**Supreme Court Case No. S212704**

**IN THE SUPREME COURT OF CALIFORNIA**

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**CPS SECURITY SOLUTIONS, INC.**
Defendants/Cross-Complainants/Appellants/Petitioners

vs.

**TIM MENDIOLA, *ET AL.***
Plaintiffs/Cross-Defendants/Respondents/Petitioners

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After a Decision of the Court of Appeal
Second Appellate District, Division Four
Consolidated on Appeal with Case No.: B240519
Los Angeles County Superior Court Case Nos. BC388956, BC391869,
JCCP 4605
Honorable Jane L. Johnson, Judge

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# BRIEF ON THE MERITS OF PETITIONERS CPS SECURITY SOLUTIONS, INC., *et al.*

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CERTIFICATION OF INTERESTED ENTITIES OR PERSONS

**S212704 – MENDIOLA v. CPS SECURITY SOLUTIONS**

| **Full Name of Interested Entity/Person** | **Party/Non-Party** | **Nature of Interest** |
|---|---|---|
| | | |
| CPS Security Solutions, Inc. | Party | Petitioner/Defendant |
| CPS Construction Security Plus, Inc. | Party | Petitioner/Defendant |
| Construction Protective Services, Inc. | Party | Petitioner/Defendant |
| Christopher L. Coffey | Non-Party | Sole Shareholder of Petitioner/Defendants |

Submitted by: Jim Douglas Newman

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## QUESTIONS PRESENTED

1. Does California law permit employers and employees who reside on the employer's premises for extended periods of time, but who do not work 24-hour shifts, to agree to deduct eight hours of sleep time from compensable hours worked?

2. Is on-call time compensable hours worked when an employee, who resides on the employer's premises for extended periods of time, voluntarily remains on-site even though the employee is subject to certain employer imposed restrictions?

## INTRODUCTION

In *Morillion v. Royal Packing Co.* (2000) *(Morillion)* 22 Cal.4th 575, this Court held that an employer who requires its agricultural workers to travel to a work site on the employer's buses must compensate the workers for their time spent traveling on the bus, even though the employees are not performing any agricultural job duties. This Court held that such time constitutes "hours worked" because the employer exercises control over the workers by *requiring* them to travel to the fields from an employer-designated location. (*Id.* at 586-588, holding compulsory travel time compensable but also recognizing that "[t]ime employees spend traveling on transportation that an employer provides but does not *require* its employees to use may not be compensable as 'hours worked.'[emphasis supplied]").

The general question presented in this case is whether an employer whose employees reside on its premises must compensate those employees for all hours when they are requested by the employer to remain on the premises and agree to do so, even if they are not performing their regular duties. Or can the employer and the employee form a *bona fide* and

enforceable agreement to exclude from these employees' compensable "hours worked" reasonable periods for sleep time during which no regular duties are performed? As described in both parties' Petitions for Review, the answer to this question has enormous significance for a broad range of occupations whose employees reside on the employer's premises.

More specifically, this case presents the question of whether persons employed in California as Trailer Guards by CPS Security Solutions, Inc. or its subsidiary Construction Protective Services, Inc. (collectively, "CPS") must be paid for sleep time hours when the employee: (1) is on-call; (2) is in his or her residence (a trailer home provided by CPS); (3) is permitted to engage in purely personal activities; and, most importantly, (4) is permitted to leave the premises with notice and, if commanded to stay, is paid from the moment the request to leave is made until the end of the on-call period. Stated differently, is an employee who lives on the employer's premises under the "control" of the employer when the employee agrees to remain in his or her residence and is on-call to respond to emergencies (that may or may not arise), but is permitted to eat, sleep, watch television and engage in other personal activities?

The trial court answered this question in the affirmative, viewing federal regulations and case law, which permit the exclusion of up to 8 hours of sleep time from compensable hours worked, as completely irrelevant to the determination of California law. (RT 18:18-21:2.) The Court of Appeal disagreed in part with the trial court's conclusion, holding that 29 C.F.R. § 785.22, the federal sleep time regulation governing employees who are required to be on duty 24 hours or more, applies to the Trailer Guards on weekends when they are generally scheduled to be at the jobsite from

3:00 p.m. Friday until 7:00 a.m. Monday. However, the Court of Appeal declined to extend the same logic to the companion section of the federal regulations that authorizes the deduction of sleep time for employees who reside on the employer's premises but who are required to be on duty for less than 24 hours, 29 C.F.R. § 785.23. The court, therefore, concluded that the sleep time agreements are not enforceable on weekdays when the Trailer Guards can leave the jobsite without notice to CPS during the daytime hours[1] (between 7:00 a.m. and 3:00 p.m).

This brief explains why the Court of Appeal erred in finding the sleep time agreements between CPS and its Trailer Guards partially unenforceable.

## STATEMENT OF FACTS

CPS provides security guard services for construction companies at construction sites throughout California and in several other states. Some of CPS's security guards work as Trailer Guards and others work as Hourly Guards. Trailer Guards reside on the work premises in a trailer home provided by CPS; Hourly Guards do not. Generally, Trailer Guards are scheduled to be on site 24 hours a day on the weekends and up to 16 hours a day on weekdays. On weekdays, the Trailer Guards are free to leave the premises from 7:00 a.m. until 3:00 p.m., when workmen are typically on site. The obligation of each Trailer Guard to reside on the premises and his

[1] As discussed below (see *infra*, at p. 23, fn. 5), federal law requires that for sleep time to be excluded from the compensable hours worked of employees who reside on the employer's premises, the employees must be "completely free to leave the premises for their own purposes and engage in normal private pursuits during all non-duty time other than the sleep time." (See, July 27, 2004 DOL opinion letter (FLSA 2004-7) (copy attached hereto as Exhibit 1).)

or her specific work schedule is set forth in a written agreement between the Trailer Guard and CPS. (Jt. App. Vol. 1, 0079-80.)

CPS was founded by two brothers, Robert and Christopher Coffey, in 1989. The geneses of the Trailer Guard business, as designed and implemented at CPS, were the problems of theft and vandalism at construction sites. (Jt. App. Vol. 1, 0031.) The Company's founders noted that losses most often occurred during times when workers were entering or exiting the site, or during the night and on weekends when no one was working. (Jt. App. Vol. 1, 0032.) The trailer guard program allowed security officers to live in trailers placed on construction sites. The security officer would work during the days, and be present in the trailer at night. (*Id.*) The first placement of a trailer on a construction site as an initial experiment resulted in an immediate cessation of theft and vandalism at the site. (*Id.*) CPS sought and obtained the approval of the Labor Commissioner, first informally and then in a formal opinion letter issued by acting Labor Commissioner John Duncan in 1997. (*Mendiola v. CPS Security Solutions, Inc. (Mendiola)* (2013) 217 Cal.App.4th 851, 858.)

The trailer homes used by the Trailer Guards provide a home-like environment. The trailers range in size from 150 to 200 square feet. Each trailer home has a living area, a bed, bathroom facilities (a toilet and shower), a kitchen area (including a sink, refrigerator, microwave or oven and stovetop) and a table. Each trailer has electricity, heat, and air-conditioning. Fresh water and pumping of sewage is provided. Trailer Guards may keep personal clothing, books, magazines, televisions, radios, personal computers and other belongings in the trailer. (Jt. App. Vol. 1, 0080-81.)

The trailers are private quarters. They are equipped with locks, and only the Trailer Guards and CPS maintenance staff are provided with keys. Maintenance employees only enter a trailer with the permission of the resident Trailer Guard. Other CPS employees, including other guards and Field Supervisors, do not have access to the trailer. (Jt. App. Vol. 1, 0083.) There are some necessary restrictions that flow from residing and working at an active construction site. Because construction sites are often hazardous, minors are not permitted to visit the sites, consumption of alcohol is restricted, and Trailer Guards are generally not permitted to keep pets or entertain visitors. Exceptions to these restrictions are permitted on a case-by-case basis, at the CPS customer's sole discretion. (Jt. App. Vol. 1, 0081.)

Not everyone is well suited to work as a Trailer Guard. For example, some security guards who have families or who maintain their own residences may not be willing to reside at a construction site, or may not accept restrictions such as the prohibition on visitors. However, **any guard who does not agree to the terms and conditions of employment as a Trailer Guard is offered a position as an Hourly Guard** when available. Hourly Guards are not provided with a trailer home and do not reside at a particular construction site. Rather, Hourly Guards work routine guard shifts, generally lasting from six to 12 hours, and are paid for all the hours they are assigned to be at the construction site. (Jt. App. Vol. 1, 0080.)

Each Trailer Guard must agree to reside on the premises and to work the specific hours at each construction site to which he or she is assigned (the "Trailer Agreement"). The Trailer Agreement specifies a Trailer Guard's scheduled work hours, during which he is periodically required to patrol the premises. On weekdays, patrol hours are generally from 5:00 a.m.

to 7:00 a.m. and 3:00 p.m. to 9:00 p.m.; on weekends, patrol hours are generally from 5:00 a.m. to 9:00 p.m. The frequency of the patrol rounds and the amount of time spent patrolling during scheduled work hours varies from site to site. (Jt. App. Vol. 1, 0080.)

The hours from 9:00 p.m. to 5:00 a.m. each day are designated as "on-call" or "personal time." Each Trailer Guard signs an agreement that designates his or her personal time. These written agreements, titled "Designation of Personal Time for In-Residence Guard" (Jt. App. Vol. 1, 0119-145), together with the specific Trailer Agreements for each work site (Jt. App. Vol. 1, 0146-0169), reflect the contractual agreements between CPS and each Trailer Guard. (Jt. App. Vol. 4, 0558-0580.) While there are minor variations in the wording of different versions of these agreements, all of the agreements contain the same material terms. (Jt. App. Vol. 1, 0080.) During on-call hours, Trailer Guards are permitted to, and in fact do, engage in personal activities such as sleeping, taking showers, cooking, eating, reading, watching television, listening to the radio and surfing the Internet. (Jt. App. Vol. 1, 0081.)

Trailer Guards who remain at the site during their on-call hours are paid for actual interruptions, such as responding to alarms. If a Trailer Guard is interrupted for three hours or more during his or her on-call hours, the entire eight-hour on-call period is counted as hours worked and is paid. (Jt. App. Vol. 1, 0084-85.) Before 9:00 p.m. each night, Trailer Guards place electronic alarm sensors at various locations around the construction site. The alarm sensors are connected to an alarm panel that sounds either in Dispatch or in the trailer. If an alarm sounds in Dispatch, the Trailer Guard is notified by telephone and instructed to investigate the disturbance. If an

alarm sounds in the trailer, or if the Trailer Guard is interrupted by noise, motion or other activity during on-call time, he or she is required to contact Dispatch, put on his or her uniform before leaving the trailer, and then investigate the disturbance. After the alarm or interruption has been cleared, the Trailer Guard must inform Dispatch so that Dispatch can report the hours worked during the interruption to the CPS payroll department. (Jt. App. Vol. 1, 0082-85.)

Pursuant to the on-call agreements and subject to their terms, Trailer Guards may leave the construction site during their on-call time. Trailer Guards who wish to leave the site during on-call hours must notify Dispatch in order to permit CPS to secure a reliever. They must advise Dispatch regarding the length of time they intend to be away from the site and where they will be. (Jt. App. Vol. 1, 0082.) Dispatch must then identify a reliever to cover the site during the Trailer Guard's absence. Significantly, Trailer Guards who request to be relieved during on-call hours but who are required to stay are paid: (1) from the moment they request to leave the construction site until a reliever arrives; or (2) if a reliever is not available, for the remainder of the on-call hours. (Jt. App. Vol. 1, 0082-0084.)

Trailer Guards who leave the construction site are typically relieved by either Rover Guards or Field Supervisors. Trailer Guard requests to leave a site during on-call hours are relatively infrequent, and staffing levels are generally adequate to meet coverage needs. Pursuant to the agreements, CPS has the ability to command a Trailer Guard to stay on site, but this is an unusual occurrence. (Jt. App. Vol. 1, 0082-0083.)

While away from the site during on-call hours, the Trailer Guard must carry a CPS-provided pager or radio telephone and is expected to stay within

a 30 minute radius of the construction site, unless other arrangements are made. (Jt. App. Vol. 1, 0082.) The individuals who relieve the Trailer Guards remain on site, but they do not have access to the trailer homes. (Jt. App. Vol. 1, 0083.)

## PROCEDURAL HISTORY OF THE CASE

Beginning in March 1996, the California DLSE conducted an audit of CPS and investigated whether CPS's policy of excluding up to 8 hours of "sleep time" from hours worked was lawful. (Jt. App. Vol. 1, 0085.) At the end of the DLSE's investigation, CPS received a letter from John C. Duncan, Chief Deputy Director of the Department of Industrial Relations and acting Labor Commissioner. Mr. Duncan's letter, dated April 24, 1997, assumed that Wage Order 4 was applicable to the Trailer Guards and provided CPS with a written opinion expressly "excluding sleep time and other non-active duty hours" from the compensable time of its Trailer Guards. (Jt. App, Vol. 1, 0086, 0172-0174.)

In 1999, newly appointed Labor Commissioner Marcy Saunders abruptly reversed the enforcement position taken by Mr. Duncan in his April 1997 letter. CPS immediately requested to meet with Ms. Saunders to discuss the agency's sudden about-face on the sleep time issue, but these requests were refused for nearly three years. (Jt. App. Vol. 1, 0086.)

In November 2002, CPS filed an action for declaratory relief seeking resolution of the policy's legality, which the parties settled by entering into an October 14, 2003 Memorandum of Understanding (MOU). *Mendiola, supra,* 217 Cal.App.4th at 858-859. In the MOU, CPS agreed to change the terms of employment for its Trailer Guards by recasting the sleep time period as uncontrolled standby or "on-call" time. The terms of the MOU

provided (1) that CPS could require its Trailer Guards to agree to reside on the premises in a trailer home provided by CPS; (2) that Trailer Guards would be on "stand-by" and required to respond to alarms while on site; (3) Trailer Guards would have the right to leave during on-call time, provided they first notified CPS; and (4) if a reliever was not available, CPS would have the right to command a Trailer Guard to remain on site, but if CPS did so, the Trailer Guard's time would be paid "hours worked." (Jt. App. Vol. 1, 0176-0180.) By focusing upon the level of control exerted by CPS over the Trailer Guards during the evening sleep time period, the current on-call policy reflected the joint efforts of CPS and the Labor Commissioner to reconcile the previously approved sleep time policy with this Court's holding in *Morillion*.[2]

In 2008, the *Mendiola* plaintiffs and the *Acosta* plaintiffs filed two separate wage and hour class action lawsuits against CPS seeking to represent the same class of California Trailer Guards. The competing class actions were consolidated by Judge Rosenfeld of the Los Angeles County Superior Court. Additional wage and hour class action lawsuits were filed against CPS in other counties, and CPS successfully petitioned the Judicial Council for coordination before a single trial judge. The cases were assigned to the Honorable Jane L. Johnson in the Complex Litigation division of the Los Angeles County Superior Court.

The parties recognized early in the litigation that it was critical to obtain a judicial determination of the lawfulness of CPS's on-call policy.

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[2] The DLSE Opinion Letter approving the original sleep time policy (the "Duncan Letter") was issued in April, 1997. This Court's *Morillion* opinion was issued in 2000. CPS filed its first action for Declaratory Relief in 2002 and the MOU was signed on October 14, 2003.

The parties entered into an extensive Stipulation of Facts and submitted dispositive cross-motions on their respective claims for declaratory relief. On April 25, 2011, the trial court granted the Trailer Guards' motion for summary adjudication of their cause of action for declaratory relief and denied CPS's motion for summary judgment on its cross-complaint. The trial court held that CPS's on-call policy violates Wage Order 4 and Labor Code Section 1194, finding that agreements to exclude sleep time from compensable hours worked are unenforceable under Wage Order 4, except, in the health care industry. (Jt. App. Vol. 4, 0576.)

CPS timely appealed the trial court's April 25, 2011 order, but the Court of Appeal dismissed the appeal as premature. On January 17, 2012, the Trailer Guards moved for a preliminary injunction in the trial court. The motion sought to enjoin CPS from continuing to violate Wage Order 4 and Labor Code Section 1194 through application of its on-call policy, and to require CPS to begin paying all California Trailer Guards for hours spent on the jobsite during their on-call time. (Jt. App. Vol. 4, 0594-619.)

On March 6, 2012, the trial court granted the Trailer Guards' motion and issued an Order for Preliminary Injunction as prayed for in the motion. On April 12, 2012, CPS timely filed an appeal. (Jt. App. Vol. 4, 0649-651.) As set forth above, the Court of Appeal affirmed the trial court's order in part and reversed in part. The Court of Appeal held that CPS's agreements are lawful on the weekends when Trailer Guards are scheduled to work 24-hour shifts, but are unlawful on weekdays when the Trailer Guards can either leave without notice or remain at home between 7:00 a.m. and 3:00 p.m.

## STANDARD OF REVIEW

As the Court of Appeal correctly recognized, an order granting a preliminary injunction is an appealable order. (Cal. Code Civ. Proc., § 904.1, subd. (a)(6).) If the facts on which the trial court relied are undisputed, as here, the propriety of granting the injunction becomes a question of law, subject to *de novo* review. (*Cinquegranti v. Department of Motor Vehicles* (2008) 163 Cal.App.4th 741, 746.) Because appellate review of the injunction requires the construction of statutes and regulations, this case presents questions of law which the appellate courts review independently. (*Id.*; Accord, *Vo v. City of Garden Grove* (2004) 115 Cal.App.4th 425 (the lower court's decision to grant a preliminary injunction is reviewed *de novo* where, as here, "the likelihood of prevailing on the merits factor depends upon a question of law"); *Strategix, Ltd. v. Infocrossing West, Inc.* (2006) 142 Cal.App.4th 1068; see also, *Marken v. Santa Monica-Malibu Unif. Sch. District* (2012) 202 Cal.App.4th 1250, 1260-1261; *Huong Que, Inc. v. Luu,* (2007) 150 Cal.App.4th 400, 408.)

## COURT OF APPEAL OPINION

In holding that the employees are not entitled to be paid for their on-call sleep time when they are scheduled for 24 hours, the Court of Appeal relied on two prior appellate decisions, *Monzon v. Schaefer Ambulance Service, Inc. (Monzon)* (1990) 224 Cal.App.3d 16 and *Seymore v. Metson Marine, Inc. (Seymore)* (2011) 194 Cal.App.4th 361. *Monzon* and *Seymore* each upheld agreements between an employer and employee to exclude eight hours of sleep time from compensable hours worked when the employee is required to be on duty for 24 hours or more. The plaintiffs in *Monzon* were ambulance drivers who were scheduled to remain on premises

for 24-hour shifts. The employer's policy was to pay the ambulance drivers for 16 of those hours, but not for eight hours of sleep time unless the drivers were called to respond to an emergency. The Court of Appeal in *Monzon* found that although the definition of "hours worked" in state wage orders is different from the Fair Labor Standards Act ("FLSA"), federal law is entitled to deference because the wage orders "are closely modeled after" the FLSA. (*Monzon, supra*, 224 Cal.App.3d at 38-39.) The court then recognized an implied sleep time exclusion in California law based on 29 C.F.R. §785.22, a federal regulation interpreting the FLSA that authorizes agreements to exclude to up eight hours of sleep time from compensable hours worked for employees scheduled for shifts of 24 hours or longer. (*Id.* at 41-46).

*Monzon* was followed by *Seymore*, where the plaintiffs worked 14-day "hitches" on ships used to clean oil spills off the California coast. (*Seymore, supra*, 194 Cal.App.4th at 366.) The plaintiffs in *Seymore* were scheduled to work for 12 hours and to be off duty for 12 hours each day. (*Ibid.*) The off-duty time included eight hours of sleep time, three hours of meal time, and one hour of free time during which the employees were on "standby." (*Id.* at 366-367.) If the ship was docked at port, the employees were permitted to leave the ship, but they were required to carry a cellular phone and respond to emergency calls within 30-45 minutes. (*Ibid.*) Although the employees did not reside on the ship between hitches, they were required to sleep aboard the ship each night during the hitch. (*Ibid.*) In reliance on *Monzon*, *Seymore* likewise found that the exclusion of sleep time for 24-hour employees is "implied from the terms" of 29 C.F.R. §785.22. (*Id.* at 382.)

The Court of Appeal in the instant case agreed "with the courts in *Seymore* and *Monzon* that because the state and federal definitions of hours worked are comparable and have a similar purpose, federal regulations and authorities may properly be consulted to determine whether sleep time may be excluded from 24-hour shifts." (*Mendiola,* 217 Cal.App.4th 851, 874.) However, the court refused to import 29 C.F.R. § 785.23, another section of the sleep time regulations promulgated over 50 years ago by the DOL in Part 785.20 *et seq.* (*Id.* at 870-871.)

Section 785.23 permits employers and employees to enter into reasonable agreements to exclude sleep time where the employee resides on the employer's premises because, as the regulation recognizes, employees who reside on their employer's premises are not always working. (*Ibid.*) The Court of Appeal refused to import section 785.23 because, the panel reasoned, this section "does not appear to apply" to situations where an employee "is required to be present at the employer's premises during specified hours." (*Ibid.*) In addition, the court held that there is not convincing evidence of the intent of the Industrial Welfare Commission ("IWC") to adopt section 785.23 as part of Wage Order 4. (*Ibid.*)

The Court of Appeal also found that the employees were sufficiently under the control of the employer during their on-call sleep time hours so that all of the on-call sleep time was compensable. (*Id.* at 868-870.) In so holding, the Court of Appeal relied on a non-exclusive list of factors set forth in *Gomez v. Lincare, Inc. (Gomez)* (2009) 173 Cal.App.4th 508. (*Ibid.*) *Gomez*, in turn, had adopted the factors from the Ninth Circuit's decision in *Owens v. Local No. 169 (Owens)* (9th Cir. 1992) 971 F.2d 347. (*Ibid.*) As set forth below, the Court of Appeal misapplied those factors by, among

other reasons, finding that "the restrictions on the on-call time are 'primarily directed toward the fulfillment of the employer's requirements,' and the guards are 'substantially restricted' in their ability to engage in private pursuits." (*Id.* at 868.) The Court of Appeal inexplicably ignored the undisputed fact that if a reliever is not available, and the employee is commanded to remain on the job site, the employee is paid from the moment he or she requests to leave for the remainder of the on-call period.

## ARGUMENT

### I. THE TRAILER GUARDS ARE NOT UNDER THE CONTROL OF CPS DURING THEIR ON-CALL SLEEP TIME, UNLESS AND UNTIL THEY REQUEST TO LEAVE THE JOB SITE

#### A. The Trailer Guards Are Voluntarily in their Residence on the Jobsite Until they Request to Leave. If a Trailer Guard is Commanded to Remain on Site, he or she is Paid From the Moment of the Request to Leave Until the End of his or her On-Call Time.

The Court of Appeal below found that the "Trailer Guards are not free to leave at will" because "a guard may leave only if a reliever is available." (*Mendiola*, 217 Cal.App.4th at 868.) In so finding, the court completely ignored the undisputed fact that the Trailer Guards are on the job site in their trailers voluntarily and can request to leave and, if commanded to stay, are paid from the moment of the request until the end of their on-call time. Stated differently, the Trailer Guards are paid from the moment they come under CPS's control.

California's wage orders generally define "hours worked" as "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether

or not required to do so." (See *e.g.*, Wage Order No. 4, Section 2(K).) In *Morillion*, this Court considered what constitutes employer "control." The employer in *Morillion* required employees to meet for work each day at specified parking lots or assembly areas from which they were transported, in buses provided and paid for by the employer, to the agricultural fields where they actually worked. (*Morillion*, *supra*, 22 Cal.4th at 579.) At the end of each day, the employer transported the employees back to the departure points on its buses. (*Ibid.*) The employer's rules prohibited employees from using their own transportation to get to and from the fields. (*Ibid.*)

The issue before this Court in *Morillion* was whether the time spent traveling on the employer's buses constituted "hours worked" under Wage Order 14, which defines "hours worked" in the same way as Wage Order 4. (*Id.* at 580.) This Court found that the two phrases in the wage order, "time during which an employee is subject to the control of an employer" and "time the employee is suffered or permitted to work," are independent factors, each of which defines whether certain time spent is compensable as "hours worked." (*Id.* at 582.) Thus, this Court concluded that "an employee who is subject to an employer's control does not have to be working during that time to be compensated" under the wage order. (*Ibid.*)

This Court then considered whether the employees in *Morillion* were "subject to the control of [their employer]" when they were on the buses going to and from the fields. (*Id.* at 586.) This Court noted that the employees "were foreclosed from numerous activities in which they might otherwise engage if they were permitted to travel to the fields by their own transportation," such as dropping off their children at school, stopping for

breakfast, or running errands requiring the use of a car. (*Ibid.*) Central to this Court's decision was the undisputed fact that the employer *required* employees to travel in its buses to and from the fields and prohibited the employees from using their own transportation. (*Id.* at 587.)

In finding that the employees were subject to their employer's control, this Court relied on two appellate decisions, *Bono Enterprises, Inc. v. Bradshaw (Bono)* (1995) 32 Cal.App.4th 968 and *Aguilar v. Association for Retarded Citizens (Aguilar)* (1991) 234 Cal.App.3d 21. The Court of Appeal in *Bono* held that employees who are required to remain on the work premises during their lunch hour have to be compensated for that time. (*Id.* at 583.) The court found that "[w]hen an employer directs, commands or restrains an employee from leaving the workplace during his or her lunch hour and thus prevents the employee from using the time effectively for his or her own purposes, that employee remains subject to the employer's control" and must be paid. (*Ibid.*) In *Aguilar*, the Court of Appeal held that the time an employer required personal attendants to spend on site, including when they were allowed to sleep, should be considered hours worked where they did not reside on the employer's premises. (*Id.* at 583-584.)

The common denominator in *Morillion*, *Bono* and *Aguilar* is that in each case, the employer required its employees to remain under the employer's control. In *Morillion*, this meant requiring the employees to ride on the employer's buses from a staging area to the worksite, and in *Bono* and *Aguilar* this meant requiring the employees to remain at the worksite during meal periods and sleep time, respectively. The significance of this requirement is illustrated by comparison with the case of *Overton v. Walt Disney Co. (Overton)* (2006) 136 Cal.App.4th 263, where the Court of

Appeal held that employees were not under the control of the employer while riding the employer's bus from the Disney parking lot to their jobs at Disneyland, because their decision to take the employer's shuttle was voluntary.

The plaintiff in *Overton* was a former Disneyland employee who was assigned parking in a lot one mile from the employee entrance to Disneyland. (*Overton*, *supra*, 136 Cal.App.4th at 266.) Disney provided a shuttle from this lot to the employee entrance. (*Ibid.*) The plaintiff had to arrive "substantially earlier" to the lot to wait for the shuttle in order to arrive on time for work. (*Ibid.*) Employees who parked in the lot were not required to take the shuttle and could walk or bicycle from the lot to the employee entrance. (*Ibid.*) The plaintiff brought a proposed class action on behalf of all Disneyland employees who parked on the satellite lot seeking compensation for the travel time on the Company shuttle. (*Id.* at 266-267.)

In *Overton*, the Court of Appeal found that *Morillion* was not controlling because, unlike *Morillion*'s agricultural workers, Disneyland employees were not *required* to park on the lot and ride the shuttle. (*Id.* at 273-274 [emphasis supplied].) The fact that the choice not to ride the shuttle would usually be an unattractive one did not sway the court. (*Ibid.*) In language relevant here, the court held that:

> As is clear in our discussion of *Morillion*, the key factor is whether Disney required its employees who were assigned parking in the Katella Lot to park there and take the shuttle. Quite obviously, Disney did not. Plaintiff concedes 10% of Disney employees (including employees assigned to the Katella Lot) did not drive their cars to Disney at all and were permitted to use alternative transportation. [Footnote omitted.] This fact alone proves that parking in the Katella Lot and riding in the shuttle were not mandatory for all employees who checked in at Harbor Pointe. The Supreme court [in

> *Morillion*] found *Vega* [*v. Jasper*] (5th Cir. 1994) 36 F.3d 417 distinguishable from *Morillion* because "employees were free to choose—rather than required—to ride their employer's buses to and from work." Similarly, employees assigned to the Katella Lot were free to choose forms of transportation which bypass the Katella Lot entirely (train, bus, being dropped off, vanpool). The employees were also free to choose not to ride the shuttle even if they did park in the Katella Lot; other means of transportation were available and permissible (walking, bicycling).

(*Id.* at 271.)

So, too, the Trailer Guards here are free to choose whether to stay in their trailers during their on-call hours or to request to leave. If a Trailer Guard stays in his trailer, he can engage in a variety of personal pursuits, including eating, sleeping, watching television and surfing the Internet. If a Trailer Guard requests to leave, and is ordered to remain on site, he or she is paid from the moment of the request to leave until the end of his or her on-call period; that is, the Trailer Guard is paid for all of the time he or she is subject to CPS's control.

Significantly, the Division of Labor Standards Enforcement ("DLSE") expressly approved CPS's on-call policy in a Memorandum of Understanding ("MOU") entered into in settlement of a declaratory relief action that CPS had filed against the DLSE. As set forth in the Court of Appeal opinion, CPS agreed in the MOU to change its then terms of employment for its Trailer Guards to include the following:

> During the period between 9:00 p.m. and 5:00 a.m. (herein called "free time") seven days a week, CPS shall implement a policy that provides the Trailer Guards are free to leave the site at will during this free time, subject to the following conditions: (i) that the Trailer Guard will be on "stand-by" and subject to being required to respond to alarms and other recalls to work during those hours; (ii) that, before any Trailer Guard leaves the site he/she shall call into a central location and inform CPS that he/she is leaving, how long he/she intends to be gone from the

> site, and where he/she intends to be; (iii) that the Trailer Guard shall carry a pager or other device that will allow CPS to contact him/her; (iv) that, if paged or otherwise summoned, the Trailer Guard shall answer the page or otherwise contact CPS immediately; and (v) that the Trailer Guard may be required to stay within a radius of distance that will allow him/her to return to the construction site within 30 minutes.[3]

(*Mendiola*, 217 Cal.App.4th at 858-859.) Significantly, the MOU also provided that:

> **The Labor Commissioner and the DLSE agree that the terms of employment regarding the "uncontrolled standby plan" agreed to herein comply with all applicable current IWC Wage Orders and related wage and hour laws and regulations.**

(Jt. App. Vol. 1, 0177 [emphasis supplied]). The DLSE's interpretation of wage and hour laws "is entitled to great weight and, unless it is clearly unreasonable, it will be upheld." (*Keyes Motors, Inc. v. Division of Labor Standards Enforcement* (1987) 197 Cal.App.3d 557, 564.)

CPS also obtained the approval of the DOL. As set forth in the Court of Appeal opinion, CPS requested and received a formal opinion from the DOL providing that CPS's sleep time agreements complied with federal law and that the designated sleep time did not need to be compensated as "hours worked" provided that the unpaid sleep time period is regularly scheduled, is at least five hours and not more than eight hours per day, and the employee

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[3] Both courts below equated the notice requirement with a requirement that the Trailer Guards obtain "permission" to leave the site during on-call hours. However, the courts below failed to recognize that there is a strong incentive for CPS to grant permission, because if permission is withheld the remainder of the on-call period is treated as compensable "hours worked" that must be paid. Similarly, the opportunity for Trailer Guards to earn overtime pay responding to any alarms that might interrupt their sleep creates an incentive for the Trailer Guards to remain at home. This case stands in marked contrast to *Morillion* where the employees' presence on the bus was **compulsory**.

is paid for interruptions. (*Mendiola*, 217 Cal.App.4th at 859.) In response to a Freedom of Information Act request, CPS received a copy of a 2009 DOL memorandum regarding a subsequent investigation of CPS. As set forth in the Court of Appeal opinion, this memorandum stated:

> [T]he Department's position has not changed since the last investigation. The employer is still allowed to deduct the 8 hour sleep time as long as the trailer guards are able to get at least 6-hour[s] of sleep time per night," and that "no further action would be taken by the Department based on the fact that the Department's position has not changed, and [CPS] is [facing] two class action lawsuits dealing with [a] similar issue.

(*Ibid.*)

### B. The Trailer Guards Are Not Under the Control of CPS Based on the Federal Factors Set Forth in the *Gomez/Owens* Test.

This Court in *Morillion* held that federal law can inform the interpretation of state law when the federal and state statutory schemes are substantially similar. In making this determination, the Court cautioned that state courts must make a "comparative analysis" in determining how much weight to give federal authority in interpreting a California wage order. (*Id.* at 588 [citing *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 798].) A comparative analysis of the compensability of on-call time under federal and state law shows that the federal and state statutory schemes both turn on the level of control exercised by the employer during the on-call time and are substantially similar. (See, e.g. *Morillion*, 22 Cal.4th 575 and *Owens*, 971 F.2d 347.) [4]

[4] The seminal U.S. Supreme Court case is *Armour & Co. v. Wantock* (1944), 323 U.S. 126. The employer there operated a factory and maintained a private fire-fighting force that worked from 8:00 a.m. to 5:00 p.m. and then remained on-call in the fire hall until the following morning at 8:00 a.m.

Because of the substantial similarity between federal and state law concerning the compensability of on-call time, the Court of Appeal in *Gomez, supra,* 173 Cal.App.4th 508 expressly adopted the factors set forth by the Ninth Circuit Court of Appeals in *Owens*, an on-call case under the FLSA. The Court of Appeal below relied on these factors, stating that "[b]ecause state and federal courts both rely on the factors set forth in *Gomez v. Lincare, Inc.* ... to determine whether on-call time is compensable, we may look to federal authorities for guidance." (*Mendiola*, 217 Cal.App.4th at 870, n. 25.)

The employees in *Gomez* were medical service representatives who were required to carry a pager or cellular phone after their regular work hours and to respond to patient telephone calls at night or on the weekend. (*Gomez*, 173 Cal.App.4th at 512-513.) The employees were prohibited from consuming alcohol while on-call, but were otherwise free to engage in any activities they desired. (*Ibid.)* Based on these facts, the court found that the employees were not under their employer's control and not entitled to be paid for their on-call time. (*Id.* at 523-524.) In so holding, the court looked to various "non-exclusive factors" from *Owens*, including (1) whether there was an on-premises living requirement such that employees were not free to

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During the nighttime hours, the fire-fighters were required to stay in the fire hall to respond to any alarms. The employer provided cooking equipment, beds, radios and facilities for cards and amusements. The fire-fighters were not able to leave the premises except, with the permission of the watchman, they could go to a nearby restaurant for their evening meal. The Supreme Court held that the nighttime hours were "hours worked" because the employees were "engaged to wait." However, the Court held that meal periods and **sleep time should be excluded from compensable hours worked**. *Id.* at 129 ("[u]sual hours for sleep and for eating...would not be counted, but the remaining hours should.").

use off-duty time for personal pursuits, (2) whether there were excessive geographical restrictions on the employee's movements, (3) whether the frequency of calls was unduly restrictive, (4) whether a fixed time limit for response was unduly restrictive, and (5) whether the employee has actually engaged in personal activities during on-call time. (*Ibid.*)

The first *Owens* factor, whether the Trailer Guards are required to live on the job site, is particularly important here. The Court of Appeal below found that this factor weighed in favor of the Trailer Guards because "[t]hey are required to live on the job site." (*Mendiola*, 217 Cal.App.4th at 868.). However, although this is how the factor was framed in *Owens*, the Ninth Circuit later clarified the factor in *Taylor v. The American Guard and Alert, Inc.* (9th Cir. 1998) 1998 U.S.App. LEXIS 26934. The court held that the key question:

> ... is not whether the [employees] had to *live* on site during their on-call time, but whether they had to *remain* on site." The facts show that they did not. The [employees] were allowed to travel away from the pump station while on-call, subject to the same restrictions as all employees of the station. Thus, the on-site requirement weighs in favor of Ahtma, not the [employees].

(*Id.* at *3-*4 [emphasis in original].)

Because the Trailer Guards are permitted to leave the job site (and are paid for their time if they are not permitted to leave), this important factor likewise weighs in favor of CPS.

Another *Owens* factor, and perhaps the most important, is whether the employee actually engages in personal activities during on-call time. Once again, the Court of Appeal below found that this factor also favored the Trailer Guards. The court reasoned that "the trailer guards do not enjoy the normal freedoms of a typical off-duty worker, as they are forbidden to have

children, pets or alcohol in the trailers and cannot entertain or visit with adult friends or family without special permission." (*Mendiola*, 217 Cal.App.4th at 869.)

In determining that this factor weighed in favor the of Trailer Guards, the Court of Appeal ignored the settled rule that the degree to which an employee must be free to engage in personal activities so that on-call time is not compensable does not require that the "employee...have substantially the same flexibility or freedom as he would if not on call, or else all or almost all on-call time would be working time, a proposition that the settled case law and the administrative guidelines clearly reject." (*Owens*, *supra*, 971 F.2d at 350-351 [quoting *Bright v. Houston Northwest Medical Center Survivor, Inc.* (5th Cir. 1991) 934 F.2d 671 (*en banc*), cert. den. (1992) 502 US 1036].)[5] It is undisputed that the Trailer Guards engage in sleeping, taking showers, cooking, eating, reading, watching television, listening to the radio, and surfing the Internet while on-call in their trailer homes. If the Trailer Guards wish to consume alcohol or engage in other restricted activities, they can request to leave the premises. If they are ordered to stay, the Trailer Guards are paid from the moment they request to leave until the end of their on-call period.

[5] Even if the Trailer Guards were not permitted to leave the premises, this would not be fatal to CPS's claim under the *Owens/Lincare* test. In a July 27, 2004 opinion letter (FLSA 2004-7) (copy attached hereto as Exhibit 1), the DOL specifically addressed the question of whether "an employee [must] be free to leave the premises during sleep time in order for that time to be unpaid?" The DOL found that it was sufficient if employees "[a]re completely free to leave the premises for their own purposes and engage in normal private pursuits during all non-duty time other than the sleep time." The DOL's interpretation of the FLSA is entitled to deference unless clearly unreasonable. (See *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.* (1984) 457 U.S. 837, 842-843.)

With respect to the remaining *Gomez/Owens* factors, the Court of Appeal found that the Trailer Guards were geographically limited to the trailer and/or the job site unless a reliever arrives; if they do leave, they are required to take a pager or radio telephone so they may be called back; they are required to remain within 30 minutes of the job site unless other arrangements have been made; and they may not easily trade their responsibilities, but can only call for a reliever and hope one will be found. (*Mendiola*, 217 Cal.App.4th at 868.)

Once again, the Court of Appeal's failure to recognize that the Trailer Guards are at the job site voluntarily until they request to leave, and that they are paid if they are prohibited from leaving, was a crucial error. For example, although the Trailer Guards are geographically limited to the trailer and the job site unless a reliever arrives, they are at the job site voluntarily unless and until they inform CPS they wish to leave. Moreover, if a Trailer Guard requests and is permitted to leave the job site, he has in effect "traded" his on-call responsibilities with the reliever guard. If a Trailer Guard requests but is not permitted to leave the job site, he or she is no longer on-call and is paid for the remainder of the period.

In sum, if this Court adopts the *Gomez/Owens* test in conjunction with the *Morillion* "control" test, an analysis of the various factors weighs in favor of CPS. Because the Trailer Guards agree to reside on the premises, they are not just at their place of work, they are also at home. While voluntarily on the premises, the Trailer Guards can and do engage in a variety of personal pursuits typical of other employees who reside on the job site and are on-call. They eat, sleep, read, watch television, and surf the

Internet. They can request to leave the job site and are then replaced by a reliever and they are fully paid for their time if a reliever is not available.

### C. In Any Event, The Agreement Between CPS And The Trailer Guards to Exclude Eight Hours of Sleep Time From Compensable Hours Worked Is Lawful.

If this Court adopts the *Gomez/Owens* test, and holds that California courts may look to federal law for guidance in determining the compensability of on-call time, then this Court must also look to DOL regulations which are part and parcel of federal law. Specifically, this Court must look to 29 C.F.R. Part 785 in its entirety.

The general rule regarding on-call time is set forth in 29 C.F.R. §785.17, which provides, in relevant part, that "[a]n employee who is required to remain on-call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while 'on-call.'" Similarly, as the Court of Appeal acknowledged, Section 785.21 of the federal regulations establishes a general rule (consistent with this Court's holding in *Morillion*) that employees who are engaged for less than 24 hours per day are deemed to be working while on the employer's premises, even when they are permitted to sleep or engage in other personal activities. (*Mendiola,* 217 Cal.App.4th 851.)

However, there are two exceptions to these general rules which are set forth in 29 C.F.R. § 785.22 and § 785.23. 29 C.F.R. § 785.22 provides that where an employee is required to be on duty for 24 hours or more, the employer and employee may agree to exclude a regularly scheduled sleeping period of up to eight hours from hours worked, provided that adequate

sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep.[6]

Section 785.23 provides that:

> An employee who resides on his employer's premises on a permanent basis or for extended periods of time is not considered as working all the time he is on the premises. Ordinarily, he may engage in normal private pursuits and must have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he may leave the premises for purposes of his own. It is, of course, difficult to determine the exact hours worked under these circumstances and any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted. This rule would apply, for example, to the pumper of a stripper well who resides on the premises of his employer and also to a telephone operator who has the switchboard in her own home.

This provision was analyzed by the Ninth Circuit Court of Appeals in the case of *Brigham v. Eugene Water & Electric Board (Brigham)* (9th Cir. 2004) 357 F.3d 931. The employees there worked and were required to live at the Carmen Smith Hydro Electric Project, which is located near Eugene, Oregon. (*Id.* at 933.) The employees worked four-day weeks, which were usually comprised of three maintenance shifts and one duty shift. (*Id.* at 933-934.) On maintenance shifts, the employees worked from 6:30 a.m. to 5:00 p.m. and were paid for all of their time. (*Ibid.*) Duty shifts, however, lasted a full 24 hours. (*Id.* at 934.) Between 6:30 a.m. and noon, employees were charged with monitoring, inspecting and logging the status of the two

[6] The Court of Appeal below held that section 785.22 had been imported into California law and that its provisions applied to the Trailer Guards on weekends when they were scheduled to be on duty for 24 hours and, as a result, the court held that CPS lawfully excluded eight hours of sleep time from compensable hours worked on weekends. Because the Court of Appeal ruled in CPS's favor on this issue, that part of the Court of Appeal's Opinion will not be addressed in this Opening Brief.

generating plants and performing any necessary maintenance. (*Ibid.*) At noon, the employees usually returned to their homes. In the evening, they were again required to inspect and log the status of the generating plants, which took approximately one hour. (*Ibid.*) For the remainder of the shift, the employees were required to remain in their homes and to be available for emergency telephone or radio contact with the central dispatcher. (*Ibid.*) Each house on the project was equipped with a system that would alert the employee to any automated monitoring alarms, to which (along with any calls from the central dispatcher) the employees were required to respond immediately. (*Ibid.*) Subject to these restrictions, as well as the requirement that the employees be fit for duty, the employees were free to sleep, eat and spend time with their families. (*Ibid.*)

Although the employees performed only about six hours of scheduled work during the course of a 24-hour duty shift, they were paid ten hours' wages. Nevertheless, the employees filed suit under the FLSA and Oregon law claiming they were entitled to be paid for the uncompensated 14 hours of each 24-hour duty shift. (*Ibid.*)

Relying on *Owens* and *Berry v. County of Sonoma (Berry)* (9th Cir. 1994) 30 F.3d 1174, the Ninth Circuit observed that "[o]ur most recent cases emphasize that 'the two predominant factors in determining whether an employee's on-call waiting time is compensable overtime are (1) the degree to which the employee is free to engage in personal activities; and (2) the agreements between the parties.'" (*Brigham*, *supra*, 357 F.3d at 936 [quoting *Berry*, *supra*, 30 F.3d at 1180].) The court then turned to the *Owens* factors and, once again citing *Berry* and *Owens*, found that because no single factor is dispositive, courts should balance the factors permitting

personal pursuits against the factors restricting personal pursuits in order to determine whether the employee is so restricted that he is effectively engaged to wait and not waiting to be engaged. (*Ibid.*) The court also recognized that an employee need not have the same or even substantially the same flexibility or freedom as he would if not on call, "else all or almost all on-call time would be working time, a proposition that the settled case law and the administrative guidelines clearly reject." (*Ibid.* [quoting *Owens*, 971 F. 2d at 350-51].)

The Ninth Circuit found the *Owens* factors "closely divided" and then turned "to an analysis of the second factor, the parties' agreement and its significance." (*Id.* at 938.) In addressing this issue, the court began with a recognition that the DOL "has promulgated substantial interpretive guidance designed to assist in assessing the compensability of waiting time" under the FLSA, referring specifically to section 785.23. (*Id.* at 940.) The court found that:

> The crucial insight of this regulation is that—in these specific circumstances, where an employee not only works but also resides on his or her employer's premises—the characterization of time for FLSA purposes need not be an all-or-nothing proposition, as it otherwise would be in the off-premises residency context. Rather, as the guidance perceptively notes, "[i]t is...difficult to determine the exact hours worked under these circumstances," *Id.*, and the parties' agreement provides a particularly important benchmark for assessing how many hours the employees actually labored.

(*Id.* at 941.)

The court then noted that section 785.23 does not treat all agreements between employers and employees as dispositive, but only agreements that are "reasonable" in light of the "pertinent facts." (*Ibid.*) The court found that "the *Owens* factors provide a worthy lens through which to gauge the

reasonableness of the parties' mutual assessment of the work equivalence of the time spent by the employees on duty shifts in their on-premises homes." (*Ibid.*) In short, the Ninth Circuit returned full circle to the analysis in *Owens* and, based on the *Owens* test, found the parties' agreement "eminently reasonable." (*Id.* at 942.)

As set forth above, an analysis of the *Owens* factors here establishes that the parties' agreement concerning on-call time likewise is "eminently reasonable." Unless and until the Trailer Guards request to leave the job site, they are in their trailer homes voluntarily engaging in a variety of personal pursuits, as detailed above. The Trailer Guards can request to leave the job site at any time and, if the request is denied, they are paid from the moment of the request until the end of the on-call period. The Trailer Guards also have a residence in which to live and, even if they are not paid for their on-call time, they work significant overtime hours on both weekdays and weekends for which they are paid at premium overtime rates. This arrangement benefits everyone; this arrangement was approved by both the DLSE and the DOL; and this arrangement should not be struck down as unlawful.

## II. IT IS NOT REASONABLE TO CONCLUDE THAT THE IWC INTENDED TO INCORPORATE ONLY ONE PART OF THE FEDERAL SLEEP TIME REGULATIONS INTO WAGE ORDER NO. 4, BUT NOT THE COMPANION REGULATION.

### A. Federal Regulations and Case Law Provide Guidance as to On-Call Time and Sleep Time Under California Law.

As discussed above, a long line of California cases holds that "because California wage laws are patterned on federal statutes, federal

cases and regulations interpreting those federal statutes may serve as persuasive guidance for interpreting California law. [citations omitted]." (*Morillion,* 22 Cal.4th at 593.) However, this Court has repeatedly cautioned against "using federal regulations extensively to interpret a California wage order, without recognizing and appreciating the critical differences in the state scheme." (*Ibid.*)

The Court of Appeal correctly agreed "with the courts in *Seymore* and *Monzon* that because the state and federal definitions of hours worked are comparable and have a similar purpose, federal regulations and authorities may properly be consulted to determine whether sleep time may be excluded from 24-hour shifts." (*Mendiola,* 217 Cal.App.4th at 874.)

The *Monzon* court observed that "[f]ederal decisions have provided reliable authority to California courts in the interpretation of state labor law provisions which have language that differs from, but parallels that of the federal statutes." (*Monzon,* 224 Cal.App.3d at 31.) The court also found that "California's wage orders are closely modeled after (although they do not duplicate), section 7(a)(1) of the Fair Labor Standards Act" and that "when California's laws are patterned on federal statutes, federal cases construing those federal statutes may be looked to for persuasive guidance." (*Id.* at 38-39.) Here, however, the Court of Appeal stopped short and refused to import 29 C.F.R. § 785.23 into state law, finding that the IWC had not intended to adopt the federal residential sleep time regulations for security guards even though it concluded that the IWC had intended to adopt the companion section of the federal sleep time regulations that were enacted (together with several other related sections) by the DOL over 50 years ago.

### B. In Refusing to Import Section 785.23 into State Law, the Court of Appeal Made Incorrect Assumptions About the IWC's Intent.

The Court of Appeal refused to import Section 785.23 into state law based on incorrect assumptions about the IWC's intent surrounding the definition of "hours worked" contained in a different wage order, Wage Order No. 5, which applies to employees in the public housekeeping industry. Wage Order No. 5 contains the usual definition of "hours worked" set forth in Wage Order No. 4 and the other wage orders, but also provides that "in the case of an employee required to reside on the employment premises, only the time spent carrying out assigned duties should be counted as hours worked." (*Id.* at 871.)

The Court of Appeal afforded undue significance to this distinction noting that "[t]he only wage order with language limiting the compensation to which a worker may be entitled while residing on the employer's premises is Wage Order No. 5." (*Ibid.*) The Court of Appeal reasoned that because Wage Order No. 5 applies only to employees in the public housekeeping industry and because the language regarding "employees who reside on the employer's premises" does not appear in any other wage order, the IWC had not intended to import 29 C.F.R. § 785.23 into the other wage orders. (*Ibid.*) The Court of Appeal also concluded that "applying part 785.23 to California employees in the manner CPS urges" would deprive employees such as those in *Seymore* of wages and would thereby "substantially impair the protections provided by California law." (*Ibid.*)

While the Court of Appeal's discussion about the IWC's legislative intent has some surface appeal, its reasoning is flawed for a number of reasons. First, the Court of Appeal failed to take into account that the IWC

amended Wage Order No. 4 and other wage orders after the decision in *Monzon* thereby adopting the decision. Second, the Labor Commissioner's interpretation of state wage law should not have been completely disregarded, especially in the rare instance where the Labor Commissioner agreed with the employer. Finally, the Court of Appeal's assumption that importing Section 785.23 into California law would dictate a different result in *Seymore* is incorrect.

### 1. The Court of Appeal Made Incorrect Assumptions about IWC Intent Regarding Wage Order No. 5.

As discussed above, the Court of Appeal held that the IWC intended to follow federal sleep time regulations for employees who work 24-hour shifts, but not for employees who reside on the employer's premises but are scheduled to be on duty for periods less than 24hours. The first conclusion is well-founded, but the second is not. There can be little doubt that the IWC agreed with the *Monzon* court's holding that California should follow federal law with respect to sleep time.

The Court of Appeal decided *Monzon* in 1990. Since then, the IWC has amended various wage orders, including in 1993, 1998, 2000, and 2001 making substantial revisions to Wage Order Nos. 4 and 9. In addition, between 2002 and 2006 (after which the IWC was defunded by the California Legislature), the IWC annually updated the wage orders. (http://www.dir.ca.gov/iwc/wageorderindustriesprior.htm.) At no time did the IWC indicate that it disagreed with the Court of Appeal's decision in *Monzon* or otherwise take action to reverse the decision. It is an established judicial principle that "when the Legislature amends a statute without altering portions of the provision that have previously been judicially

construed, the Legislature is presumed to have been aware of and have acquiesced in the previous judicial construction" and that "reenacted portions of the statute are given the same construction they received before the amendment." *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 734; see also *Estate of Heath* (2008) 166 Cal.App.4th 396, 402 ("[w]hen a statute has been construed by judicial decision, and that construction is not altered by subsequent legislation, it must be presumed that the Legislature is aware of the judicial construction and approves of it."). This provides the requisite "convincing evidence" of IWC intent to adopt *the federal sleep time regulations* by implication.

The Court of Appeal also made an incorrect assumption when it concluded that the definitional language in Wage Order No. 5 reflected the IWC's intent to import Section 785.23 of the federal regulations into Wage Order 5 and Wage Order No. 5 alone. While both provisions are directed to a similar practical concern – determining compensable hours worked for employees who reside on the employer's premises – they approach that concern from opposite directions. Wage Order 5 approaches the problem by changing the definition of "hours worked" for employees subject to Wage Order 5 who reside on the employer's premises (such as motel managers and residential apartment managers) to include "only the time spent carrying assigned duties."

In contrast, Section 785.23 approaches the problem by creating a "sleep time" exclusion that parallels the exclusion for employees who do not reside on-premises, but who work shifts of 24 hours or more. While the regulation states that "any" reasonable agreement will be upheld, that provision has been interpreted by the DOL so as to limit the amount of sleep

time that can reasonably be excluded to a maximum of eight hours per day. (*Bouchard v. Reg'l Governing Bd. of Region V Mental Retardation Svcs.* (1991) 939 F.2d 1323, 1330). Thus, contrary to the Court of Appeal's conclusion, the language in Wage Order No. 5 is not inconsistent with the interpretation of *Monzon* urged by CPS: that the IWC intended to import the federal sleep time regulations in their entirety, not just one part of them.[7]

### 2. The Court of Appeal Should Have Afforded Deference to the Labor Commissioner's Opinion that On-Call or Sleep Time Can Be Excluded from Hours Worked.

The Court of Appeal acknowledged this Court's recent admonishment in *Brinker Restaurant Corp. v. Superior Court,* 53 Cal.4th 1104, 1029, fn. 11 that DLSE opinion letters "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." (*Mendiola, supra,* 217 Ca.App.4th at 863.) While it is ultimately the judiciary's role to construe the language of an applicable wage order, DLSE opinion letters are due "consideration and respect." (*Ibid.*) Here, while the trial court and Court of Appeal acknowledged that the DLSE had approved the original sleep time plan in 1997 and had been instrumental in structuring the revisions to the "on-call" plan in 2003, both courts failed to afford the Labor Commissioner's position any deference whatsoever.

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[7] Had the Court of Appeal in *Monzon* intended to limit its holding to Section 785.22, as construed by the panel below, it would more likely have used the term "federal regulation." The use of the plural form suggests that the *Monzon* court (and, more importantly, the IWC by extension) intended to import the federal **sleep time regulations**, 29 C.F.R. Sections 785.20-23, which were promulgated in 1961 and have remained in force for over 50 years. (See, Exhibit 2).

This has serious public policy implications. Employers who seek out regulatory review and obtain regulatory approval for their business plans should be able to rely upon the government. While ultimately the law is for the courts to decide, if a court is going to reject the regulator's position, it should at least have to explain why it is doing so. Otherwise, businesses have little incentive to seek input from regulators in devising their compliance programs. That is especially true here, where (1) CPS changed its sleep time program to an on-call plan based upon the express approval of the Labor Commissioner and his Chief Counsel; and (2) the Legislature has defunded the IWC, so CPS has no other meaningful avenue of redress besides relying upon the DLSE.

In addition, the Court of Appeal's holding creates the incongruous result that the parties' agreement is enforceable on the weekends – when employees are *most* subject to the employer's control, but is not enforceable on the weekdays when they are *least* under the control of the employer. The court attempted to explain this contradiction by reasoning that "[u]nlike an employee called to work fewer hours, an employee on a regular 24-hour shift may be presumed to be spending a significant portion of that time asleep or resting." (*Mendiola, supra,* at 874-875.) The Court of Appeal failed to explain why it is not also reasonable to presume that the Trailer Guards spend a significant portion of the same time period (9:00 p.m. to 5:00 a.m.) asleep or resting on the weeknights. Granted, on weekdays some Trailer Guards may choose to sleep for a few hours during the day and stay up at night, but it would not be logical to assume they spend *all* the daytime hours sleeping, as that is the primary time available to them for shopping, doing laundry, visiting with friends and family, attending matinees or church

services and performing other personal errands away from home. In any event, the critical fact is that CPS does not require them to sleep during the day and stay up at night, unless there is activity at the worksite, in which case they are paid.

### 3. The Court of Appeal Erred in Assuming that Importing Section 785.23 into California Law Would Require a Different Outcome in *Seymore*.

The Court of Appeal wrote that "[a]pplying *29 Code of Federal Regulations part 785.23 (2012)* or the language of Wage Order No. 5 to the employees falling under other wage orders would deprive employees such as those in *Seymore*, who resided for extended periods of time on the employer's ships, of the additional compensation awarded by the court." (*Mendiola, supra,* 217 Cal.App.4th at 871.) The court then concluded that "applying part 785.23 to California employees in the manner CPS urges would substantially impair the protections provided by California law." (*Ibid.*)

The Court of Appeal erred by equating Section 785.23 with Wage Order No. 5. In fact, the two provisions are different. Section 785.23 permits an employer to exclude sleep time from compensable hours worked when an employee resides on the employer's premises while Wage Order No. 5, by contrast, provides that hours worked only includes actual "time spent carrying out assigned duties." For example, an apartment manager who resides on the employer's premises and must remain on-call to show prospective tenants a vacant apartment is only entitled to be paid for the time spent showing the apartment and not for all time spent on-call at the apartment complex (including time spent waiting to show the apartment).

(*Cf.*, *Isner v. Falkenberg/ Gilliam & Associates* (2008) 160 Cal.App.4th 1393 (apartment managers only entitled to compensation for the time they spent carrying out assigned duties even though they were required to remain on-call in apartment provided by employer).)

Contrary to what the court's conclusion below, importing Section 785.23 would not have changed the outcome of *Seymore* for two reasons. First, even though the workers in *Seymore* stayed on the ships for 14 day hitches, the employees **did not reside** on the ships. *Seymore, supra*, 194 Cal.App.4th at 376 (contrasting "certain occupation in which the employee resides on the premises. . .".) It seems that the Court of Appeal below incorrectly assumed that the workers would be deemed to "reside" on the ships under federal law because the workers stayed on the ships "for extended periods of time." (*Mendiola, supra*, 217 Cal.App.4th at 871.) In truth, the ship workers would not be deemed to "reside" on the premises pursuant to Section 785.23 because they were not permitted to stay on the ships between hitches.

Second and more importantly, even if the workers were deemed to "reside" on the ships, applying Section 785.23 would result in the exclusion of only the eight hours of sleep time permitted under *Seymore* and no more.[8]

---

[8] In contrast, if their employment had been subject to the definition of "hours worked" contained in Wage Order No. 5, they would not have been entitled to this extra compensation, because the time would not be deemed "hours worked" in the first place. Under Wage Order No. 5, all 12 hours when the workers were not performing work duties would have been uncompensated. This example serves to illustrate why the Court of Appeal's assumption that the language in Wage Order No. 5 reflects intent on the part of the IWC to apply Section 785.23 to the public housekeeping industry (and the public housekeeping industry alone) was completely mistaken; the two provisions, while addressing a similar concern, are simply not the same.

Therefore, even if 785.23 had been applicable, the *Seymore* workers would still be entitled to the four hours of additional pay they were awarded.

## CONCLUSION

For the foregoing reasons, CPS respectfully submits that this Court should affirm the conclusion reached by the Court of Appeal below that federal sleep time regulations are consistent with California wage law. This Court should reverse the Court of Appeal's decision to import only one part of the federal regulations (Section 785.22) and not the companion regulation (Section 785.23). The Court should hold that the agreements between CPS and the Trailer Guards to exclude up to 8 hours of sleep time from compensable hours worked are enforceable – even on days when the Trailer Guards are not scheduled to be on-duty for 24 hours. Finally, the case should be remanded to the Superior Court for entry of summary judgment in favor of CPS on its cross complaint for declaratory relief.

Dated: November 29, 2013

CPS SECURITY SOLUTIONS, INC

By: Jim D. Newman

JIM D. NEWMAN
Attorneys for Appellants CPS SECURITY SOLUTIONS, INC. *et al.*

**CERTIFICATION PURSUANT TO CALIFORNIA RULES OF COURT, RULE 8.204(b)(11)(C)(1) (formerly Rule 14(C)(1)**

As counsel of record for Petitioners **CPS Security Solutions, Inc., *et al.***, I hereby certify that the Opening Brief on the Merits of Petitioners CPS Security Solutions, et al., excluding this certificate, the tables of contents and authorities, and the exhibit, but including footnotes, contains 10, 798 words, based on the word count program in Microsoft Word 10.

Dated: November 29, 2013

CPS SECURITY SOLUTIONS, INC

By: _____

JIM D. NEWMAN
Attorneys for Appellants CPS SECURITY SOLUTIONS, INC. *et al.*

# EXHIBIT 1

DOL OPINION LETTER FLSA2004-7 (July 27, 2004)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

**July 27, 2004** **FLSA2004-7**

Dear ***Name**,*

This is in response to issues raised in your letter of August 7, 2002, a November 11, 2002 letter from ***Name*** of ***Name*** and in a November 1, 2002 meeting between ***Name*** and Wage and Hour Division (WHD) representatives. Through this correspondence and related discussions, you have raised two principal issues:

A. Under 29 CFR §785.23, must an employee be free to leave the premises during sleep time in order for that time to be unpaid?

B. An explanation of the relationship between 29 CFR § 785.23 and a June 30, 1988 Enforcement Policy for Hours Worked in Residential Care Establishments (June 1988 Policy) found in the WHD's November 1999 Guide for the Personal Care Industry (Guide).

We will respond to these concerns in the order listed above.

A. You expressed concern over the WHD's indication in a November 1, 2002 meeting – relating a position taken in letters of June 25, 1990, and January 6, 2000 – sleep time is always compensable hours worked under the Fair Labor Standards Act (FLSA) if employees are required to stay on the premises during this time. As discussed below, an employee permanently residing on the premises does not always have to be free to leave the premises during sleep time in order for the time to be unpaid.

In your letters, you describe an arrangement in which employees live on the employer's premises (the group home) on a permanent basis to provide care and support to group-home residents with mental retardation or other developmental disabilities. The employees typically share a house or apartment with one to four residents. You state that the employees always have a private bedroom. You also represent that the employees are required to be in the home during the overnight sleeping hours of 10:00 PM to 6:00 AM five or six nights per week. You further state that relief staffing is provided on the remaining nights, but the live-in employees are not required to leave the group home.

In further describing this work arrangement, you represent that the live-in employees are paid for overnight time "only when ... awakened and called to duty" and that "[t]he live-in employee[s] also typically work some awake hours [outside of the sleep time], most often the early morning hours of 6:00 a.m.-9:00 a.m., as [residents] begin their day and prepare to leave for school, work, or day program." You further state that "[t]he live-in employee[s] will also typically work longer hours on the weekend, when [residents] need support throughout the day."

You also advised in the November 1, 2002, meeting that the typical employees in your scenario are rarely awakened during sleep time to perform duties with the residents; the employees are paid for all time spent when awakened to perform such duties; and there is no limitation on the employees' freedom to leave the group home (premises) outside the sleep time period and other assigned (paid) work time.

Three sections in the FLSA's Hours Worked Regulations, 29 CFR Part 785, describe the conditions under which employees are considered to be working even though some of the time is spent sleeping or in other activities:

- Section 785.21 Less than 24-hour duty;
- Section 785.22 Duty of 24 hours or more; and
- Section 785.23 Employees residing on employer's premises or working at home.

Section 785.23 (referred to as the "homeworker exception") is the appropriate section to apply in the scenario that you present, in which the employees are residing permanently on the employer's group-

home premises.[1] We have thus reviewed the position previously taken in the referenced 1990 and 2000 letters in light of the "homeworker exception".

> In evaluating the application of the section 785.23 homeworker exception to your scenario, we are guided by case law establishing that sleep time for employees who reside at their employer's place of business, work in their home, or have extended tours of duty may not be compensable as work time. See Skidmore v. Swift & Co., 323 U.S. 134, 139 (1944) (sleep time may not be compensable where, "although the employees were required to remain on the premises during the entire time, the evidence shows that they were rarely interrupted in their normal sleeping and eating time, and these are pursuits of a purely private nature which would presumable occupy the employees' time.

The Division has long recognized that the fact that an employee resides on the employer's premises "does not mean that the employee is necessarily working 24 hours a day." Wage and Hour Interpretive Bulletin No. 13 (May 3, 1939). The Division concluded in Interpretive Bulletin No. 13 that an employer may exclude payment for the extended periods of inactivity that occur when an employee resides on the premises, because the employee is generally able "to carry on a normal routine of living" during such periods. These principles are now set forth in the regulations at section 785.23.

Under section 785.23, an employer may exclude payment for sleep time if there is a reasonable agreement with the employee residing on the premises that takes into account all of the pertinent facts. As we stated in an opinion letter dated August 20, 1985, the agreement:

> must take into account not only the time actually spent working, but also the time when the employee may engage in normal private pursuits, with sufficient time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he or she may leave the premises for personal reasons. The agreement must also consider such relevant factors as the degree to which the use of the employee's personal time is limited or restricted by the conditions of employment and the extent of interruption to eating and sleeping periods. It should be noted that whether an employee is free to use time for personal pursuits will depend on the facts in each case, notwithstanding the provisions of any written agreement.

The courts have looked at similar factors in evaluating the reasonableness of agreements to exclude sleep time for employees residing on the premises of their employers. See Brigham v. Eugene Water & Electric Board, 357 F.3d 931 (9th Cir. 2004); Myers v. Baltimore County, Maryland, 2002 WL 31236296 (4th Cir. 2002); Service Employees International Union v. County of San Diego, 60 F.3d 1345 (9th Cir. 1995); Kelly v. Hines-Rinaldi Funeral Home, Inc, 847 F.2d 147 (4th Cir. 1988).

Under the facts that you represented to WHD, we believe that the employees who permanently reside[2] at group homes have periods of complete freedom outside of sleep time that are sufficient to engage in normal private pursuits for purposes of their own and thus meet the section 785.23 requirement that the employees be able to "[o]rdinarily ... engage in normal private pursuits and thus have enough time for

[1] [1] Section 785.23 reads as follows:
An employee who resides on his employer's premises on a permanent basis or for
extended periods of time is not considered as working all the time he is on the premises. Ordinarily, he may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he may leave the premises for purposes of his own. It is, of course, difficult to determine the exact hours worked under these circumstances and any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted. This rule would apply, for example, to the pumper of a stripper well who resides on the premises of his employer and also to a telephone operator who has the switchboard in her own home. [Citations omitted.] Whether they were on duty or not and which apparently could be pursued adequately and comfortably in the required circumstances.

[2] WHD defines employees who "permanently reside" on the employer's premises as employees who reside on the employer's place of business seven days per week and therefore have no home of their own other than the one furnished to them by the employer under the employment contract.

eating, sleeping, entertaining, and other periods of complete freedom from all duties when he may leave the premises for purposes of his own." (Emphasis added.)

Accordingly, based upon the language of section 785.23 and limited to the work arrangement that you represented to WHD, any reasonable agreement that you reach with these employees who permanently reside on the premises to exclude sleep time, which takes into consideration all the pertinent facts, will be accepted by the WHD as compliant with the FLSA. This position is conditional upon your representations that the employees in question:

1. Reside on the premises permanently;

2. Are completely free to leave the premises for their own purposes and engage in normal private pursuits during all non-duty time other than the sleep time;

3. Are paid for all time called to duty during the sleep time;

4. Are paid for all the sleep time if such time is interrupted for duty calls to the extent that the employees cannot get at least five hours of sleep during the period (see 29 CFR § 785.22(b));

5. Typically work some hours during non-sleep time, such as, but not limited to, during early morning hours and on weekends; and

6. Are paid for all work performed during non-sleep time, i.e., duty hours in the mornings, afternoons, evenings, and on weekends.

Consistent with the reasons set forth above, we are withdrawing the letters dated June 25, 1990, and January 6, 2000, to the extent those letters conflict with the above stated position. The 2000 letter is withdrawn because it is inconsistent with the applicable regulation, which does not require that an employee be completely free to leave the premises during time for sleeping, eating and entertaining. The regulation establishes that sleeping, eating and entertaining are "normal private pursuits" that may be treated like "other periods of complete freedom from all duties," when an employee may leave the premises for personal reasons. 29 CFR § 785.23. Moreover, the regulation expressly provides that "any reasonable agreement" that considers "all of the pertinent facts will be accepted." Id. Because an agreement that requires an employee who permanently resides on the premises to remain there during sleep time may, in fact, be reasonable, the 2000 letter is withdrawn because it contravenes this position.

Similarly, the requirement in the 1990 letter that employees who reside on the premises permanently must be compensated for at least eight hours in each of five consecutive 24-hour periods in order for sleep time to be uncompensated is withdrawn, because it is inconsistent with the regulation authorizing the parties to reach any reasonable agreement that takes into account all of the relevant facts. This withdrawal applies only to employees permanently residing on the premises; the 1990 letter is not withdrawn with regard to workers who reside on the premises for an extended period of time or to relief workers.

B. You are concerned that the November 1990 Guide appears to indicate an intention to apply the June 1988 criteria defining those employees who reside on an employer's premises "for an extended period of time" to employees who reside on group home premises "on a permanent basis." This June 1988 Policy established a special position that allowed "relief" employees to be treated the same as employees who either reside on the employer's premises permanently or for extended periods of time, with respect to the deduction of sleep time.

The June 1988 Policy also listed the criteria, including certain work schedule and compensation requirements, under which employees who have separate residences in the community may be defined as residing on the employer's premises "for an extended period of time" under the section 785.23 exception. Employees who maintain a separate residence must meet these criteria as a prerequisite for

this potential application of section 785.23. These criteria listed within the June 1998 Policy, including work schedule and compensation requirements, are not, however, a prerequisite for the potential application of the section 785.23 exception to employees who reside on the group home premises on a permanent basis.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

Sincerely,

Alfred B. Robinson, Jr.
Acting Administrator

* *Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. 552 (b)(7).*

# EXHIBIT 2

"SLEEPING TIME AND CERTAIN OTHER ACTIVITIES"
U.S. Dept. of Labor, 29 C.F.R. §§ 785.20-785.23 (1961)

If, however, there are any facts (for example, the employment of the same employee at the establishment or the engagement by other employees in like duties there during periods when none of the named operations are being carried on) which raise questions as to whether he is actually engaged in the exempt activities, it will be necessary to scrutinize what he is actually doing during the conduct of the operations named in section 13(b)(4) in order to determine the applicability of the exemption to him. This is necessary because an employee who would not otherwise be within the exemption such as a carpenter doing repair work during the dead season, does not become exempt as "employed in" one of the named activities merely because the establishment begins canning or processing fish.

# PART 785—HOURS WORKED

## Subpart A—General Considerations



## Subpart B—Principles for Determination of Hours Worked



## Subpart C—Application of Principles



## Subpart D—Recording Working Time



## Subpart E—Miscellaneous Provisions

2d 493 (C.A. 6, 1952); *Biggs* v. *Joshua Hendy Corp.*, 183 F. 2d 515 (C. A. 9, 1950), 187 F. 2d 447 (C.A. 9, 1951); *Walling* v. *Dunbar Transfer & Storage Co.*, 3 W.H. Cases 284; 7 Labor Cases para. 61.565 (W.D. Tenn. 1943); *Lofton* v. *Seneca Coal and Coke Co.*, 2 W.H. Cases 669; 6 Labor Cases para. 61,271 (N.D. Okla. 1942); aff'd 136 F. 2d 359 (C.A. 10, 1943); cert. denied 320 U.S. 772 (1943); *Mitchell* v. *Tampa Cigar Co.*, 36 Labor Cases para. 65, 198, 14 W.H. Cases 38 (S.D. Fla. 1959); *Douglass* v. *Hurwitz Co.*, 145 F. Supp. 29, 13 W.H. Cases (E.D. Pa. 1956))

(b) *Where no permission to leave premises.* It is not necessary that an employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period.

SLEEPING TIME AND CERTAIN OTHER ACTIVITIES

### § 785.20 General.

Under certain conditions an employee is considered to be working even though some of his time is spent in sleeping or in certain other activities.

### § 785.21 Less than 24-hour duty.

An employee who is required to be on duty for less than 24 hours is working even though he is permitted to sleep or engage in other personal activities when not busy. A telephone operator, for example, who is required to be on duty for specified hours is working even though she is permitted to sleep when not busy answering calls. It makes no difference that she is furnished facilities for sleeping. Her time is given to her employer. She is required to be on duty and the time is worktime. (*Central Mo. Telephone Co.* v. *Conwell*, 170 F. 2d 641 (C.A. 8, 1948); *Strand* v. *Garden Valley Telephone Co.*, 51 F. Supp. 898 (D. Minn. 1943); *Whitsitt* v. *Enid Ice & Fuel Co.*, 2 W. H. Cases 584; 6 Labor Cases para. 61,226 (W.D. Okla. 1942).)

### § 785.22 Duty of 24 hours or more.

(a) *General.* Where an employee is required to be on duty for 24 hours or more, the employer and the employee may agree to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period of not more than 8 hours from hours worked, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep. If sleeping period is of more than 8 hours, only 8 hours will be credited. Where no expressed or implied agreement to the contrary is present, the 8 hours of sleeping time and lunch periods constitute hours worked. (*Armour* v. *Wantock*, 323 U.S. 126 (1944); *Skidmore* v. *Swift*, 323 U.S. 134 (1944); *General Electric Co.* v. *Porter*, 208 F. 2d 805 (C.A. 9, 1953), cert. denied, 347 U.S. 951, 975 (1954); *Bowers* v. *Remington Rand*, 64 F. Supp. 620 (S.D. Ill, 1946), aff'd 159 F. 2d 114 (C.A. 7, 1946) cert. denied 330 U.S. 843 (1947); *Bell* v. *Porter*, 159 F. 2d 117 (C.A. 7, 1946) cert. denied 330 U.S. 813 (1947); *Bridgeman* v. *Ford, Bacon & Davis*, 161 F. 2d 962 (C.A. 8, 1947); *Rokey* v. *Day & Zimmerman*, 157 F. 2d 736 (C.A. 8, 1946); *McLaughlin* v. *Todd & Brown, Inc.*, 7 W.H. Cases 1014; 15 Labor Cases para. 64,606 (N.D. Ind. 1948); *Campbell* v. *Jones & Laughlin*, 70 F. Supp. 996 (W.D. Pa. 1947).)

(b) *Interruptions of sleep.* If the sleeping period is interrupted by a call to duty, the interruption must be counted as hours worked. If the period is interrupted to such an extent that the employee cannot get a reasonable night's sleep, the entire period must be counted. For enforcement purposes, the Divisons have adopted the rule that if the employee cannot get at least 5 hours' sleep during the scheduled period the entire time is working time. (See *Eustice* v. *Federal Cartridge Corp.*, 66 F. Supp. 55 (D. Minn. 1946).)

### § 785.23 Employees residing on employer's premises or working at home.

An employee who resides on his employer's premises on a permanent basis or for extended periods of time is not considered as working all the time he is on the premises. Ordinarily, he may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he may leave the premises for purposes of his own. It is, of course, difficult to determine the exact hours worked under these circumstances and any reasonable agreement of the parties which takes into consideration all

of the pertinent facts will be accepted. This rule would apply, for example, to the pumper of a stripper well who resides on the premises of his employer and also to a telephone operator who has the switchboard in her own home. (*Skelly Oil Co.* v. *Jackson*, 194 Okla. 183, 148 P. 2d 182 (Okla. Sup. Ct. 1944; *Thompson* v. *Loring Oil Co.*, 50 F. Supp. 213 (W.D. La. 1943).)

PREPARATORY AND CONCLUDING ACTIVITIES

### § 785.24 Principles noted in Portal-to-Portal Bulletin.

In November, 1947, the Administrator issued the Portal-to-Portal Bulletin (part 790 of this chapter). In dealing with this subject, §790.8 (b) and (c) of this chapter said:

(b) The term "principal activities" includes all activities which are an integral part of a principal activity. Two examples of what is meant by an integral part of a principal activity are found in the report of the Judiciary Committee of the Senate on the Portal-to-Portal bill. They are the following:

(1) In connection with the operation of a lathe, an employee will frequently, at the commencement of his workday, oil, grease, or clean his machine, or install a new cutting tool. Such activities are an integral part of the principal activity, and are included within such term.

(2) In the case of a garment worker in a textile mill, who is required to report 30 minutes before other employees report to commence their principal activities, and who during such 30 minutes distributes clothing or parts of clothing at the workbenches of other employees and gets machines in readiness for operation by other employees, such activities are among the principal activities of such employee.

Such preparatory activities, which the Administrator has always regarded as work and as compensable under the Fair Labor Standards Act, remain so under the Portal Act, regardless of contrary custom or contract.

(c) Among the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance. If an employee in a chemical plant, for example, cannot perform his principal activities without putting on certain clothes, changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity. On the other hand, if changing clothes is merely a convenience to the employee and not directly related to his principal activities, it would be considered as a "preliminary" or "postliminary" activity rather than a principal part of the activity. However, activities such as checking in and out and waiting in line to do so would not ordinarily be regarded as integral parts of the principal activity or activities.

### § 785.25 Illustrative U.S. Supreme Court decisions.

These principles have guided the Administrator in the enforcement of the Act. Two cases decided by the U.S. Supreme Court further illustrate the types of activities which are considered an integral part of the employees' jobs. In one, employees changed their clothes and took showers in a battery plant where the manufacturing process involved the extensive use of caustic and toxic materials. (*Steiner* v. *Mitchell*, 350 U.S. 247 (1956).) In another case, knifemen in a meatpacking plant sharpened their knives before and after their scheduled workday (*Mitchell* v. *King Packing Co.*, 350 U.S. 260 (1956)). In both cases the Supreme Court held that these activities are an integral and indispensable part of the employees' principal activities.

### § 785.26 Section 3(o) of the Fair Labor Standards Act.

Section 3(o) of the Act provides an exception to the general rule for employees under collective bargaining agreements. This section provides for the exclusion from hours worked of time spent by an employee in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee. During any week in which such clothes-changing or washing time was not so excluded, it must be counted as hours worked if the changing of clothes or washing is indispensable to the performance of the employee's work or is required by law or by the rules of the employer. The same would be true if the changing of clothes or washing was a preliminary or postliminary activity compensable by

## PROOF OF SERVICE

I am over the age of 18 and not a party to this lawsuit. I am employed in the County of Los Angeles, State of California. My business address is 436 W. Walnut Street, Gardena, California 90248.

On November 29, 2013, I served the following document described as **OPENING BRIEF ON THE MERITS OF PETITIONERS CPS SECURITY SOLUTIONS, INC., *ET AL.*** on all interested parties in this action by placing [X] a true copy enclosed in a sealed envelope addressed to:

SEE ATTACHED SERVICE LIST

[ X ] **By Mail:** I deposited the envelope in the United States mail with postage fully prepaid at Gardena, California 90248.

Executed on November 29, 2013 at Gardena, California, I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Jim D. Newman

**SERVICE LIST**

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***TIM MENDIOLA et al v. CPS SECURITY SOLUTIONS, INC. et al.,***
**LASC Case No. BC388956 consolidated with**

***FLORIANO ACOSTA et al. v. CONSTRUCTION PROTECTIVE SERVICES, INC. et al.,* LASC Case No. BC391669**

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PROOF OF SERVICE

***MARTIN HOKE, et al vs. CONSTRUCTION PROTECTIVE SERVICES, et al.,***
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