness militate against consideration of an issue raised initially in the reply brief of an appellant."]; *Padron v. Watchtower Bible and Tract Society of New York, Inc.* (2017) 16 Cal.App.5th 1246, 1267 ["Any new substantive arguments raised by [an appellant] in its reply brief are deemed forfeited."].) In any event, even if we were to consider Donohue's tardy presentation, Donohue did not include evidence or authority for the suggestion that, by the use of decimal hours rather than minutes, AMN did not provide a wage statement from which

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statement; nor did she present any *evidence* of any other recruiter who was confused or unable to determine the time worked.

[34] For example, actual time of 1 hour and 30 minutes is converted to 1.5 hours, and actual time of 1 hour and 40 minutes is converted to 1.67 hours.

the amount of time worked can be, in the language of section 226, subdivision (e)(1)(B), "promptly and easily determined."[35]

Accordingly, we affirm the trial court's ruling as to AMN Issue No. 4.

E. *The Trial Court Did Not Err in Summarily Adjudicating Donohue's Overtime Claim in Favor of AMN*

Section 510, subdivision (a) requires employers like AMN to pay employees like Plaintiffs "one and one-half times the regular rate of pay" for "[a]ny work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek."

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35 In her reply brief on appeal, Donohue refers us to two pages of a separate statement (with five separately numbered paragraphs), a copy of one of Donohue's wage statements, and one page of the deposition transcript of a witness, C.B. The separate statement is neither evidence nor argument. (*Stockinger, supra*, 111 Cal.App.4th at p. 1024.) Although the copy of the wage statement contains a decimal hour, Donohue failed to present evidence or argument that she or any of Plaintiffs could not promptly and easily determine the amount of time worked.

At her deposition, C.B. testified that, in order to determine how many minutes .83 of an hour is, she would have to refer to a chart, although she guessed that it was 50 minutes. However, Donohue has not explained or provided evidence as to who C.B. is, and because Donohue did not cite this evidence until her reply brief on appeal, we decline to consider it. In any event, Donohue does not explain, or attempt to explain, how or why she or any recruiter was not able to promptly or easily determine the amount of time worked when it was expressed in decimal hours (.83 of an hour) rather than minutes (50 minutes). Given that only basic skills in arithmetic are required to convert minutes to decimal hours and decimal hours to minutes, we will not infer a triable issue of material fact without evidence that any recruiter was delayed or had difficulty in determining the amount of time worked.

As part of the second cause of action in the complaint, Donohue alleged that AMN failed to pay required overtime wages in violation of section 510, subdivision (a).[36] More specifically, Donohue alleged the following two types of overtime payment violations: (1) " 'time shaving,' " which included both the rounding of time when recruiters punched in and out, and the conversion of time that was recorded in minutes to decimal hours for purposes of multiplying the amount of time by the overtime hourly rate; and (2) failure to include " 'Referral Bonus[es],' " " 'monthly commissions,' " and " 'RAMP' pay"[37] in calculating commissions and nondiscretionary bonuses when determining a recruiter's *regular* rate of pay, which results in an improper rate of *overtime* pay.

However, on appeal, Donohue does not mention these two alleged overtime violations. Instead, she argues only that the trial court erred in adjudicating her overtime claim based on what she characterizes as AMN's "makeup time" defense.[38] Thus,

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36 The second cause of action also contains a claim for failure to pay minimum wage in violation of section 1197, but on appeal Donohue does not mention, let alone raise an argument, related to the minimum wage claim or section 1197.

37 Donohue does not tell us, either in the complaint or her appellate briefing, what she considers referral bonuses, monthly commissions, or RAMP pay.

38 Without deciding whether the makeup time argument is part of Donohue's claim or AMN's defense (which the parties dispute), it is based on section 513, which provides in part: "If an employer approves a written request of an employee to make up work time that is or would be lost *as a result of a personal obligation of the employee*, the hours of that makeup work time, if performed in the same workweek in which the work time was lost, may not be counted towards computing the total number of hours worked in a day for purposes of the overtime requirements specified in Section 510 . . . . An employee shall provide *a signed written request* for each occasion that the employee makes a

Donohue did not meet her burden of establishing a triable issue of material fact in response to AMN's initial showing. (*Aguilar, supra*, 25 Cal.4th at p. 850-851.)

We are aware that, in granting AMN's motion for summary adjudication directed to the overtime claim, the trial court included as an *alternative* ruling that Donohue was required to, but did not, plead that AMN's makeup time policy resulted in overtime violations. However, the court's *principal* ruling was *on another ground*—namely that, because AMN's application of its rounding policy complied with California law, "AMN's methods of calculating and paying overtime compensation are lawful"; yet Donohue does not argue on appeal that the court erred in so ruling on summary adjudication. Stated differently, even if we assume that the trial court erred in denying Donohue's motion as to the makeup time defense, any such error would be harmless (see discussion of prejudice at pt. III.H., *post*): Because AMN was entitled to summary adjudication on its motion directed to the overtime claim on grounds unrelated to the issue of makeup time, the result on the overtime claim is unaffected by the court's ruling, even if erroneous, that Donohue did not plead that AMN's makeup time policy resulted in overtime violations.

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request to make up work time pursuant to this section. . . ." (Italics added.)

Donohue assures us on appeal that AMN's allegedly improper designation of makeup time is not part of her claim for overtime. She explains that her overtime claim is based solely on the "allegation . . . that overtime was not paid in some instances where over 8 hours in a day were worked by employees." AMN therefore properly directed its motion to the allegations in the complaint, where Donohue alleged improper overtime payments based on time-shaving (rounding of time and use of decimal hours) and failure to include certain commissions or bonuses in the calculation of regular time, and therefore, overtime—none of which involved the application of makeup time.

Accordingly, we affirm the trial court's ruling as to AMN Issue No. 1—without expressing an opinion as to the effect of AMN's makeup policy on Donohue's overtime claim.

F. *The Trial Court Did Not Err in Summarily Adjudicating Donohue's Rest Period Claim in Favor of AMN*

A rest period mandated by state law, which includes Industrial Welfare Commission wage orders, "shall be counted as hours worked, for which there shall be no deduction from wages." (§ 226.7, subd. (d).) In general, California employers are required to provide rest periods of a specified minimum duration—e.g., 10 minutes of paid rest for every four hours worked; and for shifts of less than four hours, a 10-minute rest period after three and a half hours. (Tit. 8, §§ 11010-11150, subd. (12)(A) & § 11160, subd. (11)(A).) An employer is precluded from requiring an employee to work during a rest period, and an employer that fails to provide such a required rest period "shall pay" each affected employee one hour's pay for each workday the employee was not provided the appropriate rest period. (§ 226.7, subds. (b), (c); tit. 8, §§ 11010-11150, subd. (12)(B) & § 11160, subd. (11)(D).) In the present action, Donohue alleges that, by failing to have a compliant rest period policy, AMN violated section 226.7, subdivision (b), and title 8, section 11040, subdivision (12), which entitled Plaintiffs to recover damages.

In its motion, AMN sought to summarily adjudicate the rest period claim "because there is no evidence of a uniform policy or practice to deny rest periods." Donohue argues that the trial court improperly granted the motion by relying "on a generalization

that Ms. Donohue took 'some' rest breaks, . . . improperly ignor[ing] all of her testimony in which she said she was often *denied* other rest breaks." Donohue characterized the pertinent allegations in the complaint to be "that AMN did not provide *all* legally-compliant rest periods due," expressly asserting that "[t]he testimony in the record confirmed [her] allegations to be true."[39] By this argument, Donohue necessarily acknowledges that AMN met its initial burden, suggesting only that she met her responsive burden of establishing the existence of a triable issue of material fact.

In response to AMN's showing that its written policy complies with California law (which Donohue does not challenge on appeal), Donohue refers us to one page of her declaration and eight pages of her deposition transcript and argues that "(1) she and others were frequently denied rest breaks altogether when work got too busy, and (2) that [AMN] would often interrupt her (call her back to work) before her rest period was finished." The problem with Donohue's argument is that the *evidence* on which she relies does not establish either a general noncompliant company policy or the denial of any specific required rest period(s).

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[39] Citing Evidence Code section 356, Donohue argues on appeal that, because the court considered a portion of Donohue's deposition testimony, "[t]he rule of completeness requires *all* of Ms. Donohue's testimony on the subject of rest periods be considered." We disagree. Evidence Code section 356 provides in part: "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject *may be inquired into by an adverse party*[.]" (Italics added.) The trial court was not required to consider deposition testimony sua sponte, and there is no indication that the trial court did not consider any evidence that Donohue properly cited.

In her declaration, Donohue testified that she "was routinely discouraged from taking meal and rest breaks" and even called back to her desk "on several occasions" when attempting to take a rest break.[40] However, neither of these events establishes either a noncompliant company policy or the denial of a compliant rest period (or, in the event of a noncompliant rest period, nonpayment of the required premium).

At her deposition Donohue expressly testified that AMN allowed recruiters to take rest breaks, commenting only that taking such breaks "was highly frowned upon" and "it was not a commonality to take rest periods at all." Significantly, Donohue could not remember what she was told or what was communicated to her to cause her to believe that taking rest breaks was uncommon or disapproved. Although Donohue later identified a "recruitment manager" in "upper division" who told her "just conversationally" that she should make telephone calls instead of taking breaks, Donohue confirmed that the manager never stated that taking a rest period was " 'frowned upon' " or otherwise precluded. All of that said, Donohue testified unequivocally that *no one*—and repeated later that she could not remember any *manager or supervisor* who—ever told her that she could not take a rest break.

For these reasons, the evidence on which Donohue relies is insufficient to establish the existence of a triable issue of material fact in response to AMN's initial showing that, in the terms of the issue to be summarily adjudicated, "there is no evidence

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40 As we explain at part III.H., *post*, even though the trial court excluded this testimony, we have considered it in our de novo review on appeal.

of a uniform policy or practice to deny rest periods." Accordingly, we affirm the trial court's ruling as to AMN Issue No. 3.

G. *The Trial Court Did Not Err in Summarily Adjudicating Donohue's PAGA Claim in Favor of AMN*

Section 2699, subdivisions (a) and (g)(1), which are part of PAGA (§ 2698 et seq.), allow "an aggrieved employee" to recover civil penalties for certain violations of the Labor Code.[41] (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 980.) Under PAGA, an " 'aggrieved employee' " is defined as an employee "against whom one or more of the alleged [Labor Code] violations was committed." (§ 2699, subd. (c).)

" 'Before the PAGA was enacted, an employee could recover damages, reinstatement, and other appropriate relief but could not collect civil penalties. The Labor and Workforce Development Agency . . . collected them. The PAGA changed that.' " (*Villacres v. ABM Industries Inc.* (2010) 189 Cal.App.4th 562, 578; accord, *Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, 1126 ["Section 2699, subdivision (a) . . . 'permits aggrieved employees to recover civil

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41 "Notwithstanding any other provision of law, any provision of th[e Labor C]ode that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency . . . for a violation of this code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees pursuant to the procedures specified in Section 2699.3." (§ 2699, subd. (a).)

"[A]n aggrieved employee may recover the civil penalty described in subdivision (f) [, which deals with civil penalties,] in a civil action pursuant to the procedures specified in Section 2699.3 filed on behalf of himself or herself and other current or former employees against whom one or more of the alleged violations was committed." (§ 2699, subd. (g)(1).)

penalties that previously could be collected only by [the agency' "].) "In PAGA, the Legislature created an enforcement mechanism for aggrieved employees to file representative actions to recover penalties in cases in which there is no private cause of action as an alternative to enforcement by the Labor Commissioner." (*Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 650, superseded in part on another issue by statute.) Under PAGA, "the aggrieved employee acts as the proxy or agent of state labor law enforcement agencies, representing the same legal right and interest as those agencies, in a proceeding that is designed to protect the public, not to benefit private parties." (*Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court* (2009) 46 Cal.4th 993, 1003.)

In the seventh cause of action of the complaint, Donohue pleaded that she complied with PAGA's administrative prefiling requirements (see § 2699.3, subd. (a)) and alleged that, under PAGA, she was an aggrieved employee asserting a claim against AMN based on violations of specified Labor Code sections and Industrial Welfare Commission wage orders dealing with: straight time; overtime; meal periods; rest periods; wage statements; and amount of compensation owed upon termination of employment (based on proof of the other alleged violations). The trial court granted AMN's motion for summary adjudication of Donohue's PAGA cause of action, because—in the language of the issue to be summarily adjudicated—each of the PAGA claims "is derivative of [Donohue's] other claims under the California Labor Code, which also fail[.]" The trial court did not err.

On appeal, Donohue argues otherwise, contending that, unlike a class action plaintiff who must show a common policy or practice that results in Labor Code (or related) violations, a PAGA plaintiff need only prove the existence of a violation. In support, Donohue relies on a language from *Williams v. Superior Court* (2017) 3 Cal.5th 531 (*Williams*) that, in a PAGA action, "recovery on behalf of the state and aggrieved employees may be had for each violation, whether pursuant to a uniform policy or not." (*Williams,* at p. 559.) Even if we accept Donohue's authority,[42] Donohue did not establish that *she* suffered harm as a result of AMN's violation of the Labor Code.

Stated differently, Donohue did not establish that *she* was an aggrieved employee—a prerequisite to asserting a PAGA claim (§ 2699, subds. (a), (g)(1))—because she did not establish that "one or more of the alleged [Labor Code] violations was committed" against her (§ 2699, subd. (c)). The parties and the trial court discussed this issue in terms of analyzing whether Donohue's PAGA claims were "derivative" of her substantive claims for Labor Code violations.

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42 The procedural posture in *Williams* makes the case inapplicable to the present appeal. *Williams* was a discovery dispute, where the principal issue was whether the PAGA plaintiff had to show that he had been subject to Labor Code violations *prior* to obtaining discovery from the defendant employer regarding contact information for other California employees. (*Williams, supra*, 3 Cal.5th at pp. 538, 559.) The court concluded that the identities of the employer's other California employees were discoverable without first requiring that the PAGA plaintiff establish that he had been subject to Labor Code violations. (*Williams,* at p. 558 ["the merits of one's case has never been a threshold requirement for discovery"].) As applicable to the present appeal—and as we discuss in the text, *post*—in dictum the court explained that, *in order to recover on the merits* as opposed to merely obtaining discovery, a PAGA plaintiff must establish standing, which requires a showing the PAGA plaintiff "suffered harm" as a result of the employer's violation of the Labor Code. (*Williams,* at p. 559, citing § 2699.)

In its separate statement in support of its motion to summarily adjudicate Issue No. 7, AMN proffered the following undisputed material fact: "All claims for PAGA penalties that [Donohue] has brought in this lawsuit are derivative of her other causes of action for violations of the Labor Code." As supporting evidence, AMN relied on copies of Donohue's administrative prefiling letters and certain allegations in her complaint in which Donohue expressly contended that her PAGA claims were *entirely* derivative of her substantive claims under the Labor Code. Significantly, in her response to AMN's separate statement, Donohue did not dispute that her claims for PAGA penalties were derivative of her substantive claims for Labor Code violations.[43] Consistently, in her memorandum of points and authorities in opposition to AMN's motion in the trial court, Donohue again specifically acknowledged that her PAGA claims were derivative of her substantive Labor Code claims. Indeed, instead of presenting any independent argument related to the PAGA cause of action, Donohue merely asked the court to "Please see the above arguments"—thereby confirming that her PAGA claims were, in fact, derivative of her other Labor Code claims.

Donohue suggests that the holding in *Lopez v. Friant & Associates, LLC* (2017) 15 Cal.App.5th 773 (*Lopez*) saves her PAGA claim (§ 2699) for wage statement violations

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43 Actually, Donohue did not include *any* response to AMN's proposed undisputed material fact. AMN noted this nonresponse in its reply to Donohue's opposition, contending that, because "[Donohue] has provided no response to this fact[,] . . . it therefore remains undisputed." Donohue did not argue otherwise at the hearing (or seek leave to amend her prior response), and she does not contend otherwise on appeal.

(§ 226, subd. (a)).[44] More specifically, she argues that, under *Lopez*, the trial court here erred in ruling that, because AMN was entitled to judgment as a matter of law on her individual (class) claims under section 226, AMN was also entitled to judgment as a matter of law on her representative (PAGA) claim under section 2699.[45] However, all *Lopez* held was that a plaintiff who asserts a *representative* claim for *civil penalties* under PAGA (§ 2699) based on violations of section 226, subdivision (a), need not prove an *individual* claim for *statutory damages* under the Labor Code (§ 226, subd. (e)) based on the same violations of section 226, subdivision (a). (*Lopez,* at pp. 784-786.) Although a representative PAGA claim for penalties (§ 2699) and an individual claim for damages (§ 226, subd. (e)) *both* require proof of a violation of the requirements for itemized wage statements under section 226, subdivision (a), the *representative* claim requires only proof that the employer's wage statement violated section 226, subdivision (a), whereas the *individual* claim requires proof that the plaintiff suffered an " 'injury' resulting from a

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44 Because this is the argument that Donohue attempted to raise in her motion for reconsideration, which the trial court struck after entry of judgment, Donohue has not been prejudiced by the trial court's failure to rule on the motion.

45 In the individual (class) cause of action for damages under section 226, subdivision (e), Donohue alleged that AMN failed to include in employees' wage statements "all hours worked" in violation of subdivision (a)(2) and failed to identify "all applicable regular and overtime rates of pay" in violation of subdivision (a)(9).

In the representative (PAGA) cause of action under section 2699 for penalties based on section 226 violations, Donohue alleged that AMN failed to include in employees' wage statements "the accurate total number of overtime hours worked" in violation of subdivision (a)(2), the "accurate net or gross wages, including overtime wages, earned" in violation of subdivision (a)(1), and "the name and address of the legal entity that is the employer" in violation" of subdivision (a)(8).

'knowing and intentional' violation of section 226[, subdivision](a)." (*Lopez,* at pp. 784, 784-786.)

In *Lopez*, the defendant employer sought summary judgment on the *representative* (PAGA) claim for penalties (§ 2699) based on evidence and argument that the plaintiff employee could not establish an *individual* claim for damages (§ 226, subd. (e)) based on the same alleged section 226, subdivision (a) wage statement violations. (*Lopez, supra*, 15 Cal.App.5th at pp. 776-777.) In reaching its conclusion otherwise, the *Lopez* court stated only that a PAGA *representative* claim for penalties based on a violation of subdivision (a) of section 226 is not derivative of an *individual* claim for damages based on a violation of subdivision (e) of section 226 because the *individual* claim requires proof of a knowing and intentional violation of subdivision (a), whereas the *representative* claim does not. (*Lopez,* at p. 786.) In contrast, here, because Donohue's *individual* (class) claims failed on grounds *other than* the lack of proof of a knowing and intentional violation of section 226, subdivision (a)—namely, on the basis that Donohue did not meet her burden of establishing an issue of material fact as to the *existence* of a section 226, subdivision (a) violation (see pt. III.D., *ante*)—*Lopez* is not controlling.[46]

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46 At oral argument, counsel for Donohue presented argument based on *Huff v. Securitas Security Services USA, Inc.* (2018) 23 Cal.App.5th 745 (*Huff*)—a case that was decided many months after the filing of her reply brief. We disapprove of counsel presenting this authority without sufficient time for AMN to respond—despite six months and three rounds of supplemental briefing after the filing of *Huff* and before oral argument. However, since the case does not help Donohue, we will consider it without requesting supplemental briefing from AMN. In *Huff*, the appellate court held that an employee who is affected by at least one Labor Code violation may pursue PAGA penalties for unrelated Labor Code violations by the same employer. (*Huff,* at pp. 753-

In conclusion, based on the record and our rulings on her individual (class) Labor Code claims, *ante*, Donohue did not meet her burden of establishing trial court error in granting summary adjudication in favor of AMN on Donohue's representative (PAGA) cause of action. Stated differently, in the language from her opening brief on appeal, Donohue did not meet her burden of establishing an issue of material fact as to whether she "individually experienced" any particular Labor Code violation. (See *Huff, supra*, 23 Cal.App.5th at p. 753 [PAGA plaintiff must be "affected by at least one Labor Code violation"]) In response to AMN's showing—which included Donohue not disputing the proffered material fact that her representative (PAGA) claims were derivative of her individual (class) Labor Code claims[47]—Donohue did not establish either that she suffered a Labor Code violation or that her PAGA claims were not derivative of her individual (class) claims.

Accordingly, we affirm the trial court's ruling as to AMN Issue No. 7.

754.) Here, as we concluded in the text, *ante*, Donohue has not established the right to recover for *any* Labor Code violation; thus, even under *Huff*, she may not pursue PAGA penalties for *any* Labor Code violation(s).

47 As we explained at footnote 45, *ante*: In the individual (class) claim for damages under section 226, subdivision (e), Donohue alleged violations of *subdivisions (a)(2) and (a)(9)* of section 226; whereas in the representative (PAGA) claim for penalties under section 2699, Donohue alleged violations *subdivisions (a)(1), (a)(2), and (a)(8)* of section 226—which includes two alleged violations that were not part of the individual (class) claim. Donohue does not suggest that the PAGA claim was not derivative of the class claims because the two sets of claims alleged *different* violations of section 226, subdivision (a).

H. *The Trial Court Did Not Abuse its Discretion in Sustaining AMN's Evidentiary Objections to Certain of Donohue's Evidence*

In ruling on the cross-motions, the trial court sustained AMN's evidentiary objections to the declarations of Donohue and Clint S. Engleson, one of Donohue's attorneys. Donohue contends on appeal that these rulings are erroneous and, on that basis, she is entitled to a reversal of the judgment. We disagree.

Generally, we review for an abuse of discretion of the trial court's ruling on the exclusion of evidence in summary judgment proceedings. (*Park v. First American Title Co.* (2011) 201 Cal.App.4th 1418, 1427.) A trial court abuses its discretion only when, in its exercise, the ruling is arbitrary or the trial court "exceeds the bounds of reason, all of the circumstances before it being considered." (*Denham, supra*, 2 Cal.3d at p. 566.) That said, in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, our Supreme Court expressly left open the question of whether such evidentiary rulings are reviewed under a de novo or an abuse of discretion standard. (*Id.* at p. 535.) The parties disagree as to which standard we are to apply.

Under either standard, however, an appellant who seeks a reversal based on the erroneous exclusion of evidence in summary judgment proceedings must establish how the error resulted in a "miscarriage of justice," often referred to as prejudice. (Cal.

Const., art. VI, § 13;[48] Code Civ. Proc., § 475;[49] *Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069.) For purposes of this analysis, a "miscarriage of justice" may be found on appeal " ' "only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." ' " (*Pool,* at p. 1069; accord, *San Diego Gas & Electric Co. v. Schmidt* (2014) 228 Cal.App.4th 1280, 1301-1302.) In this context, "reasonably probable" means "more than an *abstract possibility*." (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.) Prejudice is not presumed (Code Civ. Proc., § 475), and the appellant bears the burden of establishing *both* error *and* a miscarriage of justice. (*Denham, supra*, 2 Cal.3d at p. 566.)

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48 "No judgment shall be set aside . . . in any cause, on the ground of . . . the improper . . . rejection of evidence . . . , unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has *resulted in a miscarriage of justice*." (Cal. Const., art. VI, § 13, italics added.)

49 "No judgment, decision, or decree shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it *shall appear from the record* that such error, ruling, instruction, or defect *was prejudicial,* and also that by reason of such error, ruling, instruction, or defect, the said party complaining or appealing sustained and suffered substantial injury, and that *a different result would have been probable if such error, ruling, instruction, or defect had not occurred or existed.* There shall be no presumption that error is prejudicial, or that injury was done if error is shown." (Code Civ. Proc., § 475, italics added.)

Without deciding which standard of review applies, we assume that the challenged evidence should have been admitted.[50] As we explain, however, because Donohue did not meet her burden of establishing prejudice, any error in excluding the evidence is harmless.

1. *Donohue's Testimony*

In support of her opposition to AMN's motion directed to meal periods and rest periods, Donohue testified as follows:

> "I understand AMN is arguing that I somehow 'certified' that I received all meal and rest breaks while working for the company by clicking a box to that effect when submitting my timecard. This is not the case. To confirm, I could not submit my timecard—and thus get paid—without clicking this box. Because I had no choice but to click this box, my doing so does not 'certify' the fact that I received meal and rest breaks. As I have testified multiple times, I was routinely discouraged from taking meal and rest breaks while I worked for AMN and was in fact called back to my desk—over the intercom—on several occasions when attempting to take meal and rest breaks."

AMN objected to this testimony on numerous grounds. The trial court excluded the testimony without stating the basis of its ruling.

On appeal, Donohue contends that this testimony is "relevant," "based on personal knowledge," and "simply expand[s] on and clarif[ies] what she had meant by her prior deposition testimony." She then argues that the exclusion of this testimony "was highly prejudicial, as it created a multitude of triable issues of fact with regard to the meal and

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[50] Indeed, in our discussions of both the meal period and rest period issues at parts III.C.1. & III.F., respectively, *ante*, we considered applicable portions of Donohue's declaration testimony that the trial court excluded.

rest period claims." However, by acknowledging that this testimony is cumulative and by failing to suggest how this testimony supports a specific triable issue of material fact, Donohue has not met her burden of establishing prejudice.

Accordingly, Donohue is not entitled to relief based on the trial court's exclusion of Donohue's declaration testimony.

2. *Engleson's Testimony*

In support of her opposition to AMN's motion, Donohue submitted the declaration from one of her attorneys, Engleson. In his declaration, Engleson provided substantive testimony, as well as foundational/authentication testimony related to 16 exhibits. AMN objected to the declaration and to certain of the exhibits on various grounds, and the trial court sustained AMN's evidentiary objections on the basis that most of the declaration was "an improper attorney declaration." The court did not rule on the objections to any of the exhibits.

On appeal, Donohue does not challenge the ruling that Engleson's declaration was an improper attorney declaration. She challenges only that portion of the court's ruling that sustained AMN's objections to the 16 exhibits. However, Donohue does not attempt to explain (let alone succeed in explaining) how she was prejudiced by the exclusion of any particular exhibit.

Accordingly, Donohue is not entitled to relief based on the trial court's ruling sustaining AMN's objection to Engleson's declaration.

I. *Donohue Did Not Retain Her Individual Claims*

In her final argument, *without a record reference*, Donohue contends that, because "AMN's notice of summary judgment motion only seeks to adjudicate the certified class action claims, . . . it was error for the trial court to adjudicate Ms. Donohue's ***individual*** claims for meal break, rest break, unpaid compensation and wage statement violations." (Original italics and bolding) We emphasize "without a record reference," because the record discloses that AMN gave notice of and moved for "summary judgment or, in the alternative, summary adjudication, in its favor and *against* the certified class and *named plaintiff Kennedy Donohue in her individual capacity*, on Plaintiffs' Second Amended Complaint, and as to each cause of action therein." (Italics added.)

Accordingly, Donohue's argument that AMN's motion did not seek to adjudicate her individual claims is frivolous, and we reject it.

IV. DISPOSITION

The judgment is affirmed. AMN is entitled to its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(2).)

IRION, J.

WE CONCUR:

HALLER, Acting P. J.

O'ROURKE, J.

Filed 12/10/18

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

KENNEDY DONOHUE, Plaintiff and Appellant, v. AMN SERVICES, LLC, Defendant and Respondent.	D071865 (Super. Ct. No. 37-2014-00012605-CU-OE-CTL)

THE COURT:

The opinion in this case filed November 21, 2018 was not certified for publication. It appearing the opinion meets the standards for publication specified in California Rules of Court, rule 8.1105(c), the requests pursuant to California Rules of Court, rule 8.1120(a), for publication are GRANTED.

IT IS HEREBY CERTIFIED that the opinion meets the standards for publication specified in California Rules of Court, rule 8.1105(c); and

ORDERED that the words "Not to Be Published in the Official Reports" appearing on page one of said opinion be deleted and the opinion herein be published in the Official Reports.

HALLER, Acting P. J.

Copies to: All parties

Filed 12/28/18

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

KENNEDY DONOHUE, Plaintiff and Appellant, v. AMN SERVICES, LLC, Defendant and Respondent.	D071865 (Super. Ct. No. 37-2014-00012605-CU-OE-CTL) ORDER MODIFYING OPINION NO CHANGE IN JUDGMENT

THE COURT:

It is ordered that the opinion filed herein on November 21, 2018 be modified as follows:

1. On page 31, line 4 of footnote 27, "1:24 p.m." is changed to "1:34 p.m.".

There is no change in the judgment.

HALLER, Acting P. J.

Copies to: All parties

KEVIN J. LANE, Clerk of the Court of Appeal, Fourth Appellate District, State of California, does hereby Certify that the preceding is a true and correct copy of the Original of this document/order/opinion filed in this Court, as shown by the records of my office.

WITNESS, my hand and the Seal of this Court.

12/28/2018

KEVIN J. LANE, CLERK

By Deputy Clerk

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

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 San Diego, State of California. My business address is Sullivan Law Group, APC, 2330 3rd Ave., San Diego, California 92101.

On January 22, 2019, I served a true and correct copy of the within document described as:

1. **Plaintiff-Appellant and Petitioner Kennedy Donohue's Petition for Review**
2. **Appendix A to Petition for Review**

on the interested parties and persons as indicated on the attached Service List, as follows:

BY ELECTRONIC SERVICE (where indicated on the attached service list): I forwarded the true and correct copy of the within document electronically, via the Court's True Filing system.

BY MAIL (where indicated on the attached service list): I placed a true and correct copy of the above document(s) in a sealed envelope, addressed as indicated above. I am readily familiar with the firm's practice and collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party serviced, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on January 22, 2019 at San Diego, California.

/s/ Eric K. Yaeckel
Eric Yaeckel

SERVICE LIST

Mary Dollarhide, Esq. DLA Piper LLP 4365 Executive Drive, Suite 1100 San Diego, CA 92121	Attorneys for Defendant and Respondent (*electronic service via True Filing*)
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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **TEMP-GLN7Y2V8**
Lower Court Case Number:

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1/22/2019
Date

/s/Eric Yaeckel
Signature

Yaeckel, Eric (274608)
Last Name, First Name (PNum)

Sullivan Law Group, APC

Law Firm