No. S243805

Supreme Court

OF THE

State of California

AMANDA FRLEKIN, ET AL.,

Plaintiffs, Appellants, and Petitioners,

v.

APPLE, INC.,

Defendant and Respondent.

On a Certified Question from the United States
Court of Appeals for the Ninth Circuit
Case No. 15-17382

Motion for Judicial Notice; Memorandum in Support; Declaration in Support; Proposed Order [Cal. Rules of Ct., rule 8.252(a)]

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MOTION FOR JUDICIAL NOTICE; MEMORANDUM IN SUPPORT

Pursuant to Evidence Code section 459 and California Rule of Court 8.520(g) and 8.252(a), petitioners Amanda Frlekin et al. respectfully ask the Court to take judicial notice of the following documents, true and correct copies of which are attached hereto:

Exhibit 1: Wage Order 5 Amended (Mercantile Industry) (April 22, 1919, eff. Jun. 21, 1919)

Exhibit 2: Wage Order 5 Amended 1920 (Mercantile Industry) (Jun. 1, 1920, eff. Jul. 31, 1920)

Exhibit 3: Wage Order 5a (Mercantile Industry) (Dec. 29, 1922, eff. Apr. 8, 1923)

Exhibit 4: Wage Order 7 NS (Mercantile Industry) (Apr. 5, 1943, eff. Jun. 21, 1943)

Exhibit 5: Wage Order 7 R (Mercantile Industry) (Feb. 8, 1947, eff. Jun. 1, 1947)

Exhibit 6: Wage Order 1-52 (May 16, 1952, eff. Aug. 1, 1952)

Exhibit 7: California Office of Administrative Law, Letter Upholding Determination No. 11, Docket No. 89-018, Determination Dated July 31, 1990 (Sept. 7, 1990)

Exhibit 8: California Office of Administrative Law Determination No. 11, Docket No. 89-018 (July 31, 1990)

Exhibit 9: Appellant's Opening Brief, *Alcantar v. Hobart Service*, No. 13-55400 (9th Cir. Aug. 19, 2013) (relevant excerpts, cover and pp. 1, 2, 36-44)

Exhibit 10: Appellant's Reply Brief, *Alcantar v. Hobart Service*, No. 13-55400 (9th Cir. Jan. 2, 2014) (relevant excerpts, cover and pp. 21-25)

Exhibit 11: Order, *Frlekin, et al. v. Apple, Inc.*, No. 15-17382 (9th Cir. Jun. 16, 2017)

For the following reasons, each of these exhibits is the proper subject of judicial notice by this Court:

A. Historical Versions of IWC Wage Orders

Exhibits 1-6 are historical versions of the IWC's Wage Orders for the mercantile industry, predecessors to current wage Order 7-2001 (8 Cal. Code Regs. §11070), at issue in this case. *See* Declaration of Kimberly A. Kralowec ("Kralowec Decl."), below, ¶2.

This Court regularly takes judicial notice of historical versions of the IWC's Wage Orders when construing the current Orders. *See, e.g., Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004, 1026-32, 1034-39, 1041-49 (2012) (extensively considering language of historical Wage Orders in construing meal period and rest break provisions); *Martinez v. Combs*, 49 Cal.4th 35, 59-60 (2010) (considering Wage Orders' amendment history dating back to 1947); *Reynolds v. Bement*, 36 Cal.4th 1075, 1083 n.3 (2005) (granting judicial notice of six historical Wage Orders); *Morillion v. Royal Packing Co.*, 22 Cal.4th 575, 591-93 & n.1 (2000) (considering historical changes in Wage Orders' definition of "hours worked" and quoting Wage Order 1 NS (1947)).

In this case, the historical wage orders are relevant to the question this Court accepted for review, which involves the proper interpretation of the definition of "hours worked" in Wage Order 7-2001. 8 Cal. Code Regs. §11070, ¶2(G).

B. Other Official Records and Acts of the DIR and OAL

Exhibits 7 and 8 are documents related to Official Determination No. 11, Docket No. 89-018, of the California Office of Administrative Law ("OAL), maintained as part of the official records of the California Department of Industrial Relations ("DIR"). *See* Kralowec Decl., ¶3.

These records constitute official acts of the OAL and are part of the official records of the DIR. Pursuant to Evidence Code section 452, subdivision (c), the

Court may take judicial notice of official acts of the executive branch of this state and of the "records, reports and orders of [state] administrative agencies." *Ordlock v. Franchies Tax Board*, 38 Cal.4th 897, 911 n.8 (2006); *see also White v. Davis*, 30 Cal.4th 528, 553 n.11 (2003).

The documents are relevant because they address the reasons for the IWC's 1947 amendment to the definition of "hours worked."

C. Official Records of the Ninth Circuit

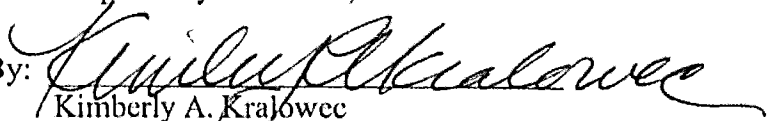
Exhibits 9 and 10 are true and correct copies of relevant portions of two briefs filed in *Alcantar v. Hobart Service*, No. 13-55400 (9th Cir.), and Exhibit 11 is an Order of the Ninth Circuit in this case. *See* Kralowec Decl., ¶¶4-5.

Official records of the federal courts, including the Ninth Circuit, are subject to judicial notice pursuant to Evidence Code section 452, subdivision (d). The briefs are relevant because they establish that the meaning of the term "hours worked" was not a contested issue on appeal in *Alcantar v. Hobart Service*, 800 F.3d 1047 (9th Cir. 2015). *See Fairbanks v. Superior Court*, 46 Cal.4th 56, 64 (2009) (a "judicial decision is not authority for a point that was not actually raised and resolved").

For all of these reasons, the Court is respectfully asked to grant the motion for judicial notice in full.

Dated: December 18, 2017

Respectfully submitted,

By: 

Kimberly A. Kralowec
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Lee A. Shalov
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Attorneys for Plaintiffs, Appellants, and Petitioners

DECLARATION OF KIMBERLY A. KRALOWEC IN SUPPORT OF MOTION FOR JUDICIAL NOTICE

I, Kimberly A. Kralowec, declare as follows:

1. I am an attorney licensed to practice law in the State of California. I am appellate counsel of record for petitioners Amanda Frlekin et al. in the above-referenced proceeding. I have personal knowledge of the matters stated below, and if called upon to testify, would do so competently as to them.

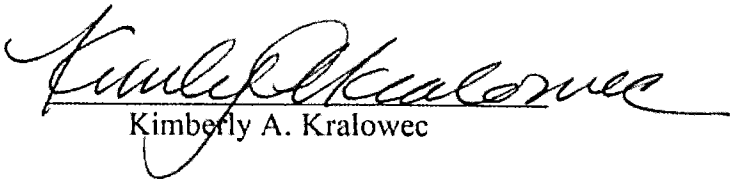
2. In 2009, I personally visited the archive maintained by the California Department of Industrial Relations at its facility in San Francisco. Exhibits 1-6 attached hereto are true and correct copies of documents that I reviewed at the archive, and which were scanned at my direction.

3. In 2016, I personally visited the archive maintained by the California Department of Industrial Relations at its facility in Oakland. Exhibits 7 and 8 attached hereto are true and correct copies of documents that I reviewed at the archive, and which were scanned at my direction.

4. Exhibits 9 and 10 attached hereto are true and correct copies of relevant excerpts of the following briefs filed with the Ninth Circuit in *Alcantar v. Hobart Service*, No. 13-55400 (9th Cir. 2013), which were downloaded from the PACER website at my direction.

5. On motion by petitioners, the Ninth Circuit granted judicial notice of Exhibits 4-5 and 9-10 in this case. A true and correct copy of the Ninth Circuit's order granting judicial notice is attached hereto as Exhibit 11.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on December 18, 2017 at San Francisco, California.



Kimberly A. Kralowec

No. S243805

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AMANDA FRLEKIN, ET AL.,

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Case No. 15-17382

[Proposed]
Order Granting Motion for Judicial Notice

Pursuant to Evidence Code sections 452, 453, and 459, and Rule of Court 8.252(a), the motion for judicial notice of petitioners Amanda Frlekin et al. is hereby granted in full.

_____

Justice

INDUSTRIAL WELFARE COMMISSION

STATE OF CALIFORNIA

525 Market Street, San Francisco

To Whom it May Concern:

TAKE NOTICE: That pursuant to and by virtue of the authority vested in it by the Statutes of California, 1913, Chapter 324, and amendments thereto, and after public hearing duly had in the City and County of San Francisco on Friday, December 6, 1918,

THE INDUSTRIAL WELFARE COMMISSION OF THE STATE OF CALIFORNIA does hereby order that:

EXPERIENCED WORKERS

1. No person, firm or corporation shall employ or suffer or permit an experienced woman or minor to be employed in the mercantile industry in California at a rate of wages less than $13.50 per week ($58.50 per month), except as otherwise provided in Section 9 of this Order.

LEARNERS

2. The wages of learners may be less than the minimum rate prescribed for experienced workers, provided:

(*a*) MINOR LEARNERS. That learners, male or female, entering employment under eighteen years of age, be paid not less than the following scale:

SCHEDULE OF APPRENTICESHIP FOR MINORS

Beginning Age	Wage First Six Months	Wage Second Six Months	Wage Third Six Months	Wage Fourth Six Months	Wage Fifth Six Months	Wage Sixth Six Months	Thereafter Not Less Than	Length of Apprenticeship
14 years	$8.00 a week $34.67 a month	$8.50 a week $36.83 a month	$9.00 a week $39.00 a month	$10.00 a week $43.33 a month	$11.00 a week $47.67 a month	$12.00 a week $52.00 a month	$13.50 a week $58.50 a month	3 years
15 years	$8.00 a week $34.67 a month	$8.50 a week $36.83 a month	$9.00 a week $39.00 a month	$10.00 a week $43.33 a month	$11.00 a week $47.67 a month	$12.00 a week $52.00 a month	$13.50 a week $58.50 a month	3 years
16 years	$8.00 a week $34.67 a month	$8.50 a week $36.83 a month	$9.00 a week $39.00 a month	$10.00 a week $43.33 a month	$11.00 a week $47.67 a month	$12.00 a week $52.00 a month	$13.50 a week $58.50 a month	3 years
17 years	$8.00 a week $34.67 a month	$8.50 a week $36.83 a month	$9.00 a week $39.00 a month	$10.00 a week $43.33 a month	$11.00 a week $47.67 a month	$12.00 a week $52.00 a month	$13.50 a week $58.50 a month	*

*Note.—When a minor girl who starts at the age of 17 years attains the age of 18 years, she shall be paid not less than the beginning wage for adult learners.

(*b*) ADULT LEARNERS BEGINNING EIGHTEEN YEARS OF AGE AND UNDER TWENTY YEARS OF AGE. That female learners entering employment 18 years of age and under 20 years of age, be paid not less than the following scale:

SCHEDULE OF APPRENTICESHIP FOR ADULTS BEGINNING OVER EIGHTEEN AND UNDER TWENTY YEARS OF AGE

Beginning Age	Wage First Six Months	Wage Second Six Months	Wage Third Six Months	Wage Fourth Six Months	Thereafter Not Less Than	Length of Apprenticeship
18 years	$9.00 a week $39.00 a month	$10.00 a week $43.33 a month	$11.00 a week $47.67 a month	$12.00 a week $52.00 a month	$13.50 a week $58.50 a month	2 years
19 years	$9.00 a week $39.00 a month	$10.00 a week $43.33 a month	$11.00 a week $47.67 a month	$12.00 a week $52.00 a month	$13.50 a week $58.50 a month	2 years

(*c*) ADULT LEARNERS BEGINNING TWENTY YEARS OF AGE AND OVER. That female learners entering employment 20 years of age and over be paid not less than the following scale:

SCHEDULE OF APPRENTICESHIP FOR ADULTS BEGINNING TWENTY YEARS OF AGE AND OVER

Beginning Age	Wage First Six Months	Wage Second Six Months	Wage Third Six Months	Thereafter Not Less Than	Length of Apprenticeship
20 years and over	$10.00 a week $43.33 a month	$11.00 a week $47.67 a month	$12.00 a week $52.00 a month	$13.50 a week $58.50 a month	1½ years

(*d*) That all learners shall be registered with the Commission. Application for the registration of learners shall be made by the employer not later than two weeks from the date of starting employment. Pending issuance of certificates of registration, the learner shall be paid not less than the minimum rate for the wage group in which she belongs.

(*e*) The total number of female learners in any establishment shall not exceed 33⅓% of the total number of females employed, and the total number of male learners shall not exceed 33⅓% of the total number of males employed. In computing the total number of employees, special and part-time workers shall not be included.

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PART-TIME WORKERS

3. (*a*) All adult part-time workers and experienced minor part-time workers, except waitresses,* shall be paid not less than $0.35 per hour.

(*b*) All inexperienced minor male and female part-time workers, except waitresses, shall be paid not less than $0.25 per hour.

(*c*) All adult and minor part-time workers shall be registered with the Commission. Application for the registration of part-time workers must be made by the employer, and pending the issuance of certificates, such workers must be paid in accordance with the rates specified in Sections 3 (*a*) and 3 (*b*).

(*d*) The total number of adult and minor female part-time workers in any establishment shall not exceed 5% of the total number of females employed.

SPECIAL WORKERS

4. (*a*) ADULT SPECIAL WORKERS. All adult special workers shall be paid not less than $2.25 per day.

(*b*) MINOR EXPERIENCED SPECIAL WORKERS. All minor experienced special workers shall be paid not less than $2.25 per day.

(*c*) MINOR INEXPERIENCED SPECIAL WORKERS. All minor inexperienced special workers shall be paid not less than $1.50 per day.

5. All women and minors now employed in the mercantile industry must be rated and paid in accordance with their periods of employment, as specified in Sections 1 and 2.

6. Where payment of wages is made upon a commission, bonus or piece-rate basis, the earnings shall not be less than the minimum time rate for the wage group in which the worker belongs.

7. Every person, firm or corporation employing women or minors in the mercantile industry shall keep a record of the names and addresses, the hours worked and the amounts earned by such women and minors. Such records shall be kept in a form and manner approved by the Industrial Welfare Commission. Minor employees must be marked "Minor" on the pay roll.

8. No person, firm or corporation shall employ, or suffer or permit any woman or minor to work in any mercantile establishment more than eight (8) hours in any one day, or more than forty-eight (48) hours in any one week, or more than six (6) days in any one week.

INFIRM WORKERS

9. A permit may be issued by the Commission to a woman physically disabled by age or otherwise, authorizing the employment of such licensee for a wage less than the legal minimum wage; and the Commission shall fix a special minimum for such a woman.

10. Every person, firm or corporation employing women or minors in the mercantile industry shall furnish to the Commission, at its request, any and all reports or information which the Commission may require to carry out the purposes of the Act creating the Commission; such reports and information to be verified by the oath of the person, member of the firm, or the president, secretary or manager of the corporation furnishing the same, if and when so requested by the Commission.

Every person, firm or corporation shall allow any member of the Commission, or any of its duly authorized representatives, free access to the place of business of such person, firm or corporation, for the purpose of making inspection of, or excerpts from, all books, reports, contracts, pay rolls, documents or papers of such person, firm or corporation relating to the employment of labor and payment therefor by such person, firm, or corporation; or for the purpose of making any investigation authorized by the Act creating the Commission.

11. Every person, firm or corporation employing women or minors in the mercantile industry shall post a copy of this order in a conspicuous place in the general work room and in the women's dressing rooms.

12. The Commission shall exercise exclusive jurisdiction over the questions arising as to the administration and interpretation of this Order.

DEFINITIONS

A learner is a woman or minor to whom the Industrial Welfare Commission issues a permit to work for a person, firm or corporation for less than the legal minimum wage in consideration of such person being provided by his or her employer with reasonable facilities for learning the mercantile industry. Learners' permits will be withheld by the Commission where there is evidence of attempted evasion of the law by firms which make a practice of dismissing learners when they reach their promotional periods.

A special worker is one who works less than 6 days a week.

A part-time worker is one who is employed for less than eight hours in one day.

Students attending accredited vocational, continuation or co-operative schools may be employed at part-time work on special permits from the Commission, and at rates to be determined by the Commission.

For the purpose of this Act, a minor is defined to be a person of either sex under the age of eighteen years.

THIS ORDER SHALL BECOME EFFECTIVE SIXTY (60) DAYS FROM THE DATE HEREOF.

Dated at San Francisco, California, this twenty-second day of April, 1919.

Order No. 5 of the Industrial Welfare Commission, dated July 6, 1917, is hereby rescinded as and of the date when this Order becomes effective.

INDUSTRIAL WELFARE COMMISSION, STATE OF CALIFORNIA
FRANK J. MURASKY, *Chairman*
KATHERINE PHILIPS EDSON
A. B. C. DOHRMANN
ALEXANDER GOLDSTEIN
WALTER G. MATHEWSON

ATTEST: KATHERINE PHILIPS EDSON, *Executive Officer.*

NOTICE

NOTHING IN THIS ORDER PREVENTS EMPLOYERS FROM PAYING MORE THAN THE RATES FIXED BY THE COMMISSION AS THE MINIMUM OR LOWEST RATES. THIS ORDER APPLIES TO ALL WOMEN AND MINORS IN ANY MERCANTILE INDUSTRY.

*Special minimum rates for "part-time" work waitresses will be determined when the orders are made in the hotel and restaurant industry.

The Industrial Welfare Commission expects to review its Orders annually.

STATUTES OF CALIFORNIA, 1913, CHAPTER 324

"Every employer or other person who, either individually or as an officer, agent or employee of a corporation, or other persons, violates or refuses or neglects to comply with the provisions of this act, or any orders or rulings of this Commission, shall be guilty of a misdemeanor, and upon conviction thereof, be punished by a fine of not less than fifty dollars, or by imprisonment for not less than thirty days, or by both such fine and imprisonment."

W. C. Order No. 5 Amended 1920
Mercantile Industry
Effective July 31, 1920

INDUSTRIAL WELFARE COMMISSION

STATE OF CALIFORNIA

328 FLOOD BUILDING, 870 MARKET STREET

SAN FRANCISCO

To Whom It May Concern:

TAKE NOTICE: That pursuant to and by virtue of the authority vested in it by the Statutes of California, 1913, Chapter 324, and amendments thereto, and after public hearing duly had on motion of the Commission at the City Hall in the City and County of San Francisco, on Wednesday, March 24, 1920, notice of said hearing having been duly given in the manner provided by law, and the Industrial Welfare Commission thereafter finding and determining that the least wage adequate to supply to women employed in industry the necessary cost of proper living is $16.00 a week,

THE INDUSTRIAL WELFARE COMMISSION OF THE STATE OF CALIFORNIA does hereby order that:

EXPERIENCED WORKERS

Minimum (or least) rate for experienced women and experienced minors

1. No person, firm or corporation shall employ, or suffer or permit an experienced woman or experienced minor to be employed in the mercantile industry in California (except as otherwise provided in Section 13 of this Order) at a rate of wages less than $16.00 a week ($69.33⅓ a month).

Experience defined, adult woman

An adult woman is deemed experienced when she has been employed one year and a half in the mercantile industry.

Experience defined, minors

A minor is deemed experienced when he or she has been employed one year in the mercantile industry.

LEARNERS

Conditions of apprenticeship

2. No person, firm or corporation shall employ, or suffer or permit learners to be employed in the mercantile industry for less than the legal minimum wage of $16.00 a week, except at the rates and under the conditions hereinafter set forth:

Number of Learners Limited

(*a*) No person, firm or corporation shall suffer or permit the employment of over 33⅓ per cent of the total number of females (exclusive of the office force, the millinery workroom force, and the female workers regulated by Order No. 12) as learners, at less than the legal minimum wage of $16.00 a week. In computing the total number of females, special and part-time workers shall not be included.

Minimum (or least) rates for inexperienced adult women

(*b*) Adult female learners shall be paid not less than the following rates:

SCHEDULE OF APPRENTICESHIP FOR ADULT WOMEN

Wage first 6 months	Wage second 6 months	Thereafter not less than	Length of apprenticeship
$12.00 a week $52.00 a month	$14.00 a week $60.66⅔ a month	$16.00 a week $69.33⅓ a month	12 months

Minimum (or least) rates for inexperienced minors

(*c*) Minor learners shall be paid not less than the following rates:

SCHEDULE OF APPRENTICESHIP FOR MINORS

Wage first 6 months	Wage second 6 months	Wage third 6 months	Thereafter not less than	Length of apprenticeship
$10.00 a week $43.33⅓ a month	$12.00 a week $52.00 a month	$14.00 a week $60.66⅔ a month	$16.00 a week $69.33⅓ a month	18 months

NOTE: A minor girl who is still a learner upon reaching the age of eighteen years shall be paid not less than the rates specified for adult learners.

Registration of learners

(*d*) Every person, firm or corporation employing learners shall make application for the registration of such learners at the end of two weeks' employment, and pending the issuance of certificates of registration, shall pay to all learners not less than the minimum rate for the wage group in which they belong.

Penalty for failure to register learners

(*e*) All women and minor learners for whom applications for learners' certificates have not been made to the Industrial Welfare Commission at the end of two weeks' employment will be rated by the Commission as experienced workers, to be paid not less than $16.00 a week.

Learner defined

A learner is a woman or minor whom the Industrial Welfare Commission permits to work for a person, firm or corporation for less than the legal minimum wage, in consideration of the provision, by such employer, of reasonable facilities for learning the mercantile industry.

Learners' permits will be withheld by the Commission where there is evidence of attempted evasion of the law by firms which make a practice of dismissing learners when they reach their promotional periods.

PART-TIME WORKERS

Minimum (or least) rates for part-time workers

3. No person, firm or corporation shall employ, or suffer or permit any woman or minor to be employed as a part-time worker (except waitresses*) at less than the following rates and under the following conditions:

Adult women and experienced minor part-time workers

(*a*) ADULT FEMALE PART-TIME WORKERS AND EXPERIENCED MINOR PART-TIME WORKERS at not less than 40¢ an hour.

Inexperienced minor Part-time workers

(*b*) INEXPERIENCED MINOR PART-TIME WORKERS at not less than 30¢ an hour.

Registration of part-time workers

(*c*) All adult and minor part-time workers shall be registered with the Commission. Registration of part-time workers is accomplished by sending to the Commission, at the end of two weeks' employment, the following information concerning each part-time worker: Name, age, address, hours to be worked a week, amount to be paid a week, and for minors under sixteen years of age, the kind of working permit.

Number of part-time workers limited

(*d*) The total number of adult and minor female part-time workers shall not exceed 10 per cent of the total number of females employed.

Students of accredited vocational, continuation or cooperative schools

(*e*) Any person, firm or corporation may employ students attending accredited vocational, continuation or cooperative schools at part-time work on special permits from the Commission, and at rates to be determined by the Commission.

Part-time worker defined

A part-time worker is one who is employed on an hourly basis for less than eight hours in one day.

SPECIAL WORKERS

Minimum (or least) rates for special workers

4. No person, firm or corporation shall employ, or suffer or permit any woman or minor to be employed as a SPECIAL WORKER at less than the following rates:

Adult special workers

(*a*) ADULT SPECIAL WORKERS at not less than $2.66⅔ a day.

Minor special workers

(*b*) MINOR SPECIAL WORKERS at not less than $2.00 a day.

Special worker defined

A special worker is one who is employed on a full day basis for less than six days a week.

OFFICE WORKERS

Office workers regulated by office order

5. (*a*) Every person, firm or corporation employing women or minors in the mercantile industry shall pay all OFFICE WORKERS in accordance with the provisions of the Industrial Welfare Commission Order No. 9 Amended 1920.

Selling experience granted to office workers

(*b*) A woman or minor who has been employed in the selling force of a mercantile establishment shall, when she enters the office force of that establishment, be granted one-third of her selling experience, to be applied on her office experience.

Office experience granted to saleswomen

(*c*) A woman or minor who has been employed as an office worker in a mercantile establishment shall, when she enters the selling force of that establishment, be granted one-third of her office experience, to be applied to her selling experience.

*The rates for part-time waitresses are regulated by Industrial Welfare Commission Order No. 12 Amended 1920.

THIS ORDER MUST BE POSTE

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SEASONAL MILLINERY WORKROOM APPRENTICES

Minimum (or least) rates for seasonal millinery workroom apprentices

6. No person, firm or corporation shall employ, or suffer or permit the employment of seasonal millinery workroom apprentices for less than the legal minimum wage of $16.00 a week, except at the rates and under the conditions hereinafter set forth:

Number of seasonal millinery workroom apprentices limited

(*a*) No person, firm or corporation shall suffer or permit the employment, in the millinery workroom of any mercantile establishment, of over 33⅓ per cent of the total number of females employed in the millinery workroom, as apprentices, at less than the legal minimum wage of $16.00 a week.

Minimum (or least) rates for seasonal millinery workroom apprentices

(*b*) Seasonal millinery apprentices shall be paid not less than the following scale:

SCHEDULE FOR MILLINERY WORKROOM APPRENTICES

FIRST SEASON

First 4 weeks	$8.00 a week
Second 4 weeks	9.00 a week
Third 4 weeks	10.00 a week

SECOND SEASON

First 4 weeks	$12.00 a week
Second 4 weeks	13.00 a week
Third 4 weeks	14.00 a week

and thereafter not less than $16.00 a week.

Registration of seasonal millinery workroom apprentices

(*c*) Every person, firm or corporation employing seasonal millinery workroom apprentices shall make application to the Industrial Welfare Commission for the registration of such apprentices at the end of two weeks' employment.

Seasonal millinery workroom experience granted to saleswomen

(*d*) A woman or minor who has been employed as a seasonal millinery worker in a mercantile establishment shall, when she enters the selling force of that establishment, be granted one-third of her millinery workroom experience, to be applied on her selling experience.

FEMALE WORKERS IN FOOD-CATERING DEPARTMENTS

Employment of women in food-catering departments regulated by hotel and restaurant order

7. Every person, firm or corporation employing women or minors in the mercantile industry shall pay all female workers (including combination women) in food-catering department in accordance with the provisions of Industrial Welfare Commission Order No. 12 Amended 1920.

Combination woman defined

A combination woman is one who acts both as waitress and saleswoman.

Women and minors to be paid in accordance with experience

8. Every person, firm or corporation now employing women or minors in the mercantile industry shall rate and pay such women and minors in accordance with their periods of employment, as specified in Sections 1, 2 and 6 of this Order.

No deduction from the minimum (or least) wage for cash shortage

9. No person, firm or corporation shall make a deduction from the minimum wage of any woman or minor for a cash shortage, unless it be shown that the shortage is caused by the willful or dishonest act of the employee, notwithstanding any contract or arrangement to the contrary.

Wages paid on commission, bonus or piece-rate basis must equal the minimum (or least) rate

10. Every person, firm or corporation making payment of wages upon a commission, bonus or piece-rate basis shall guarantee to all women and minor employees not less than the minimum time rates for the wage groups in which they belong.

Keeping of records

11. (*a*) Every person, firm or corporation employing women or minors in the mercantile industry shall keep, in a form and manner approved by the Industrial Welfare Commission, records of the names and addresses, the rates paid, the hours worked and the amounts earned by all women and minor employees, such records to be kept on file for at least one year. Male minors shall be marked "M" and female minors "F" on the pay roll.

Failure to keep records a misdemeanor

(*b*) Every person, firm or corporation employing women or minors in the mercantile industry, failing to keep records as required in Section 11 (*a*) of this Order, SHALL BE GUILTY OF A MISDEMEANOR.

Hours of women and minors limited

12. No person, firm or corporation shall employ, or suffer or permit any woman or minor to work in any mercantile establishment more than eight (8) hours in any one day or more than forty-eight (48) hours in any one week, or more than six (6) days in any one week. The hours of labor of women and minors employed in the food-catering departments of mercantile establishments are regulated by Industrial Welfare Commission Order No. 12 Amended 1920.

Permit issued for special minimum wage

13. A permit may be issued by the Commission to a woman physically disabled by age or otherwise, authorizing the employment of such licensee for a wage less than the legal minimum wage; and the Commission shall fix a special minimum for such woman.

Filing reports

14. (*a*) Every person, firm or corporation employing women or minors in the mercantile industry shall furnish to the Commission, at its request, any and all reports or information which the Commission may require to carry out the purposes of the Act creating the Commission, such reports and information to be verified by the oath of the person, member of the firm, or the president, secretary or manager of the corporation furnishing the same, if and when so requested by the Commission.

Inspection

(*b*) Every person, firm or corporation shall allow any member of the Commission, or any of its duly authorized representatives, free access to the place of business of such person, firm or corporation, for the purpose of making inspection of, or excerpts from, all books, reports, contracts, pay rolls, documents or papers of such person, firm or corporation, relating to the employment of women and minors and payment therefor by such person, firm or corporation; or for the purpose of making any investigation authorized by the Act creating the Commission.

Posting of Order

15. Every person, firm or corporation employing women or minors in the mercantile industry shall post a copy of this Order in the general workroom and one in the women's dressing room.

16. The Commission shall exercise exclusive jurisdiction over all questions arising as to the administration and interpretation of this Order.

THIS ORDER SHALL BECOME EFFECTIVE SIXTY (60) DAYS FROM THE DATE HEREOF, or July 31, 1920.

Dated at San Francisco, California, this first day of June, 1920.

Order No. 5 Amended, 1919, dated April 22, 1919, is hereby rescinded as and of the date when this Order becomes effective.

ATTEST: KATHERINE PHILIPS EDSON,
Executive Officer.

INDUSTRIAL WELFARE COMMISSION
STATE OF CALIFORNIA

A. B. C. DOHRMANN, Chairman
KATHERINE PHILIPS EDSON
ALEXANDER GOLDSTEIN
WALTER G. MATHEWSON

NOTICE

NOTHING IN THIS ORDER PREVENTS EMPLOYERS FROM PAYING MORE THAN THE RATES FIXED BY THE COMMISSION AS THE MINIMUM OR LEAST RATES. THIS ORDER APPLIES TO ALL WOMEN AND MINORS IN THE MERCANTILE INDUSTRY.

The Industrial Welfare Commission expects to review its Orders annually.

SOUTHERN CALIFORNIA OFFICE, 412 UNION LEAGUE BUILDING, LOS ANGELES

STATUTES OF CALIFORNIA, 1913, CHAPTER 324

"Every employer or other person who, either individually or as an officer, agent or employee of a corporation, or other persons, violates or refuses or neglects to comply with the provisions of this act, or any orders or rulings of this Commission, shall be guilty of a misdemeanor, and upon conviction thereof, be punished by a fine of not less than fifty dollars, or by imprisonment for not less than thirty days, or by both such fine and imprisonment."

"For the purpose of this act, a minor is defined to be a person of either sex under the age of eighteen years."

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I.W.C. Order No. 5a
MERCANTILE INDUSTRY
EFFECTIVE APRIL 8, 1923

INDUSTRIAL WELFARE COMMISSION

STATE OF CALIFORNIA

620 STATE BUILDING, CIVIC CENTER

SAN FRANCISCO

SOUTHERN CALIFORNIA OFFICE:

1019 ASSOCIATED REALTY BUILDING, LOS ANGELES

To Whom It May Concern:

TAKE NOTICE: That pursuant to and by virtue of the authority vested in it by the Statutes of California, 1913, Chapter 324, and amendments thereto, and after public hearing duly had on motion of the Commission at the City Hall in the City and County of San Francisco on Thursday, December 14, 1922, notice of said hearing having been duly given in the manner provided by law, and the Industrial Welfare Commission thereafter finding and determining that the least wage adequate to supply to women and minors employed in industry the necessary cost of proper living and to maintain their health and welfare is $16 a week.

THE INDUSTRIAL WELFARE COMMISSION OF THE STATE OF CALIFORNIA DOES HEREBY ORDER THAT:

1. MINIMUM WAGE FOR EXPERIENCED WOMEN AND MINOR WORKERS.

(a) No employer shall pay or suffer or permit to be paid to any experienced woman or minor employed in any mercantile establishment in California less than $16 for the standard week's work. An employer who furnishes to any employee less than the standard week's work shall pay to said employee for said week not less than the legal minimum wage of $16.

The term "standard week" as herein used is defined to be the regularly established number of hours worked per week in the place of employment.

The term "minor" as used herein is defined to be a person of either sex under the age of eighteen years.

(b) Experience Defined. Adult women are deemed experienced workers in the mercantile industry when they have completed one year of work in said industry and minors are deemed experienced workers in the mercantile industry when they have completed two years of work in said industry, except that any minor whose learning period shall have commenced prior to the effective date of this order shall be deemed experienced when he or she has been employed one year and six months in the mercantile industry.

2. MINIMUM WAGE FOR INEXPERIENCED WOMEN AND MINOR WORKERS OR LEARNERS.

(a) Learners Defined. A learner is a woman or minor whom the Industrial Welfare Commission permits, through the issuance of a certificate of registration, to work for less than the legal minimum wage of $16 a week in consideration of the provision by the employer of reasonable facilities for learning the industry. Learners' certificates of registration will be withheld by the Commission where there is evidence of attempted evasion of the law by employers who make a practice of dismissing learners when they reach their promotional periods.

The term "learner" as herein used is synonymous with the terms "inexperienced woman" or "inexperienced minor."

(b) Limitation of Number of Learners. The total number of female learners in any mercantile establishment (exclusive of the office force, the millinery workroom force, elevator operators and female workers in food catering departments) receiving less than the legal minimum wage of $16 a week shall not exceed 33⅓% of the total number of female workers employed in said establishment (exclusive of the office force, the millinery workroom force, elevator operators and female workers in food catering departments). In computing the total number of females employed under this subdivision, special and part-time workers shall not be included.

(c) Registration of Learners. Each employer shall register each learner employed by him with the Industrial Welfare Commission three weeks from the commencement of the employment of said learner, and pending the issuance of certificates of registration by the Commission, he shall pay to all learners not less than the minimum rates as provided by paragraph 2, subdivisions (d) and (e). All women and minor workers not registered with the Industrial Welfare Commission at the end of three weeks employment shall be rated by the Commission as experienced workers to be paid not less than the legal minimum wage of $16 a week.

(d) Minimum Wage for Adult Female Learners. No employer in the mercantile industry shall pay or suffer or permit to be paid to any adult female learner less than the following:

During First Six Months of the Learning Period in the Mercantile Industry—Not less than $12 a week for the standard week's work. An employer who furnishes to any employee less than the standard week's work shall pay to said employee for said week not less than $12.

During Second Six Months of the Learning Period in the Mercantile Industry—Not less than $14 a week for the standard week's work. An employer who furnishes to any employee less than the standard week's work shall pay to said employee for said week not less than $14.

(e) Minimum Wage for Minor Learners. No employer in the mercantile industry shall pay or suffer or permit to be paid to any minor learner less than the following:

During First Six Months of the Learning Period in the Mercantile Industry—Not less than $10 a week for the standard week's work. An employer who furnishes to any employee less than the standard week's work shall pay to said employee for said week not less than $10.

During Second Six Months of the Learning Period in the Mercantile Industry—Not less than $11 a week for the standard week's work. An employer who furnishes to any employee less than the standard week's work shall pay to said employee for said week not less than $11.

During Third Six Months of the Learning Period in the Mercantile Industry—Not less than $12 a week for the standard week's work. An employer who furnishes to any employee less than the standard week's work shall pay to said employee for said week not less than $12.

During Fourth Six Months of the Learning Period in the Mercantile Industry—Not less than $14 a week for the standard week's work. An employer who furnishes to any employee less than the standard week's work shall pay to said employee for said week not less than $14.

NOTE—A minor girl who is still a learner upon reaching the age of eighteen years shall be paid thereafter not less than the rates specified for adult learners.

3. MINIMUM WAGE FOR PART-TIME ADULT AND MINOR WORKERS.

(a) No employer shall pay or suffer or permit to be paid to any adult or minor part-time worker (except waitresses and errand boys) less than the following:

Adult Female Part-Time Workers—Not less than 40¢ an hour.

Minor Part-time Workers—Not less than 30¢ an hour.

(b) Limitation of Number of Part-Time Workers. The total number of adult and minor female part-time workers in any mercantile establishment shall not exceed 10% of the total number of female employees.

(c) Any employer may employ students attending accredited vocational, continuation or cooperative schools at part-time work on special permits from the Industrial Welfare Commission and at rates to be determined by the Commission.

(d) Part-Time Worker Defined. A part-time worker is a woman or minor who is employed on an hourly basis for less than eight hours in one day.

THIS ORDER MUST BE POSTE

4. MINIMUM WAGE FOR SPECIAL WORKERS.

(a) No employer shall pay or suffer or permit to be paid to any adult woman or minor special worker less than the following:

Adult Female Special Workers—Not less than $2.66⅔ a day.

Minor Special Workers—Not less than $2.00 a day.

(b) Special Worker Defined. A special worker is a woman or minor who is employed on a full-day basis for three weeks or less.

5. MINIMUM WAGE FOR OFFICE WORKERS.

(a) Office workers are not included within the operation of this order but are covered by the provisions of the order of the Industrial Welfare Commission for general and professional offices.

(b) A woman or minor who has been employed in the selling force of a mercantile establishment shall, when she enters the office force of that establishment, be granted one-third of her selling experience, to be applied toward office experience.

(c) A woman or minor who has been employed as an office woman in a mercantile establishment shall, when she enters the selling force of that establishment, be granted one-third of her office experience, to be applied toward mercantile experience.

6. MINIMUM WAGE FOR WOMEN AND MINORS EMPLOYED IN THE FOOD CATERING DEPARTMENTS OF MERCANTILE ESTABLISHMENTS.

Women and minors employed in the food catering departments of mercantile establishments are not included within the operation of this order but are covered by the provisions of the order of the Industrial Welfare Commission for hotels and restaurants.

7. MINIMUM WAGE FOR ELEVATOR OPERATORS.

An employer employing women or minors as elevator operators shall pay to such women and minors not less than $12 a week for the standard week's work during the first three weeks of employment and thereafter not less than $16 a week for the standard week's work.

8. MINIMUM WAGE FOR MESSENGER AND ERRAND BOYS.

An employer employing minor boys regularly as messenger or errand boys shall pay to such minor boys not less than $10.56 a week for the standard week's work during the first three weeks of their employment and thereafter not less than $12 a week for the standard week's work. Part-time messenger or errand boys shall be paid not less than 25¢ an hour.

9. No employer shall make any deduction from the foregoing minimum rates for a cash shortage, unless it is shown that the shortage is caused by the wilful or dishonest act of the employee, notwithstanding any contract or arrangement to the contrary.

10. KEEPING OF RECORDS.

Every employer employing women or minors in the mercantile industry shall keep, in a form and manner approved by the Industrial Welfare Commission, records of the names and addresses, the number of hours worked and the amounts earned by all women and minor employees, such records to be kept on file for at least one year. Male minors shall be marked "M" and female minors "F" on the payroll.

Every employer employing women or minors in the mercantile industry, failing to keep records as required in Section 10 of this Order, SHALL BE GUILTY OF A MISDEMEANOR.

11. FILING REPORTS.

Every employer employing women or minors in the mercantile industry shall furnish to the Commission, at its request, any and all reports or information which the Commission may require to carry out the purposes of the Act creating the Commission, such reports and information to be verified by oath of the person furnishing the same, if and when so requested by the Commission.

12. INSPECTION.

Every employer employing women or minors in the mercantile industry shall allow any member of the Commission or any of its duly authorized representatives, free access to the place of business of such employer, for the purpose of making inspection of or excerpts from all books, reports, contracts, payrolls, documents or papers of such employer relating to the employment of women and minors and payment therefor by such employer, or for the purpose of making any investigation authorized by the Act creating the Commission.

13. HOURS OF LABOR.

No employer shall employ or suffer or permit any woman or minor to work in any mercantile establishment more than eight (8) hours in any one day, or more than forty-eight (48) hours in any one week, or more than six (6) days in any one week.

14. PERMIT FOR SPECIAL MINIMUM WAGE.

A permit may be issued upon joint application of worker and employer to a woman physically defective by age or otherwise authorizing her employment for a period of six (6) months or less, at a special minimum wage less than the legal minimum wage hereinabove established.

15. POSTING OF ORDERS.

Every employer shall post a copy of this Order in a conspicuous place where it can be read by the women and minor employees.

16. The Commission shall exercise exclusive jurisdiction over all questions arising as to the administration and interpretation of this Order.

DATED at San Francisco, California, this 29th day of December, 1922.

Order No. 5, amended 1920, dated June 7, 1920, is hereby rescinded as and of the date when this Order becomes effective.

INDUSTRIAL WELFARE COMMISSION
STATE OF CALIFORNIA

ATTEST: KATHERINE PHILIPS EDSON,
Executive Commissioner.

A. B. C. DOHRMANN, *Chairman*
KATHERINE PHILIPS EDSON
WALTER G. MATHEWSON
HENRY W. LOUIS
PAUL A. SINSHEIMER

NOTICE

NOTHING IN THIS ORDER PREVENTS EMPLOYERS FROM PAYING MORE THAN THE RATES FIXED BY THE COMMISSION AS THE MINIMUM OR LEAST RATES. THIS ORDER APPLIES TO ALL WOMEN AND MINORS IN THE MERCANTILE INDUSTRY.

The Industrial Welfare Commission expects to review its orders annually.

STATUTES OF CALIFORNIA, 1913, CHAPTER 324

"Every employer or other person who, either individually or as an officer, agent or employee of a corporation, or other persons, violates or refuses or neglects to comply with the provisions of this Act, or any orders or rulings of this Commission, shall be guilty of a misdemeanor, and upon conviction thereof, be punished by a fine of not less than fifty dollars, or by imprisonment for not less than thirty days, or by both such fine and imprisonment."

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:D IN A CONSPICUOUS PLACE

I.W.C. Order No. 7 NS
MERCANTILE INDUSTRY
Effective June 21, 1943

Tenth Regional War Labor Board ruled on June 17, 1943, this order not in conflict with national stabilization policy and therefore approved in that respect

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF INDUSTRIAL WELFARE

515 VAN NESS AVENUE, SAN FRANCISCO (2)
208 STATE BUILDING, LOS ANGELES (12)
245 HOLLAND BUILDING, FRESNO
504 NEW CALIFORNIA BUILDING, SAN DIEGO (1)

To Whom It May Concern:

TAKE NOTICE: That pursuant to and by virtue of the authority vested in it by Sections 1171 to 1203, inclusive, Labor Code of the State of California, and after findings and recommendations of a wage board having been received and public hearing duly had on March 12, 1943, on motion of the Industrial Welfare Commission, notice of said hearing having been duly given in the manner provided by law, the Industrial Welfare Commission hereafter finding and determining that the minimum wage to be paid to women and minors in the mercantile industry is such wage as hereinafter set out, and the hours of work consistent with, and the standard conditions of labor demanded by the health and welfare of such women and minors are as set forth below,

THE INDUSTRIAL WELFARE COMMISSION OF THE STATE OF CALIFORNIA DOES HEREBY ORDER THAT:

1. APPLICABILITY OF ORDER

This Order shall apply to all women and minor employees employed in the mercantile industry, whether on a time, piece-rate, commission, or other basis of pay.

2. DEFINITIONS

(a) **"The Commission"** means the Industrial Welfare Commission of the State of California.

(b) **"Mercantile industry"** includes any industry or business operated for the purpose of:

1. Selling, purchasing, or distributing merchandise to wholesalers, retailers, industrial or commercial users, or acting as agents, jobbers, or brokers in buying merchandise for or selling merchandise to such persons or companies, and rendering services incidental to such operations;
2. Selling, purchasing, or distributing merchandise for personal or household consumption, and rendering services incidental to the sale of such goods; and
3. Selling, purchasing, or distributing real estate, insurance or securities;

Except those functions of the industry performed by:

(a) Employees covered by the Order for Professional, Technical, Clerical and Similar Occupations;

(b) Employees covered by the Order for the Public Housekeeping Industry;

(c) Employees covered by the Order for the Manufacturing Industry; and

(d) Employees covered by the Order for the Personal Service Industry.

(c) **"Employ"** means to engage, suffer, or permit to work.

(d) **"Employee"** means any woman or minor engaged, suffered or permitted to work, and includes employees who work under instructions which indicate participation in a mercantile organization engaged in selling, demonstrating, distributing, or advertising, and under conditions which indicate that the employer has reasonable control over the hours worked by the employee.

(e) **"Employer"** means any person, as defined in the California Labor Code, Section 18, who employs any woman or minor.

(f) **"Hours employed"** includes all time during which:

1. A woman or minor is required to be on the employer's premises ready to work, or to be on duty, or to be at a prescribed work place.
2. A woman or minor is suffered or permitted to work, whether or not required to do so. Such time includes, but shall not be limited to, time when the employee is required to wait on the premises while no work is provided by the employer and time when an employee is required or instructed to travel on the employer's business after the beginning and before the end of her work day.

(g) A **"Work Day"** or **"Day"** means the twenty-four (24) hour period from 6:00 a.m. of one day to 6:00 a.m. of the following day.

(h) **"Split Shift"** means a schedule of daily hours in which the hours of work are not consecutive, except that interruption of working hours for meal or rest periods of one hour or less does not constitute a split shift.

(i) **"Experienced Employee"**: All employees covered by this Order shall be deemed experienced, except as provided in subsection (j) of this section.

(j) **"Learner"** is a woman or minor whom the Commission permits, upon registration, to work for less than the legal minimum wage provided for experienced employees in consideration of the provision by the employer of reasonable facilities for learning the industry.

(k) **"Handicapped Employee"** means a woman or minor employee whose earning capacity is impaired by age or physical or mental deficiency or injury and whom the Commission may permit to be employed at a special minimum wage. Such permits shall be granted only upon joint application of employer and employee and after investigation and finding of disability by the Division of Industrial Welfare.

(l) **"Wages"** means compensation to an employee, and the minimum wages provided herein shall be an unconditional payment in cash or check negotiable at par, without deduction, except such deductions as are required by law, and except such deductions as are permitted by law and voluntarily requested in writing by the employee.

3. HOURS

(a) No employer shall employ any person under the age of eighteen (18) years for more than eight (8) hours in any one day, or more than forty-eight (48) hours in any one week, or more than six (6) days in any one week, or after the hour of 10 p.m. or before the hour of 6 a.m.

(b) No employer shall employ any female in any establishment or industry covered by this Order more than eight (8) hours in any one day of twenty-four (24) hours, or more than forty-eight (48) hours in any one week, or more than six (6) days in any one week. Said eight (8) hours of employment must be performed in a period not to exceed thirteen (13) hours.

(c) Every woman and minor shall have one day's rest in seven. Sunday shall be considered the established day of rest for all women and minors unless a different arrangement is made by the employer for the purpose of providing another day of the week as the day of rest.

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(d) Every employer shall allow a meal period of not less than thirty (30) consecutive minutes for each woman or minor employee not later than five (5) hours after the beginning of the employee's work day. If during such meal period the employee cannot be relieved of all duties and permitted to leave the premises, such meal period shall not be deducted from hours worked.

(e) No employee whose work requires that she remain standing shall be required to work more than two and one-half (2½) hours consecutively without a rest period of ten (10) minutes. No wage deduction shall be made for such rest period.

(f) Where women are employed between the hours of 10 p.m. and 6 a.m.:

1. No woman shall be required to report for work or be dismissed during these hours unless suitable transportation is available.
2. The employer shall see that suitable facilities are available for securing hot food or drink, or heating food or drink during these hours.

(g) Eleven (11) hours must elapse between the end of one work day and the beginning of another, except at the time when there is a change from one working schedule or assignment to another.

4. LEARNERS

Employers may employ women and minors as learners in accordance with the terms of permits issued by the Commission, provided that within two (2) weeks after employment the employer shall register such learner upon forms to be supplied by the Commission. Such permits will be granted under the following conditions:

(a) Pending registration of such workers with the Industrial Welfare Commission, the employer shall pay to all learners not less than the minimum rates as provided in paragraph 5, subdivision (b). All women and minor workers not registered with the Industrial Welfare Commission at the end of two (2) weeks' employment shall be rated as experienced workers to be paid not less than the rates as provided in paragraph 5, subdivision (a).

(b) No permit shall be issued where there is evidence of attempted evasion of the law by employers who make a practice of dismissing learners when they reach the promotional period.

(c) An employee may be deemed a learner for the first 480 hours of employment in the mercantile industry.

(d) If an employee transfers from one occupation covered by this Order to any other occupation covered by this Order, whether in the same or in another establishment, full credit shall be given for previous experience.

(e) The total number of learners in any mercantile establishment covered by this Order receiving less than the minimum wage for experienced workers shall not exceed twenty percent (20%) of the total number of workers covered by this Order in the establishment. Workers employed less than thirty-six (36) hours a week shall not be included in computing the total number of employees.

5. MINIMUM WAGES

Every employer shall pay to each employee, wages not less than the following:

(a) **Experienced employees:**

1. In any week in which such employee is employed forty (40) hours, $18.00 per week.
2. In any week in which such employee is employed less than forty (40) hours, fifty cents (50¢) per hour, except that the total wage need not exceed $18.00 per week, and except that vocational students who are employed less than forty (40) hours per week, and minors whose working hours are regulated by the California School Code, may be paid forty-five cents (45¢) per hour.
3. In any week in which such employee is employed longer than forty (40) hours, forty-five cents (45¢) per hour for each hour worked in excess of forty (40) hours up to and including forty-eight (48) hours.
4. Each day an employee is required to report for work and does report for work, but is not put to work or works four (4) hours or less, the employer shall pay the employee for not less than four (4) hours at fifty cents (50¢) per hour, except that this shall not apply to vocational students or to minors whose working hours are regulated by the California School Code.
5. On any day in which an employee works a split shift, fifty cents (50¢) for the day in addition to the minimum wage required by this section.
6. Where an employee is employed after 10 p.m. or before 6 a.m., sixty cents (60¢) per hour during such hours.
7. In no case shall gratuities or tips from patrons, or others, be counted as part of the minimum wage; and the employee shall not be required to report tips for this purpose.
8. Handicapped employees: Sixty-six and two-thirds percent (66⅔%) of the wages prescribed in this section.

(b) **Learners:**

1. In any week in which such employee is employed forty (40) hours, $16.00 per week.
2. In any week in which such employee is employed less than forty (40) hours, forty-five cents (45¢) per hour, except that the total wage need not exceed $16.00 per week, and except that vocational students and minors whose working hours are regulated by the California School Code, who are employed less than forty (40) hours per week may be paid forty cents (40¢) per hour.
3. In any week in which such employee is employed longer than forty (40) hours, forty cents (40¢) per hour for each hour worked in excess of forty (40) hours.
4. Each day an employee is required to report for work and does report for work, but is not put to work or works four (4) hours or less, the employer shall pay the employee for not less than four (4) hours at forty-five cents (45¢) per hour, except that this shall not apply to vocational students or to minors whose working hours are regulated by the California School Code.
5. On any day in which an employee works a split shift, fifty cents (50¢) for the day in addition to the minimum wage required by this section.
6. Where an employee is employed after 10 p.m. or before 6 a.m., fifty cents (50¢) per hour during such hours.
7. In no case shall gratuities or tips from patrons, or others, be counted as part of the minimum wage; and the employee shall not be required to report tips for this purpose.
8. Handicapped employees: Sixty-six and two-thirds percent (66⅔%) of the wages prescribed in this section.

6. COMMISSIONS

The minimum wage shall be paid whether compensation is measured by time, piece, commission, or otherwise. In computing the minimum wage, a commission shall be counted in the payroll period in which it is earned.

7. PROHIBITED WAGE DEDUCTIONS

(a) No rule or regulation or condition of employment shall be enforced or required by any employer whereby the employee would be compelled to pay or use for any purpose any portion of the minimum wages herein required to be paid. The foregoing shall apply, but is not limited to, the purchase of tools, equipment and uniforms or to the maintenance, laundering and cleaning of uniforms.

(b) As used in this Order, the term "uniform" includes all garments such as suits, dresses, aprons, collars, cuffs, head-dresses, hats, and all other garments whatsoever which are worn by the employee as a condition of employment. It shall be a presumption that uniforms worn by the employees of any establishment are worn as a condition of employment, if such uniforms are of similar design, color or material, or form part of the decorative pattern of the establishment or distinguish the employee as an employee of the concern.

(c) No person, firm or corporation shall make any deduction from the minimum wage of an employee on account of a cash shortage unless it be shown that the shortage is caused by the wilful or dishonest act of the employee, notwithstanding any contract or arrangement to the contrary.

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(d) No person, firm or corporation shall make any deduction from the minimum wage of an employee on account of breakage or loss of equipment by the employee unless it be shown that the breakage or loss is caused by the wilful or culpable act of the employee, notwithstanding any contract or arrangement to the contrary.

8. CHARGES FOR MEALS AND ROOMS

(a) Employees shall not be required to pay for meals not eaten nor to pay more than the following amounts for a bona fide meal:

Breakfast 30 cents Lunch 35 cents
Dinner 50 cents

(b) Charges for room:

1. No employer employing women or minors in the establishments defined under this Order who furnishes rooms for lodging purposes to such employees may charge more than $3.00 per week to a resident employee occupying a room alone.
2. Where two employees occupy one room, the employer may charge not more than $2.00 per week per person, and separate beds shall be furnished to the employees.

9. KEEPING OF RECORDS

(a) Every employer shall keep at his place of employment, in a manner approved by the Commission, an accurate record with respect to each employee of the following information:

1. Name in full;
2. Home address;
3. Social Security number;
4. Date of birth, if under 18 years of age;
5. Occupation;
6. Learners shall be marked "L"; male minors under 18 years of age shall be marked "M"; and female minors under 18 years of age shall be marked "F"; and students shall be marked "S";
7. Hours employed, which shall show the beginning and ending of hours employed by the employee each work day, which shall be recorded each day at the time the employee begins and ends employment;
8. Total wages paid and total hours employed in each payroll period;
9. Hours employed and wages paid to each employee shall appear on the same record.

(b) All required records shall be kept on file for at least one year at the office or establishment at which the employees are employed.

(c) Every workroom shall be equipped with a clock, plainly visible to all employees.

10. FILING REPORTS

Every employer shall furnish to the Commission, or its duly authorized representative, at its request, any and all reports or information which the Commission may in its judgment require to carry out the purposes of this Order; such reports and information to be verified by oath of the employer or his agent who furnishes the same, if and when so requested by the Commission.

11. INSPECTIONS

The Commission or duly authorized representatives of the Division of Industrial Welfare shall be allowed free access to any office or establishment where women or minors covered by this Order are employed to investigate and gather data regarding wages, hours, and other conditions and employment practices, and shall be permitted to inspect and make excerpts from any and all records and to question all employees for such purposes; or for the purpose of making any other investigation authorized by Labor Code Section 1174.

12. INTERPRETATION OF ORDER

The Industrial Welfare Commission shall exercise jurisdiction over all questions arising as to the interpretation of this Order.

13. PENALTIES

Failure, refusal or neglect to comply with any of the provisions of this Order is a violation of the Labor Code of the State of California, and is punishable by fine, or imprisonment, or both.

14. SEPARABILITY

If the application of any provision of this Order, or any section, subsection, subdivision, sentence, clause, phrase, word, or portion of the Order shall be held invalid or unconstitutional, the remaining provisions thereof shall not be affected thereby, but shall continue to be given full force and effect, as if the part so held invalid, or unconstitutional, had not been included herein.

15. HEALTH AND WELFARE REGULATIONS

Every employer of women or minors covered by this Order in addition to the foregoing provisions, is required to comply with the provisions of the Industrial Welfare Commission Order prescribing Health and Welfare Regulations for Any Occupation, Trade, or Industry.

16. POSTING OF ORDER

Every employer shall post a copy of this Order in a conspicuous place where it can be read by the women and minor employees.

Dated at San Francisco, California, this 5th day of April, 1943.

Order No. 5a, amended, dated April 8, 1923, is hereby rescinded as and of the date when this Order becomes effective.

This Order is effective June 21, 1943.

INDUSTRIAL WELFARE COMMISSION
STATE OF CALIFORNIA

JOHN C. PACKARD, *Chairman*
MARGARET I. CHACE
A. F. GAYNOR
EMILY H. HUNTINGTON
ANSLEY K. SALZ

RENA BREWSTER, *Chief*
Division of Industrial Welfare

NOTICE

It is recommended that employees covered by this Order keep a record of the hours they work each day and the wage paid.

NOTHING IN THIS ORDER PREVENTS EMPLOYERS FROM PAYING MORE THAN THE RATES FIXED BY THE COMMISSION AS THE MINIMUM OR LEAST RATES. THIS ORDER APPLIES TO ALL WOMEN AND MINORS IN THE MERCANTILE INDUSTRY.

STATUTES OF 1937, CHAPTER 90, CALIFORNIA LABOR CODE

SECTION 1199. Every employer or other person acting either individually or as an officer, agent, or employee of another person is guilty of a misdemeanor and is punishable by a fine of not less than fifty dollars ($50.00) or by imprisonment for not less than thirty (30) days, or by both, who does any of the following:

(a) Requires or causes any woman or minor to work for longer hours than those fixed, or under conditions of labor prohibited by an order of the Commission.

(b) Pays or causes to be paid to any woman or minor a wage less than the minimum fixed by an order of the Commission.

(c) Violates or refuses or neglects to comply with any provisions of this Chapter or any order or ruling of the Commission.

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STATE PRINTING OFFICE

INDUSTRIAL WELFARE COMMISSION ORDER N

WAGES, HOURS, AND WORKING CON
IN THE MERCAI

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF INDUSTRIAL WELFARE

965 Mission Street, San Francisco 3
404 State Building, Los Angeles 12
Anglo Bank Building, Fresno 1
1122 Fourth Avenue, San Diego 1
1540 San Pablo Avenue, Oakland 12

To Whom It May Concern:

TAKE NOTICE: That pursuant to and by virtue of authority vested in it by Sections 1171 to 1203, inclusive, of the Labor Code of the State of California, and after public hearing duly had, notice of said hearing having been duly given in the manner provided by law, the Industrial Welfare Commission, upon its own motion, having found and concluded that the Mercantile Industry Order, Number 7 NS, enacted by the Industrial Welfare Commission on April 5, 1943, should be altered and amended;

NOW, THEREFORE, The Industrial Welfare Commission of the State of California does hereby alter and amend said Mercantile Industry Order, Number 7 NS, and does hereby enact its amended Order as follows:

No person, as defined in Section 18 of the Labor Code, shall employ any woman or minor in any establishment or industry in which the wages, hours, or working conditions are not in conformance with the standards hereinafter set forth:

1. APPLICABILITY OF ORDER

This Order shall apply to all women and minors employed in the mercantile industry whether paid on a time, piece rate, commission, or other basis, except women employed in administrative, executive, or professional capacities.

No woman shall be considered to be employed in an administrative, executive, or professional capacity unless one of the following conditions prevails:

(a) The employee is engaged in work which is predominantly intellectual, managerial, or creative; which requires exercise of discretion and independent judgment; and for which the remuneration is not less than $250 per month; or

(b) The employee is licensed or certified by the State of California and is engaged in the practice of one of the following recognized professions: law, medicine, dentistry, architecture, engineering, teaching, or accounting.

2. DEFINITIONS

(a) "Commission" means the Industrial Welfare Commission of the State of California.

(b) "Division" means the Division of Industrial Welfare of the State of California.

(c) "Mercantile Industry" means any industry, business, or establishment operated for the purpose of purchasing, selling, or distributing goods or commodities at wholesale or retail.

(d) "Employ" means to engage, suffer, or permit to work.

(e) "Employee" means any woman or minor employed by an employer.

(f) "Employer" means any person, as defined in Section 18 of the Labor Code, who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of a woman or minor.

(g) "Minor" means, for the purpose of this Order, a male or female person under the age of eighteen (18) years.

(h) "Hours Worked" means 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.

(i) "Emergency" means an unpredictable or unavoidable occurrence at unscheduled intervals requiring immediate action.

3. HOURS

(a) No woman or minor shall be employed more than eight (8) hours during any one day of twenty-four (24) hours or more than forty-eight (48) hours in any one week. Said eight (8) hours of employment must be performed in a period not to exceed thirteen (13) hours, unless the employee resides at the place of employment.

(b) Nothing in Section 3(a) shall prevent the employment of a woman eighteen (18) years of age or over, more than eight (8) hours in any one day or more than forty-eight (48) hours in any one week in an emergency, when the employment is not prohibited by Part 4, Chapter 3, Article 1 of the State Labor Code, provided that such overtime is compensated for at not less than one and one-half times the employee's regular rate of pay.

(c) No woman employee shall be required to report for work or be dismissed from work between the hours of 10 P.M. and 6 A.M. unless suitable transportation is available. If a meal period occurs during these hours, facilities shall be available for securing hot food or drink, or for heating food and drink, and a suitable, sheltered place shall be provided in which to consume such food and drink.

(NOTE: REFER TO STATE LABOR CODE FOR REGULATIONS GOVERNING SEVENTH DAY EMPLOYMENT AND FOR ADDITIONAL RESTRICTIONS ON WORKING HOURS OF MINORS.)

4. MINIMUM WAGES

(a) Every employer shall pay to each woman or minor employee wages not less than sixty-five cents (65¢) per hour for all hours worked; except that a lesser rate, but not less than fifty cents (50¢) per hour, may be paid to:

(1) Women, over 18 years of age, during their first two hundred (200) hours of employment in skilled or semi-skilled occupations in which they have had no previous similar or related experience, provided that the number of women employed at such rate shall not exceed ten percent (10%) of the persons regularly employed in the establishment.

(2) Minors, provided that the number of minors employed at such rate shall not exceed ten percent (10%) of the persons regularly employed in the establishment.

(b) Each day an employee is required to report for work and does report, but is not put to work or is furnished less than half the usual day's work, said employee shall be paid for half the usual day's work at the employee's regular rate of pay, which shall be not less than the minimum wage herein provided.

(c) Every employer shall pay to each employee not less than the applicable minimum wage for hours worked in each payroll period, whether the remuneration is measured by time, piece, commission, or otherwise.

(d) In no case shall gratuities or tips from patrons or others be counted as part of the minimum wage. No employee shall be required to report tips for this purpose.

(e) The provisions of this section shall not apply to apprentices regularly indentured under the State Division of Apprenticeship Standards.

(f) On any day in which an employee works a split shift, sixty-five cents (65¢) per day shall be paid in addition to the minimum wage.

("Split Shift" means a work schedule which is interrupted by non-working periods other than bona fide rest or meal periods.)

5. PERMIT FOR HANDICAPPED WORKERS

A permit may be issued by the Commission authorizing employment of a woman or minor whose earning capacity is impaired by advanced age, physical disability, or mental deficiency, at less than the minimum wage herein provided. Such permits shall be granted only upon joint application of employer and employee.

6. RECORDS

(a) Every employer shall keep at the place of employment, in a manner approved by the Division, accurate information with respect to each employee as follows:

(1) Name, address, and occupation;

(2) Birth date, if under eighteen (18) years, and designation as a minor on the payroll record;

(3) Time record showing actual time employment begins and ends each day, and hours worked daily;

(4) Total hours worked and total wages paid each payroll period, which shall appear on the same record.

(b) When a piece rate plan is in operation, a schedule of piece work rates must be available in the workroom, and a duplicate piece work record shall be furnished to each employee unless the employer's system of recording is acceptable to the Division.

(c) All required records shall be properly dated, showing month, day, and year, and shall be kept on file by the employer for at least one year.

(d) Every workroom shall be equipped with a clock.

7. CASH SHORTAGE OR BREAKAGE

No employer shall make any deduction from the minimum wage of an employee for any cash shortage, breakage, or loss of equipment, notwithstanding any contract or arrangement to the contrary, unless it can be shown that the shortage, breakage, or loss is caused by a dishonest or wilful act, or by the culpable negligence of the employee.

8. UNIFORMS AND EQUIPMENT

(a) No employee shall be required to contribute directly or indirectly from the minimum wage for the purchase or maintenance of tools, equipment, or uniforms; nor for the laundering and cleaning of uniforms. The term "uniform" includes wearing apparel and accessories of distinctive design or color required by the employer to be worn by the employee as a condition of employment.

(b) When protective garments, such as gloves, boots, or aprons, are necessary to safeguard the health or prevent injury to an employee, such garments shall be provided and paid for by the employer.

9. MEALS AND LODGING

"Meal" means an adequate serving of a variety of wholesome, nutritious foods.

"Lodging" means living accommodations which are adequate, decent, and sanitary according to usual and customary standards. Employees shall not be required to share a bed.

When meals or lodging are furnished by the employer as part of the minimum wage, they may not be evaluated in excess of the following:

Room Occupied Alone—$3.50 per week.

Room Shared—$2.50 per week.

Apartment—66⅔% of the ordinary rental value, and in no event more than $75.00 per month.

Meals: { Breakfast, 30 cents; Lunch, 40 cents; Dinner, 60 cents }

Deductions may not be made for meals not eaten and shall be made only for bona fide meals consistent with employee's work shift.

10. MEAL PERIOD

No employee shall be required to work more than five (5) consecutive hours after reporting for work, without a meal period of not less than thirty (30) minutes. An "on duty" meal period will be permitted only when the nature of the work prevents an employee from being relieved of all duty, and such "on duty" meal period shall be counted as hours worked without deduction from wages.

11. REST PERIOD

Every employer shall authorize all employees to take rest periods which, insofar as practicable, shall be in the middle of each work period. Rest periods shall be computed on the basis of ten minutes for four hours working time, or majority fraction thereof. No wage deduction shall be made for such rest periods.

12. DRESSING AND REST ROOMS

(a) Employers shall provide for adequate safe-keeping of employees' outer clothing during working hours, and for their work clothes during non-working hours. When the occupation requires a change of clothing, a suitable space shall be provided where female employees may make such change in privacy and comfort.

(b) When the number of females employed at one time is more than twenty (20) and less than fifty (50) there shall

THIS ORDER MUST BE POSTE

FORM No. 93
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No. 7 R, EFFECTIVE JUNE 1, 1947, REGULATING
IDITIONS FOR WOMEN AND MINORS
NTILE INDUSTRY

be provided one couch, and thereafter at least one additional couch shall be provided for every one hundred (100) female employees or fraction thereof; except that, when the nature of the work requires standing, one couch must be provided where there are more than ten (10) female employees. Beds in hospital rooms may not be counted in the number of required couches.

(c) Couches shall be placed in suitable rooms, conveniently located, exclusively used by women, and open to them during all working hours. Such rooms shall be properly lighted, ventilated, and heated.

13. DRINKING WATER AND WASHING FACILITIES

(a) Each place of employment shall be supplied with pure drinking water, convenient to employees. Individual paper cups shall be provided or sanitary drinking fountains shall be installed and so regulated that a jet of at least two (2) inches shall be constantly available.

(b) For every twenty-five (25) female employees or fraction thereof, there shall be one wash basin or equivalent group washing facilities. Surfaces of this equipment shall be smooth and resistant to stain and shall be kept clean and sanitary. Sufficient soap and either individual cloth or paper towels shall be supplied. Towels used in common are prohibited.

14. TOILET ROOMS

(a) NUMBER. Women's toilet rooms must be so marked and the number of toilets required is as follows:

Where the number of females employed at one time is between:	The number of toilets shall be not less than:
1-15*	1
16-30	2
31-45	3
46-60	4
61-80	5
81-100	6

and thereafter one toilet for every twenty-five (25) female employees or majority fraction thereof.

* If the entire staff of an establishment numbers less than five (5) and only one toilet is available, it may be used by both sexes.

(b) GENERAL CONSTRUCTION

(1) Toilets shall be of the water pressure type, installed in accordance with approved and customary standards.

(2) The entrances to toilet rooms shall be effectively screened so that no toilet compartment is visible from any workroom. Each toilet shall be in a separate compartment of adequate size, so constructed as to provide privacy, and with a door of such dimensions as to permit easy entrance and exit.

(3) Toilet compartments shall be thoroughly ventilated to the outside air and shall be adequately lighted.

(4) Floors shall be of cement, terrazzo, tile, glazed brick, or other composition which is impervious to moisture, and the angle formed by the floor and wall shall be sealed. Surfaces of walls, partitions, doors, fixtures, toilet seats, bowls, and other equipment shall be smooth and non-absorbent, and all painted surfaces shall be a light color.

(c) SUPPLIES. Toilet paper, in a proper holder, shall be supplied in each compartment. Sanitary napkins shall be readily obtainable at a reasonable price and a suitable means for their disposal shall be provided.

(d) LOCATION. Toilet rooms must be conveniently located on the immediate premises and employees shall not be required to walk up or down more than one flight of stairs to reach such rooms. In existing establishments when, in the judgment of the Division, a toilet cannot be located on the premises, relief periods other than required rest periods shall be authorized for women and minors.

15. FIRST AID

Adequate first aid supplies must be provided and kept clean and sanitary in a dust-proof container.

16. LIFTING

No female employee shall be required or permitted to lift or carry any object weighing in excess of twenty-five (25) pounds, except upon permit from the Division.

17. SEATS

Suitable seats shall be provided for all female employees. When the nature of the work requires standing, an adequate number of said seats shall be placed adjacent to the work area and employees shall be permitted to use such seats when not engaged in the active duties of their employment.

18. FLOORS

(a) Unless floors are of wood, cork, rubber composition, or other resilient material, mats or gratings of approved material shall be supplied at all points where women or minors are required to stand at their work.

(b) The floors and stairs of every establishment shall be safe, smooth and tight.

(c) Where wet processes are employed, the floor must be properly drained. When floors are wet or slippery, racks or gratings of sufficient height and free from hazard shall be provided. If the nature of the employment will not permit the use of racks or gratings, protection for the feet shall be provided by the employer.

19. CLEANLINESS AND UPKEEP

Premises, equipment, and fixtures shall be kept safe, clean, sanitary, and in good repair.

20. LIGHTING

All establishments in which women or minors are employed shall be properly lighted during working hours. Sources of illumination shall be of such nature and so placed that the light furnished will be adequate for efficient work and prevent unnecessary strain on the vision or glare in the eyes of the workers.

21. VENTILATION

Each room in which women or minors are employed shall be thoroughly ventilated and there shall be not less than 500 cubic feet of air per person.

22. TEMPERATURE

The nature of the employment permitting, there shall be maintained in each workroom a minimum temperature of 65° F. and, weather permitting, a maximum of 72° F. If, owing to the nature of the process, excessive heat is created in the workroom, special devices shall be installed to reduce such excessive heat. Where the nature of the employment will not permit a temperature of 65° F., a heated room shall be provided to which employees may retire for warmth.

23. EXITS

Every floor on which women or minors are employed shall have at least two exits, remotely located from each other, access to which is unobstructed. Such exits shall be other than elevators. From the third or higher floors at least one means of egress must be an accepted fire exit, and additional fire exits may be ordered where necessary. Exits shall be plainly marked and kept unlocked during working hours.

24. ELEVATORS

Elevator service shall be provided so that no female employee shall be required to walk up or down more than two flights of stairs to reach her place of employment.

25. EXEMPTIONS

If, in the opinion of the Commission after due investigation, it is found that the enforcement of any provision contained in Sections 10 to 24 of this Order, would not materially increase the comfort, health, or safety of employees and would work undue hardship on the employer, exemptions may be made at the discretion of said Commission. Such exemptions must be in writing to be effective and can be revoked after reasonable notice is given in writing. Applications for exemptions shall be made by the employer to the Commission in writing.

26. FILING REPORTS

Every employer shall furnish to the Commission and to the Division any and all reports or information which may be required to carry out the purpose of this Order; such reports and information to be verified if and when so requested.

27. INSPECTION

The Commission and duly authorized representatives of the Division shall be allowed free access to any office or establishment covered by this Order to investigate and gather data regarding wages, hours, working conditions, and employment practices and shall be permitted to inspect and make excerpts from any and all records and to question all employees for such purposes.

28. PENALTIES

Failure, refusal or neglect to comply with any of the provisions of this Order is a violation of the Labor Code of the State of California, and is punishable by fine, or imprisonment, or both.

Every employer who employs a woman, eighteen (18) years of age or over, in violation of Section 3 of this Order, shall pay said employee a penalty of double the employee's regular rate of pay for all hours worked in violation thereof.

29. SEPARABILITY

If the application of any provision of this Order, or any section, subsection, subdivision, sentence, clause, phrase, word, or portion of this Order shall be held invalid or unconstitutional, the remaining provisions thereof shall not be affected thereby, but shall continue to be given full force and effect as if the part so held invalid or unconstitutional had not been included herein.

30. POSTING OF ORDER

Every employer shall keep posted, in a conspicuous place, a copy of this Order where it can be read by the women and minor employees.

Dated at Los Angeles, California, this eighth day of February, 1947.

Order 7 NS, enacted April 5, 1943, is hereby rescinded as and of the date when this Order becomes effective.

INDUSTRIAL WELFARE COMMISSION
STATE OF CALIFORNIA

JOHN C. PACKARD, *Chairman*
MAE CARVELL
LEROY E. GOODBODY
MAE STONEMAN
ELEANOR C. HEWLETT

RENA BREWSTER, *Chief*
Division of Industrial Welfare

EXCERPTS FROM STATE LABOR CODE

Section 18. "Person" means any person, association, organization, partnership, business trust, or corporation.

Section 1199. Every employer or other person acting either individually or as an officer, agent, or employee of another person is guilty of a misdemeanor and is punishable by a fine of not less than fifty dollars ($50) or by imprisonment for not less than 30 days, or by both, who does any of the following:

(a) Requires or causes any woman or minor to work for longer hours than those fixed, or under conditions of labor prohibited by an order of the commission.

(b) Pays or causes to be paid to any woman or minor a wage less than the minimum fixed by an order of the commission.

(c) Violates or refuses or neglects to comply with any provision of this chapter or any order or ruling of the commission.

Section 1252. No female employee shall be requested or permitted to carry any object weighing 10 pounds or more up or down any stairway or series of stairways that rise for more than five feet from the base thereof.

PART 4. Chapter 3, Article 1

Section 1350. No female shall be employed in any manufacturing, mechanical, or mercantile establishment or industry, laundry, cleaning, dyeing, or cleaning and dyeing establishment, hotel, public lodging house, apartment house, hospital, beauty shop, barber shop, place of amusement, restaurant, cafeteria, telegraph or telephone establishment or office, in the operation of elevators in office buildings, or by any express or transportation company in this State, more than eight hours during any one day of 24 hours or more than 48 hours in one week.

Section 1351. No employer shall employ, cause to be employed or permit any female to work any number of hours whatever, with knowledge that such female has theretofore been employed within the same day of 24 hours in any establishment or industry and by any previous employer for a period of time which will, combined with the period of time of employment by a previous employer, exceed eight hours in one day or 48 hours in one week. This provision shall not prevent the employment of any female in more than one establishment where the total number of hours worked by her does not exceed eight hours in any one day of 24 hours or 48 hours in one week.

Section 1352. The provisions of this article in relation to hours of employment shall not apply to or affect graduate nurses in hospitals, nor the harvesting, curing, canning, or drying of any variety of perishable fruit, fish, or vegetable during the periods when it is necessary to harvest, cure, can, or dry fruit, fish, or vegetables to prevent spoiling, nor to employees actually engaged in the processing of biologicals, human blood products and other such products of laboratories operating under license from either or both the United States Department of the Treasury and the United States Department of Agriculture during such periods when it is necessary to continue the processing of such products to prevent spoilage or deterioration.

Section 1354. Every person, or the agent or officer thereof, employing any female who violates any provision of this article, or who employs, or permits any female to work in violation thereof, is guilty of a misdemeanor, punishable, for a first offense, by a fine or (of) not less than twenty-five dollars ($25) nor more than one hundred dollars ($100); and for a second or subsequent offense, by a fine of not less than one hundred dollars ($100) nor more than two hundred fifty dollars ($250), or imprisonment for not more than 60 days, or both.

Day of Rest Law: See Labor Code Sections 510 to 554, inclusive.

Working Hours of Minors: See Labor Code Sections 1391 to 1398, inclusive.

D IN A CONSPICUOUS PLACE

ORDER NUMBER 1—52

INDUSTRIAL WELFARE COMMISSION ORDER

WAGES, HOURS, AND WORKING CO
IN THE MANUFACTURING ANI

(REPLACING FORMER ORDERS 1R AND 7R)

STATE OF CALIFORNIA—DEPARTMENT OF INDUSTRIAL RELATIONS

DIVISION OF INDUSTRIAL WELFARE

965 Mission Street, San Francisco 3
907 State Building, Los Angeles 12
1531 Webster Street, Oakland 12
57 North Fulton Street, Fresno 1
210 Jergins Trust Building, Long Beach 2
1521 Fourth Avenue, San Diego 1
419 Forum Building, Sacramento

To Whom It May Concern:

TAKE NOTICE: That pursuant to and by virtue of authority vested in it by Sections 1171 to 1204, inclusive, of the Labor Code of the State of California, and after public hearing duly had, notice of said hearing having been duly given in the manner provided by law, the Industrial Welfare Commission, upon its own motion having found and concluded that the Manufacturing Industry Order, Number 1R, and the Mercantile Industry Order, Number 7R, enacted by the Industrial Welfare Commission on February 8, 1947, should be altered and amended:

NOW, THEREFORE, The Industrial Welfare Commission of the State of California does hereby alter and amend said Manufacturing Industry Order, Number 1R, and said Mercantile Industry Order, Number 7R, and does hereby enact its amended Order as follows:

No person, as defined in Section 18 of the Labor Code, shall employ any woman or minor in any establishment or industry in which the wages, hours, or working conditions are not in conformance with the standards hereinafter set forth:

1. APPLICABILITY OF ORDER

This Order shall apply to all women and minors employed in the manufacturing industry or in the mercantile industry whether paid on a time, piece rate, commission, or other basis, except women employed in administrative, executive, or professional capacities.

No woman shall be considered to be employed in an administrative, executive, or professional capacity unless one of the following conditions prevails:

(a) The employee is engaged in work which is predominantly intellectual, managerial, or creative; and which requires exercise of discretion and independent judgment; and for which the remuneration is not less than $350 per month; or

(b) The employee is licensed or certified by the State of California and is engaged in the practice of one of the following recognized professions: law, medicine, dentistry, architecture, engineering, teaching, or accounting.

2. DEFINITIONS

(a) "Commission" means the Industrial Welfare Commission of the State of California.

(b) "Division" means the Division of Industrial Welfare of the State of California.

(c) "Manufacturing Industry" means any industry, business, or establishment operated for the purpose of preparing, producing, making, altering, repairing, finishing, processing, inspecting, handling, assembling, wrapping, bottling, or packaging goods, articles, or commodities, in whole or in part;

EXCEPT when such activities are covered by Orders in the:
Canning, Preserving and Freezing Industry;
Industries Handling Farm Products After Harvest; or
Motion Picture Producing Industry.

"Mercantile Industry" means any industry, business, or establishment operated for the purpose of purchasing, selling, or distributing goods or commodities at wholesale or retail.

(d) "Employ" means to engage, suffer, or permit to work.

(e) "Employee" means any woman or minor employed by an employer.

(f) "Employer" means any person, as defined in Section 18 of the Labor Code, who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of a woman or minor.

(g) "Minor" means, for the purpose of this Order, a male or female person under the age of eighteen (18) years.

(h) "Hours Worked" means 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.

(i) "Emergency" means an unpredictable or unavoidable occurrence at unscheduled intervals requiring immediate action.

3. HOURS

(a) No woman or minor shall be employed more than eight (8) hours during any one day of twenty-four (24) hours nor more than six (6) days in any one week, except under the following conditions:

(1) When overtime employment is not prohibited by Sections 1350-1354* of the Labor Code of the State of California, women eighteen (18) years of age or over may, in case of emergency, be employed in excess of eight (8) hours in one day or in excess of six (6) days in one week provided the employee is compensated for all hours worked in excess of eight (8) hours in one day and for all hours worked on the seventh (7th) day [except such seventh day employment as is authorized in subsection (a) (2) hereof] at not less than one and one-half (1½) times the employee's regular rate of pay.

(2) An employee may be employed seven (7) days in one week when the total hours of employment during said week do not exceed thirty (30) and the total hours of employment in any one day thereof do not exceed six (6).

* See last column for "Excerpts from Labor Code," Sections 1350-1354.

(b) The eight (8) hours of employment shall be performed within a period of not more than thirteen (13) hours and, except when there is a bona fide change of shift, eleven (11) hours shall elapse between the end of one work day of the employee and the beginning of the next.

(c) No woman employee shall be required to report for work or be dismissed from work between the hours of 10 P.M. and 6 A.M. unless suitable transportation is available. If a meal period occurs during these hours, facilities shall be available for securing hot food or drink, or for heating food and drink; and a suitable, sheltered place shall be provided in which to consume such food and drink.

NOTE: REFER TO STATE LABOR CODE FOR ADDITIONAL RESTRICTIONS ON WORKING HOURS OF MINORS.

4. MINIMUM WAGES

(a) Every employer shall pay to each woman and minor employee wages not less than seventy-five cents (75¢) per hour for all hours worked; except that a lesser rate, but not less than sixty cents (60¢) per hour, may be paid to:

(1) Women, eighteen (18) years of age or over, during their first two hundred (200) hours of employment in skilled or semi-skilled occupations in which they have had no previous similar or related experience, provided that the number of women employed at such rate shall not exceed ten percent (10%) of the persons regularly employed in the establishment. An employer of less than ten (10) persons may employ one learner at said lesser rate.

(2) Minors, provided that the number of minors employed at said lesser rate shall not exceed ten percent (10%) of the persons regularly employed in the establishment. An employer of less than ten (10) persons may employ one minor at said lesser rate.

(b) Every employer shall pay to each employee, on the established pay day for the period involved, not less than the applicable minimum wage for all hours worked in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise.

(c) In no case shall gratuities or tips from patrons or others be counted as part of the minimum wage. No employee shall be required to report tips for this purpose.

(d) The provisions of this section shall not apply to apprentices regularly indentured under the State Division of Apprenticeship Standards.

(e) On any day in which an employee works a split shift, seventy-five cents (75¢) per day shall be paid in addition to the minimum wage except when the employee resides at the place of employment.

("Split Shift" means a work schedule which is interrupted by non-working periods other than bona fide rest or meal periods.)

5. REPORTING TIME PAY

Each day an employee is required to report for work and does report but is not put to work or is furnished less than half said employee's usual day's work, the employee shall be paid for half the usual day's work, but in no event for less than two hours, at the employee's regular rate of pay, which shall be not less than the minimum wage herein provided.

6. PERMIT FOR HANDICAPPED WORKERS

A permit may be issued by the Commission authorizing employment of a woman or minor whose earning capacity is impaired by advanced age, physical disability, or mental deficiency, at less than the minimum wage herein provided. Such permits shall be granted only upon joint application of employer and employee.

7. RECORDS

(a) Every employer shall keep at the place of employment, in a manner approved by the Division, accurate information with respect to each employee as follows:

(1) Full name, home address, and occupation.

(2) Birth date, if under eighteen (18) years, and designation as a minor on the payroll record.

(3) Time records showing all in-and-out time which shall be recorded when it occurs, and also total hours worked each day. Meal periods during which operations cease and authorized rest periods need not be recorded.

(4) Total wages paid each payroll period, including value of board, lodging, or other compensation actually furnished to the employee. The total hours worked in the payroll period shall appear on the same record as wages paid for that period.

(b) All required records shall be properly dated, showing month, day, and year, and shall be kept on file by the employer for at least one year.

(c) When a piece rate or incentive plan is in operation, a schedule of rates must be available in the workroom. An accurate production record shall be furnished to each employee unless the employer's system of recording is acceptable to the Division.

(d) Clocks shall be provided in all major work areas.

8. CASH SHORTAGE AND BREAKAGE

No employer shall make any deduction from the minimum wage of an employee for any cash shortage, breakage, or loss of equipment, notwithstanding any contract or arrangement to the contrary, unless it can be shown that the shortage, breakage, or loss is caused by a dishonest or wilful act, or by the culpable negligence of the employee.

9. UNIFORMS AND EQUIPMENT

(a) No employee shall be required to contribute directly or indirectly from the minimum wage for the purchase or maintenance of tools, equipment, or uniforms; nor for the laundering and cleaning of uniforms. The term "uniform" includes wearing apparel and accessories of distinctive design or color required by the employer to be worn by the employee as a condition of employment.

(b) When protective garments are required by the employer, or are necessary to safeguard the health, or prevent injury to an employee, such garments shall be provided and paid for by the employer.

10. MEALS AND LODGING

"Meal" means an adequate well-balanced serving of a variety of wholesome, nutritious foods.

"Lodging" means living accommodations which are adequate, decent, and sanitary according to usual and customary standards. Employees shall not be required to share a bed.

When meals or lodging are furnished by the employer as part of the minimum wage, they may not be evaluated in excess of the following:

Room Occupied Alone—$4 per week.
Room Shared—$3 per week.
Apartment—Two-thirds (⅔) of the ordinary rental value, and in no event more than $86 per month.

Meals: { Breakfast, 35 cents
Lunch, 45 cents
Dinner, 70 cents

Deductions may not be made for meals not eaten and shall be made only for bona fide meals consistent with employee's work shift.

11. MEAL PERIODS

No employer shall employ any woman or minor for a work period of more than five (5) hours without a meal period of not less than thirty (30) minutes; except that when a work period of not more than six (6) hours will complete the day's work, the meal period may be waived. An "on duty" meal period will be permitted only when the nature of the work prevents an employee from being relieved of all duty, and time spent for such "on duty" meal period shall be counted as time worked.

12. REST PERIODS

Every employer shall authorize and permit all employees to take rest periods which, insofar as practicable, shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3½) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.

13. DRESSING AND REST ROOMS

(a) Employers shall provide for adequate safekeeping of employees' outer clothing during working hours, and for their work clothes during non-working hours. When the occupation requires a change of clothing, a suitable space shall be provided where female employees may make such change in privacy and comfort.

(b) When the number of females employed at one time is more than twenty (20) and less than fifty (50) there shall be provided one couch, and thereafter at least one additional couch shall be provided for every one hundred (100) female employees or fraction thereof; except that, when the nature of the work requires standing, one couch must be provided where there are more than ten (10) female employees. Beds in hospital rooms may not be counted in the number of required couches.

FORM NO. 106
000012

THIS ORDER MUST BE POSTE

No. 1-52, EFFECTIVE AUGUST 1, 1952.

NDITIONS FOR WOMEN AND MINORS) THE MERCANTILE INDUSTRIES

(c) Couches shall be placed in suitable rooms, conveniently located, exclusively used by women, and open to them during all working hours. Such rooms shall be properly lighted, ventilated, and heated.

14. DRINKING WATER AND WASHING FACILITIES

(a) Each place of employment shall be supplied with pure drinking water, convenient to employees. Individual paper cups shall be provided or sanitary drinking fountains shall be installed and so regulated that a jet of at least two (2) inches shall be constantly available.

(b) For every twenty-five (25) female employees or fraction thereof, there shall be one wash basin or equivalent group washing facilities. Surfaces of this equipment shall be smooth and resistant to stain and shall be kept clean and sanitary.

(c) Sufficient soap and either individual cloth or paper towels shall be supplied. Towels used in common are prohibited.

15. TOILET ROOMS

(a) NUMBER. Women's toilet rooms must be so marked and the number of toilets required is as follows:

Where the number of females employed at one time is between:	The number of toilets shall be not less than:
1-15*	1
16-30	2
31-45	3
46-60	4
61-80	5
81-100	6

and thereafter one toilet for every twenty-five (25) female employees or majority fraction thereof.

* If the entire staff of an establishment numbers less than five (5) and only one toilet is available, it may be used by both sexes.

(b) GENERAL CONSTRUCTION

(1) Toilets shall be of the water pressure type, installed in accordance with approved and customary standards.

(2) The entrances to toilet rooms shall be effectively screened so that no toilet compartment is visible from any workroom. Each toilet shall be in a separate compartment of adequate size, so constructed as to provide privacy, and with a door of such dimensions as to permit easy entrance and exit. Each toilet compartment door shall be provided with a latch or bolt.

(3) The walls of toilet rooms shall extend to a ceiling and the room shall be thoroughly ventilated to the outside air and shall be adequately lighted.

(4) Floors shall be of cement, terrazzo, tile, glazed brick or other composition which is impervious to moisture and the angle formed by the floor and wall shall be sealed or coved.

(5) Surfaces of walls, partitions, doors, fixtures, toilet seats, bowls, and other equipment shall be smooth and non-absorbent, and all painted surfaces shall be a light color.

(c) SUPPLIES. Toilet paper, in a proper holder, shall be supplied in each compartment. Sanitary napkins shall be readily obtainable at a reasonable price and a suitable means for their disposal shall be provided.

(d) LOCATION. Toilet rooms must be conveniently located on the immediate premises and not more than one floor immediately above or below the employee's work place unless adequate elevator service is available. In existing establishments when, in the judgment of the Division, a toilet cannot be located on the premises, relief periods other than required rest periods shall be authorized for women and minors.

(e) MAINTENANCE. Toilet rooms shall be kept clean and sanitary, and shall contain only such equipment, fixtures, and supplies as properly belong therein.

16. FIRST AID

Adequate first aid supplies must be provided and kept clean and sanitary in a dust-proof container.

17. LIFTING

No female employee shall be required to lift or carry any object weighing in excess of twenty-five (25) pounds, except upon permit from the Division.

(See last column for "Excerpts from Labor Code," Section 1252.)

18. SEATS

Suitable seats shall be provided for all female employees. When the nature of the work requires standing, an adequate number of said seats shall be placed adjacent to the work area and employees shall be permitted to use such seats when not engaged in the active duties of their employment.

19. FLOORS

(a) Unless the surface of the floor is of wood, cork, rubber composition, linoleum, asphalt tile, or other material of comparable resilience, the floor surface in the work area where women or minors stand in the performance of their duties shall be supplied with a covering material of suitable resilience.

(b) The floors and stairs of every establishment shall be safe, smooth and tight.

(c) Where wet processes are employed, the floor must be properly drained. When floors are wet or slippery, racks or gratings of sufficient height and free from hazard shall be provided. If the nature of the employment will not permit the use of racks or gratings, protection for the feet shall be provided by the employer.

20. CLEANLINESS AND UPKEEP

Premises, equipment, and fixtures shall be kept safe, clean, sanitary, and in good repair.

21. LIGHTING

All establishments in which women or minors are employed shall be properly lighted during working hours. Sources of illumination shall be of such nature and so placed that the light furnished will be adequate for efficient work and prevent unnecessary strain on the vision or glare in the eyes of the workers.

22. VENTILATION

Each room in which women or minors are employed shall be thoroughly ventilated.

23. TEMPERATURE

The nature of the employment permitting, there shall be maintained in each workroom a minimum temperature of 65° F., and, weather permitting, a maximum of 75° F. If, owing to the nature of the process, excessive heat is created in the workroom, special devices shall be installed to reduce such excessive heat. Where the nature of the employment will not permit a temperature of 65° F., a heated room shall be provided to which employees may retire for warmth.

24. EXITS

Except as otherwise herein provided, every floor, mezzanine, or balcony on which women or minors are employed shall have at least two exits, remotely located from each other, access to which is unobstructed. Such exits shall be other than elevators. From the third or higher floors at least one means of egress must be an accepted fire exit, and additional fire exits may be ordered where necessary. Exits shall be plainly marked and kept unlocked during working hours.

In facilities constructed prior to the effective date of this Order, the above requirement of two exits shall not apply to a first floor, second floor, mezzanine, or balcony when all the following conditions are met: The premises cannot be altered to provide a second exit; an adequate number of properly maintained fire extinguishers are readily available; and the activities carried on in the establishment do not create a fire hazard.

(For other regulations regarding exits, see General Safety Orders, Title 8, Section 3244, California Administrative Code.)

25. ELEVATORS

When females are employed on the fourth or higher floors, adequate elevator service must be provided.

26. EXEMPTIONS

If, in the opinion of the Commission after due investigation, it is found that the enforcement of any provision contained in Sections 11 to 25 of this Order would not materially increase the comfort, health, or safety of employees and would work undue hardship on the employer, exemptions may be made at the discretion of said Commission. Such exemptions must be in writing to be effective and can be revoked after reasonable notice is given in writing. Applications for exemptions shall be made by the employer to the Commission in writing.

27. FILING REPORTS

Every employer shall furnish to the Commission and to the Division any and all reports or information which may be required to carry out the purpose of this Order, such reports and information to be verified if and when so requested.

28. INSPECTION

The Commission and duly authorized representatives of the Division shall be allowed free access to any office or establishment covered by this Order to investigate and gather data regarding wages, hours, working conditions, and employment practices, and shall be permitted to inspect and make excerpts from any and all records and to question all employees for such purposes.

29. PENALTIES

Failure, refusal or neglect to comply with any of the provisions of this Order is a violation of the Labor Code of the State of California, and is punishable by fine or imprisonment, or both.

30. SEPARABILITY

If the application of any provision of this Order, or any section, subsection, subdivision, sentence, clause, phrase, word, or portion of this Order shall be held invalid or unconstitutional, the remaining provisions thereof shall not be affected thereby, but shall continue to be given full force and effect as if the part so held invalid or unconstitutional had not been included herein.

31. POSTING OF ORDER

Every employer shall keep posted, in a conspicuous place, a copy of this Order where it can be read by the women and minor employees.

Dated at Los Angeles, California, this sixteenth day of May, 1952.

Orders 1R and 7R, enacted February 8, 1947, are hereby rescinded as and of the date when this Order becomes effective.

INDUSTRIAL WELFARE COMMISSION
STATE OF CALIFORNIA
LEROY E. GOODBODY, *Chairman*
MAE CARVELL
ELEANOR C. HEWLETT
DANIEL E. KOSHLAND
MAE STONEMAN
MARGARET KAY ANDERSON, *Chief*
Division of Industrial Welfare

EXCERPTS FROM STATE LABOR CODE

Section 18. "Person" means any person, association, organization, partnership, business trust, or corporation.

Section 1199. Every employer or other person acting either individually or as an officer, agent, or employee of another person is guilty of a misdemeanor and is punishable by a fine of not less than fifty dollars ($50) or by imprisonment for not less than 30 days, or by both, who does any of the following:

(a) Requires or causes any woman or minor to work for longer hours than those fixed, or under conditions of labor prohibited by an order of the commission.

(b) Pays or causes to be paid to any woman or minor a wage less than the minimum fixed by an order of the commission.

(c) Violates or refuses or neglects to comply with any provision of this chapter or any order or ruling of the commission.

Section 1252. No female employee shall be requested or permitted to carry any object weighing 10 pounds or more up or down any stairway or series of stairways that rise for more than five feet from the base thereof.

Eight Hour Law:

Section 1350. No female shall be employed in any manufacturing, mechanical, or mercantile establishment or industry, laundry, cleaning, dyeing, or cleaning and dyeing establishment, hotel, public lodging house, apartment house, hospital, beauty shop, barber shop, place of amusement, restaurant, cafeteria, telegraph or telephone establishment or office, in the operation of elevators in office buildings, or by any express or transportation company in this State, more than eight hours during any one day of 24 hours or more than 48 hours in one week.

Section 1351. No employer shall employ, cause to be employed or permit any female to work any number of hours whatever, with knowledge that such female has theretofore been employed within the same day of 24 hours in any establishment or industry and by any previous employer for a period of time which will, combined with the period of time of employment by a previous employer, exceed eight hours in one day or 48 hours in one week. This provision shall not prevent the employment of any female in more than one establishment where the total number of hours worked by her does not exceed eight hours in any one day of 24 hours or 48 hours in one week.

Section 1352. The provisions of this article in relation to hours of employment shall not apply to or affect graduate nurses in hospitals, or clinical laboratory technologists or clinical laboratory technicians in hospitals during an emergency; provided, that any such technologist or technician who, by reason of an emergency, is permitted or required by her employer to work in excess of the maximum hours prescribed by other provisions of this article, shall be paid, for time worked in excess of such hours, at a rate of not less than one and a half times her straight time rate of pay, nor the harvesting, curing, canning, or drying of any variety of perishable fruit, fish, or vegetable during the periods when it is necessary to harvest, cure, can, or dry fruit, fish, or vegetables to prevent spoiling, nor to employees actually engaged in the processing of biologicals, human blood products and other such products of laboratories operating under license from either or both the United States Department of the Treasury and the United States Department of Agriculture during such periods when it is necessary to continue the processing of such products to prevent spoilage or deterioration. Emergency within the meaning of this section means an unpredictable or unavoidable occurrence at unscheduled intervals, requiring immediate action. The exception provided herein shall be effective only in cases where the employer, upon learning of the emergency, exercises reasonable diligence to provide immediately relief for the employee required to work over the prescribed number of hours.

(Amended by Stats. 1945, Ch. 640, and by Stats. 1953, Ch. 1254.)

Section 1352.1. The provisions of this article shall not apply to or affect executives, administrators, or professional women. No women shall be considered to be employed in an administrative, executive or professional capacity unless one of the following conditions prevail:

(a) The employee is engaged in work which is predominantly intellectual, managerial, or creative; which requires exercise of discretion and independent judgment; and for which the remuneration is not less than three hundred fifty dollars ($350) per month, or

(b) The employee is licensed or certified by the State of California and is engaged in the practice of one of the following recognized professions: Law, medicine, dentistry, architecture, engineering or accounting.

Section 1354. Every person, or the agent or officer thereof, employing any female who violates any provision of this article, or who employs, or permits any female to work in violation thereof, is guilty of a misdemeanor, punishable, for a first offense, by a fine or [of] not less than twenty-five dollars ($25) nor more than one hundred dollars ($100); and for a second or subsequent offense, by a fine of not less than one hundred dollars ($100) nor more than two hundred fifty dollars ($250), or imprisonment for not more than 60 days, or both.

INDUSTRIAL HOMEWORK

Section 2658. No employer shall deliver any materials or articles for manufacture by industrial homework to any person in this State unless the employer so delivering them or his agent, if the employer is not a resident of this State, has obtained a valid employer's permit from the division. A permit shall be issued upon payment to the division of a fee of fifty dollars ($50) and shall be valid for the remainder of the calendar year for which it is issued, unless sooner revoked or suspended. Application for a permit shall be made in such form as the division may by regulation prescribe. The division may revoke or suspend an employer's permit upon a finding that the employer has violated this part or has failed to comply with any provision of the permit.

Working Hours of Minors: See Labor Code Sections 1391 to 1398, inclusive.

D IN A CONSPICUOUS PLACE

STATE OF CALIFORNIA
GEORGE DEUKMEJIAN, Governor

OFFICE OF ADMINISTRATIVE LAW
555 CAPITOL MALL, SUITE 1290
SACRAMENTO, CA 95814
(916) 323-6225

September 7, 1990

Mr. Richard J. Simmons, Esq.
MUSICK, PEELER & GARRETT
One Wilshire Boulevard
Los Angeles, CA 90017

Re: 1990 OAL Determination No. 11
Docket No. 89-018
Determination dated July 31, 1990

Dear Mr. Simmons:

This is in response to your letter dated August 29, 1990, requesting the Office of Administrative Law (OAL) to reconsider the decision reached in the above-referenced OAL determination. The decision was that the enforcement policy of the Division of Labor Standards Enforcement (DLSE) at issue in the determination was not a "regulation" within the meaning Government Code section 11342, subdivision (b). The decision was reached after OAL found that the enforcement policy was the only legally tenable interpretation of the applicable wage order, and therefore was merely an application of existing law to a particular set of facts without further interpreting or supplementing the law.

In your letter you argue that there is more than one legally tenable interpretation of the wage order which defines "Hours worked" when applied to the factual situation of where an employer requires his or her employees to remain on the employment premises during a meal period.

The California wage order definition of "hours worked" provides:

> "'Hours worked' means 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." [Emphasis added.]

The challenged DLSE enforcement policy states, in interpreting and applying the definition above, that when an employer requires an employee to remain on the employment premises during a meal period, the employer is exerting control over the employee and therefore must compensate the employee for the meal period as "hours worked," even when the employee is not required to perform any duties.

Basically, you argue that the federal regulations and federal courts, in interpreting and applying federal statutes, provide that the employer would not have to compensate the employee for the meal period where the employee is required to remain on the premises as long as the employee was relieved of all duties, and therefore, there are at least two legally tenable interpretations of the wage order, not merely one.

As stated above, the California wage order defines "Hours worked" as:

> "'Hours worked' means 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." [Emphasis added.]

The federal statute, 29 United States Code section 203 (g) of the Fair Labor Standards Act (FLSA), defines "Employ" as:

> "'Employ' includes to suffer or permit to work." [Emphasis added.]

Section 203 (o) of FLSA defines "Hours Worked" as:

> "Hours Worked.--In determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed, there shall be excluded any time spent 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."

Section 785.19 of 29 Code of Federal Regulations states:

> "(a) Bona fide Meal periods. Bona fide meal periods are not worktime. . . . The employee must be completely relieved from duty for the purposes of eating regular meals. . . . The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. . . .
>
> "(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." [Underlined words are italicized in original.]

You argue that not only do the federal courts and regulations provide an additional tenable interpretation to the meaning of "hours worked," but that DLSE's enforcement policy is in direct

conflict with the federal interpretation and standard. We agree that the federal policy is in direct conflict with DLSE's policy, but disagree that the federal policy provides another tenable interpretation of the California wage order. It is clear that the California wage order definition of "hours worked" is significantly different from the federal definitions of "employ" and "hours worked." The federal statutes do not contain the very broad language "time during which an employee is subject to the control of an employer." The federal definition of "employ" simply provides "to suffer or permit to work." These words are also found in the California definition of "hours work," but as one component of the broader category "time during which an employee is subject to the control of the employer."

The federal cases which you cite interpret the federal statutes (the FLSA), not the California wage order. While federal cases interpreting federal law may be persuasive when interpreting state law that is patterned on the federal law, the federal case law on the subject is not applicable to the particular California wage order at issue here. The federal cases interpret federal statutory language, which is significantly different from the language contained in the California wage order, and therefore are not persuasive for purposes of interpreting the wage order and do not provide an additional legally tenable interpretation to the California wage order.

You also raise the point that the Industrial Welfare Commission's (IWC) amendment of the wage order in 1947 was in direct response to, and was intended to conform to, the meaning of "hours worked" as interpreted by the federal courts during that particular time period.

As DLSE stated in its Response to the Request for Determination (pages 22-24):

> ". . . The U.S. Department of Labor must rely upon definitions of 'workweek' to determine what is compensable and those definitions have been provided by federal caselaw interpreting the F.L.S.A. On the other hand, the IWC Orders specifically define the term 'Hours Worked' and have done so since 1942. However, the IWC has amended its interpretation since it was first introduced. In 1942, the California IWC Order 1-42 provided as follows:
>
> > '"Hours Employed"' means all time during which:
> > (1) an employee is required to be on the employer's premises, or to be on duty, or to be at a prescribed work place; or
> > (2) an employee is suffered or permitted to work whether or not required to do so. Such time

> includes, but shall not be limited to waiting time.' [Emphasis added.]

"In the 1947 IWC Order 1-47, the language was amended:

> '"Hours worked" means 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.'

"The IWC's 1947 change in the language of the Orders which define 'Hours Worked' clearly indicated that the Commission intended to broaden the definition. It must be noted that the 1942 definition of 'Hours Employed' was similar to that adopted by the U.S. Supreme Court four years later in the case of Anderson v. Mr. Clemens Pottery Co. (1946) 328 U.S. 680, 690-691, 66 S.Ct. 1187 to define 'workweek.' [Footnote omitted.] The Mt. Clemens Pottery Court held that the 'Workweek' included:

> 'all the time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace.' Anderson v. Mt. Clemens Pottery Co. (1946) 328 U.S. 680, 690-691, 66 S.Ct. 1187. (Emphasis added)

"The 1947 IWC definition of 'hours worked' replaced the requirements that the employee be on the employer's premises, or on duty or at a prescribed workplace, and simply provided that the employer must pay for all hours the employee is 'subject to the control' of the employer. That definition, unknown in federal law, continues to be the definition of 'Hours Worked" for state law purposes. Had the IWC intended that the definition adopted by the federal courts in Anderson v. Mt. Clemens Pottery Co., supra, [cite omitted], (which was similar to, but less restrictive than, the definition in the 1942 IWC Orders) was to apply to California, they need only to have replaced one comma with an 'or'. Instead, the Commission completely changed the language of the Orders. The change adopted by the Commission in 1947 did, however, clearly indicate that even the more restrictive disjunctive language contained in the 1942 Orders was not as restrictive as the Commission felt necessary.

"The language adopted in 1947 defining the term 'Hours Worked' remains unchanged in Order 1-89. The employer must compensate the employee for all hours during which the employee is subject to the control of the employer. . . ."

Since you have not provided OAL with any IWC administrative record material showing that an opposite conclusion should be reached regarding the intent of IWC in support of your argument, we find that we agree with DLSE on this point.

Two well settled rules of statutory construction are that the language of the statute should be given its plain meaning (Title Insurance and Trust Co. v. County of Riverside (1989) 48 Cal.3d 84, 91, 255 Cal.Rptr. 670, 674), and when the language is clear and unambiguous, there is no need for statutory construction. (Tiernan v. Trustees of Cal. State University (1983) 33 Cal.3d 211, 218-219, 188 Cal.rptr. 115, 119-120.) The principle rules of statutory construction also govern the construction of administrative regulations.

In looking at the plain meaning of the wage order's language--"under the control of the employer"--there is no doubt that when an employer requires his or her employees to remain on the premises during a meal period that the employer is exerting "control" over the employee. The degree of control is not at issue; the wage order simply states "under the control of the employer." (We need not address here other hypothetical situations in which the degree of the employer's control might be so limited as to result in the conclusion that the time in question was not "hours worked"; a flat prohibition on leaving the employment premises is obviously very close to the "control" end of a "control-no control" continuum.) It is the particular language of the wage order which makes it so different from the federal statutes and which makes the interpretation of the wage order so different from the interpretation given to the federal statutes by the federal courts and regulations.

We have reviewed the arguments made in your request. Lacking (1) an appellate court case interpreting the California wage order in a way other than DLSE's interpretation, or (2) a superior court injunction enjoining DLSE from enforcing its policy, or (3) any administrative record material showing that the intent of the wage order is other than the meaning given by DLSE in its enforcement policy, we conclude that the decision reached in the determination was correct.

While we recognize that it may be inconvenient, even burdensome, from the perspective of a national employer, to have to follow different procedures in California than in other states, this is a policy question that is best taken up with the IWC. Variations between state rules on various subjects not preempted by federal law are an inevitable consequence of the federal system created by the U.S. Constitution.

Sincerely,

HERBERT F. BOLZ
Coordinating Attorney
Rulemaking and Regulatory
Determinations Unit

for: JOHN D. SMITH
Chief Counsel

dmc/hfb/jds

cc: H. Thomas Cadell, Jr.
Chief Counsel, Legal Division
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Karla Yates, Executive Officer
Industrial Welfare Commission
Department of Industrial Relations
30 Van Ness Avenue, Suite 4400
San Francisco, CA 94102

799408119

CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

SACRAMENTO, CALIFORNIA

In re:	1990 OAL Determination No. 11
Request for Regulatory Determination filed by Musick, Peeler & Garrett regarding a policy of the Division of Labor Standards Enforcement requiring employers to pay for meal periods of employees who are required to remain on employment premises	[Docket No. 89-018] July 31, 1990 Determination Pursuant to Government Code Section 11347.5; Title 1, California Code of Regulations, Chapter 1, Article 2

Determination by:

JOHN D. SMITH, Chief Counsel

Herbert F. Bolz, Coordinating Attorney
Debra M. Cornez, Staff Counsel
Rulemaking and Regulatory
Determinations Unit

SYNOPSIS

The issue presented to the Office of Administrative Law is whether or not an enforcement policy of the Division of Labor Standards Enforcement, which states that employers who require employees to remain on the employment premises during a meal period must compensate the employees for that meal period, even when the employees are relieved of all duties, is a "regulation" required to be adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law has concluded that this enforcement policy is not a "regulation" required to be adopted in compliance with the Administrative Procedure Act.

THE ISSUE PRESENTED [2]

The Office of Administrative Law ("OAL") has been requested to determine[3] whether or not an enforcement policy of the Division of Labor Standards Enforcement ("DLSE") is a "regulation" required to be adopted pursuant to the Administrative Procedure Act ("APA"). The enforcement policy states that employers are required to compensate employees for meal periods "as hours worked" when they are required to remain on the employment premises during meal periods, even when the employees are relieved of all duties.

THE DECISION [4,5,6,7,8]

OAL finds that:

(1) the Division's rules are generally required to be adopted pursuant to the APA;

(2) the challenged enforcement policy is not a "regulation" as defined in the key provision of Government Code section 11342, subdivision (b), but is merely an application of existing law to a particular set of facts without further interpreting or supplementing the law; and therefore,

(3) the enforcement policy does not violate Government Code section 11347.5, subdivision (a).[9]

REASONS FOR DECISION

I. AGENCY; AUTHORITY; BACKGROUND

Agency

A cabinet-level agency, the Department of Industrial Relations ("Department") was first created in 1921 as the Department of Labor and Industrial Relations.[10] In 1927, the Legislature gave the agency its present name.

Within the Department, there is the Division of Labor Standards Enforcement[11] ("DLSE" or "Division"), created in 1976 by the enactment of Labor Code sections 82 and 83.[12] The California Labor Commissioner is Chief of DLSE.[13]

DLSE is responsible for enforcing various provisions of the California Labor Code, including those involving wages, hours and working conditions.[14] DLSE also investigates employee complaints, resolves claims for wages and benefits and may provide for a hearing in any action to recover wages, penalties, and other demands for compensation.[15]

Authority [16]

Due to the complexity of the organization of the Department of Industrial Relations, the extent of DLSE's rulemaking power is not readily apparent.[17] As this matter comes before us solely in the context of a request for regulatory determination, however, we need not reach any definitive conclusions with respect to the issue of "authority." (See note 16 for additional discussion.)

Background: This Determination

To facilitate better understanding of the issues presented in this determination, we set forth the following relevant statutes, Industrial Welfare Commission orders contained in the California Code of Regulations ("CCR"), and undisputed facts.

Labor Code section 1193.5 states in part:

> "The provisions of this chapter [chapter 1, part 4 of the Labor Code, sections 1171-1204] shall be administered and enforced by the division [DLSE] . . . ."

Labor Code section 1198.4 provides in part:

> "Upon request, the Chief of [DLSE] shall make available to the public any enforcement policy statements or interpretations of orders of the Industrial Welfare Commission. . . ."

The Industrial Welfare Commission ("Commission" or "IWC") is also within the Department of Industrial Relations.[18] The Commission, following unique rulemaking procedures that date back to the World War I era, adopts regulation orders that govern wages, hours, and working conditions in fifteen different industry and occupation categories.[19] Labor Code section 1185 provides:

> "The orders of the commission [IWC] fixing minimum wages, maximum hours, and standard conditions of labor for all employees, when promulgated in accordance with the provisions of this chapter [Chapter 1 ("Wages, Hours and Working Conditions"), Part 4 of the Labor Code], shall be valid and operative and such orders are hereby expressly exempted from the provisions of [the APA]. [Emphasis added.]"

These orders are located in Title 8, sections 11010 through 11150, of the CCR.[20] As noted above in Labor Code section 1185, these orders, though printed in the CCR, are not subject to the APA's procedural requirements or substantive review by OAL.

In each order section, except as noted below, under subsection 2 ("Definitions"), the term "Hours worked" is defined as:

> "'Hours worked' means the time during which an employee is subject to the control of the employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so."

Additional language appears in the definition of "Hours worked" in section 11050, which governs the Public Housekeeping Industry. This term is defined in subsection 2 as:

> "'Hours worked' means the time during which an employee is subject to the control of the employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so, and in the case of an employee who is required to reside on the employment premises, that time spent carrying out assigned duties shall be counted as hours worked."

On September 28, 1989, Richard J. Simmons ("Requester"), an attorney with Musick, Peeler & Garrett, submitted to OAL a Request for Determination challenging DLSE's enforcement policy that

> "whenever an employer requires its employees to remain on the [employment] premises for meal periods, it is exerting control and must pay for that time as 'hours worked' even if the employees are relieved of all other job duties."[21]

As evidence of this enforcement policy, the Requester included with the Request five exhibits; only the first one will be set out here.[22] The first exhibit includes two documents. The first document is a reply letter dated January 5, 1988, addressed to Richard S. Rosenberg, from former Labor Commissioner, Lloyd W. Aubry, Jr. The Labor Commissioner states therein:

> "The Division has historically taken the position that unless employees are relieved of all duties and are free to leave the premises, the meal period is considered as 'hours worked. [Emphasis added.]"

The second document is a declaration by C. Robert Simpson, Jr., another former Labor Commissioner. This declaration was submitted in support of DLSE's opposition to a preliminary injunction regarding the same enforcement policy challenged in this determination proceeding. The declaration was also apparently enclosed with the letter to Mr. Rosenberg. In the declaration, Mr. Simpson states at paragraphs 3 and 4:

> "3. It is the policy of the [DLSE] that whenever an employer has employees under his dominion, direction or control, that employer is required to pay for the employee's time.
>
> "4. Whenever an employer requires his employees to remain on premises for meal periods he is exerting control and must pay for that time as 'hours worked' even if the employees are relieved of all other job duties. [Emphasis added.]"

The Requester argues in summary that

> "The DLSE enforcement policy concerning the mandatory treatment of off-duty meal periods as hours worked clearly constitutes a 'regulation' within the meaning of the APA and should be invalidated. The DLSE's substantive rule was not promulgated or adopted in accordance with the provisions of the APA even though the DLSE is an agency subject to the APA and the enforcement policy establishes new and specific legal standards that apply to every employer in the state that is subject to the Wage Orders. . . . [Emphasis in original.]"[23]

On March 16, 1990, OAL published a summary of this Request for Determination in the California Regulatory Notice Register,[24] along with a notice inviting public comment.

On April 26, 1990, OAL received DLSE's Response to the Request for Determination. DLSE's arguments will be addressed below.

II. ISSUES

There are three main issues before us:[25]

(1) WHETHER THE APA IS GENERALLY APPLICABLE TO THE DLSE'S QUASI-LEGISLATIVE ENACTMENTS.

(2) WHETHER THE CHALLENGED POLICY IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

(3) WHETHER THE CHALLENGED POLICY FALLS WITHIN ANY ESTABLISHED GENERAL EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE APA IS GENERALLY APPLICABLE TO DLSE'S QUASI-LEGISLATIVE ENACTMENTS.

The APA generally applies to all state agencies, except those in the "judicial or legislative departments."[26] Since DLSE is in neither the judicial nor legislative branch of state government, we conclude that APA rulemaking requirements generally apply to the it.[27]

We are aware of no specific[28] statutory exemption which would permit DLSE to conduct rulemaking without complying with the APA.

SECOND, WE INQUIRE WHETHER THE CHALLENGED POLICY IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In part, Government Code section 11342, subdivision (b), defines "regulation" as:

> ". . . every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, . . ." [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

> "(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA] . . . ." [Emphasis added.]

Applying the definition of "regulation" found in the key provision Government Code section 11342, subdivision (b), involves a two-part inquiry:

First, is the challenged rule of the state agency either

- a rule or standard of general application or
- a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either

- implement, interpret, or make specific the law enforced or administered by the agency or
- govern the agency's procedure?

The answer to the first inquiry is "yes."

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.[29] The enforcement policy is clearly a standard of general application. It is applied to all employers who are subject to the Commission's orders.

The answer to the second inquiry is "no."

In general, when an agency merely applies the law that it is charged with administering or enforcing and does not add to, interpret or modify that law, then the agency may legally inform interested parties of the law and its application. Such an action by the agency is nonregulatory and is simply "administrative" in nature. If, however, the agency makes new law, i.e., supplements or further interprets a statute or provision of law, such activity is deemed to be an exercise of quasi-legislative power.

In its Response, DLSE argues that the challenged enforcement policy is merely an application of the law that it is charged with enforcing. DLSE also argues that the enforcement policy is an application of the law to a particular set of facts, and that the application is the only legally tenable interpretation; i.e., whenever an employer requires his or her employees to remain on the employment premises during a meal period, the employer is exerting control over the employees, even if the employees have been relieved of all duties, and therefore, the employer must compensate the employees for the meal period as "hours worked."

The term "Hours worked" is defined as "time during which an employee is subject to the control of the employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." (Emphasis added.) There is no doubt that when an employer requires his or her employees to remain on the employment premises during meal periods that the employer is exerting control over the employees, even when the employees are relieved of all duties. We conclude that the challenged enforcement policy is the only legally tenable interpretation, and therefore is not a "regulation" as defined in Government Code section 11342, subdivision (b).

While we agree with DLSE and find that the enforcement policy is merely DLSE's application of the law to a particular set of facts, without further interpreting or supplementing the law, we find it necessary to express our disagreement with other points made by DLSE in its Response.[30]

There is no question that DLSE has the statutory authority to enforce the Commission's orders or that DLSE is statutorily required to "make available to the public any enforcement policy statements or interpretations of orders of the [Commission]."[31] This statutory authority and requirement, however, does not exempt DLSE enforcement policies from the scope of the APA, which argument DLSE would like OAL to accept.[32] Government Code section 11346 specifically states that APA requirements are applicable to any exercise of quasi-legislative power unless expressly exempted by the Legislature.

DLSE presents the argument, as it has in prior determination proceedings, that DLSE enforcement policies are not subject to the APA. As support for this argument, DLSE cites, again, Skyline Homes, Inc. v. Department of Industrial Relations,[33] which states

> "Similarly, in this case, DLSE is not promulgating regulations. The regulation is wage order 1-76,

> properly promulgated by the [Commission]. The DLSE is charged with enforcing the wage orders, to do so, it must first interpret them. The enforcement policy is precisely that--an interpretation--and need not comply with the APA."[34]

We reject this argument hear as we have done in the prior OAL determinations--one concerning the California Coastal Commission, and two concerning the Labor Commissioner.[35] We reject the proposition that Skyline gives state agencies carte blanche to avoid compliance with the APA.

Another argument presented by DLSE is that the letter to Mr. Rosenberg from former Labor Commissioner Aubry, and the declaration of former Labor Commissioner Simpson are documents that

> "are simply responses to requests for information. In the case of the letter of Commissioner Aubry, the document is a response to a request for an opinion regarding the interpretation of the IWC Orders which the employer could anticipate if enforcement became necessary. The response is mandated by law. In the case of the Declaration of Commissioner Simpson, the response simply states the historical position of the Division which, incidentally, represents the only logical interpretation of the IWC Orders definition of the term 'Hours Worked'."[36]

DLSE further states

> "The provisions of Labor Code [section] 1198.4 make it perfectly clear that the DLSE is required '[u]pon request] to make available to the public any enforcement policy statements or interpretations of orders of the [Commission]. There can be no question that the DLSE has the authority to enforce the IWC Orders. A statement by the DLSE that it will interpret the IWC Orders in a particular manner in the event of an court action does not require compliance. Consequently, any enforcement policy statement or interpretation, whether in the form of a letter, a declaration, an interpretive bulletin or procedure memorandum to the Division personnel which deals with the enforcement of the IWC Orders are not subject to the APA."

Whether a state agency rule constitutes a "regulation" hinges upon its effect and impact on the public,[37] not on the agency's characterization of the rule or the document which contains the rule. We therefore reject the above argument by DLSE.

WE THEREFORE CONCLUDE THAT THE CHALLENGED ENFORCEMENT POLICY IS NOT A "REGULATION" AS DEFINED IN THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342, SUBDIVISION (b), AND THUS IS NOT SUBJECT TO THE REQUIREMENTS OF THE APA.

Having reached the conclusion that the enforcement policy is not a "regulation," it is not necessary for us to undertake the third inquiry of whether the policy falls within any established exception to APA requirements.

III. CONCLUSION

For the reasons set forth above, OAL finds that:

(1) DLSE's rules are generally required to be adopted pursuant to the APA;

(2) the challenged policy is not a "regulation" as defined in the key provision of Government Code section 11342, subdivision (b), but is merely an application of existing law to a particular set of facts without further interpreting or supplementing the law; and therefore,

(3) the policy does not violate Government Code section 11347.5, subdivision (a).

DATE: July 31, 1990

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1. This Request for Determination was filed by Richard J. Simmons, Esq., of Musick, Peeler & Garrett, One Wilshire Boulevard, Los Angeles, CA 90017, (213) 629-7600. The Division of Labor Standards Enforcement, Department of Industrial Relations, was represented by H. Thomas Cadell, Jr., Chief Counsel, 30 Van Ness Avenue, Suite 4400, San Francisco, CA 94102, (415) 557-2516.

To facilitate the indexing and compilation of determinations, OAL began, as of January 1, 1989, assigning consecutive page numbers to all determinations issued within each calendar year, e.g., the first page of this determination, as filed with the Secretary of State and as distributed in type-written format by OAL, is "306" rather than "1." Different page numbers are necessarily assigned when each determination is later published in the California Regulatory Notice Register.

2. The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4.

In August 1989, a second survey of governing case law was published in 1989 OAL Determination No. 13 (Department of Rehabilitation, August 30, 1989, Docket No. 88-019), California Regulatory Notice Register 89, No. 37-Z, p. 2833, note 2. The second survey included (1) five cases decided after April 1986 and (2) seven pre-1986 cases discovered by OAL after April 1986. Persuasive authority was also provided in the form of nine opinions of the California Attorney General which addressed the question of whether certain material was subject to APA rulemaking requirements.

Since August 1989, the following authorities have come to light:

> (1) Los Angeles v. Los Olivas Mobile Home P. (1989) 213 Cal.App.3d 1427, 262 Cal.Rptr. 446, 449 (the Second District Court of Appeal -- citing Jones v. Tracy School District (1980) 27 Cal.3d 99, 165 Cal.Rptr. 100 (a case in which an internal memorandum of the Department of Industrial Relations became involved) -- refused to defer to the administrative interpretation of a rent stabilization ordinance by the city agency charged with its enforcement because the interpretation occurred in an internal memorandum rather than in an administrative regulation adopted after notice and hearing).

(2) Compare Developmental Disabilities Program, 64 Ops.Cal.Atty.Gen. 910 (1981) (Pre-11347.5 opinion found that Department of Developmental Services' "guidelines" to regional centers concerning the expenditure of their funds need not be adopted pursuant to the APA if viewed as nonmandatory administrative "suggestions") with Association of Retarded Citizens v. Department of Developmental Services (1985) 38 Cal.3d 384, 211 Cal.Rptr. 758 (court avoided the issue of whether DDS spending directives were underground regulations, deciding instead that the directives were not authorized by the Lanterman Act, were inconsistent with the Act, and were therefore void).

(3) California Coastal Commission v. Office of Administrative Law (1989) 210 Cal.App.3d 758, 258 Cal.Rptr. 560 (relying on a footnote in a 1980 California Supreme Court opinion, First District Court of Appeal, Division One, set aside 1986 OAL Determination No. 2 (California Coastal Commission, Docket No. 85-003) on grounds that challenged coastal development guidelines fell within scope of express statutory exception to APA requirements); reviewed denied by California Supreme Court on August 31, 1989, two justices dissenting.

(4) Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, modified on other grounds, 219 Cal.App.3d 1151e, petition for review unanimously denied, June 21, 1990 (giving "due deference" to 1987 OAL Determination No. 10 (Department of Health Services, Docket No. 86-016), the Second District Court of Appeal, Division Three, held that the statistical extrapolation rule used in Medi-Cal provider audits was an invalid and unenforceable underground regulation).

Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL's Regulatory Determinations Unit with a citation to the opinion and, if unpublished, a copy of the opinion. (Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index.) Readers are also encouraged to submit citations to Attorney General opinions addressing APA compliance issues.

3. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), section 121, subsection (a), provides:

> "'Determination' means a finding by [OAL] as to whether a state agency rule is a [']regulation,['] as defined in Government Code section 11342, sub-

> division (b), which is invalid and unenforceable unless it has been adopted as a regulation and filed with the Secretary of State in accordance with the [APA] or unless it has been exempted by statute from the requirements of the [APA]." [Emphasis added.]

See Planned Parenthood Affiliates of California v. Swoap (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b), yet had not been adopted pursuant to the APA, was "invalid").

4. In a recent case, the Second District Court of Appeal, Division Three, held that a Medi-Cal audit statistical extrapolation rule utilized by the Department of Health Services must be adopted pursuant to the APA. Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, modified on other grounds, 219 Cal.App.3d 1151e, petition for review unanimously denied, June 21, 1990. Prior to this court decision, OAL had been requested to determine whether or not this Medi-Cal audit rule met the definition of "regulation" as found in Government Code section 11342, subdivision (b), and therefore was required to be adopted pursuant to the APA. Pursuant to Government Code section 11347.5, OAL issued a determination concluding that the audit rule did meet the definition of "regulation," and therefore was subject to APA requirements. 1987 OAL Determination No. 10 (Department of Health Services, Docket No. 86-016, August 6, 1987). The Grier court concurred with OAL's conclusion.

The Grier court stated that the

> "Review of [the trial court's] decision is a question of law for this court's independent determination, namely, whether the Department's use of an audit method based on probability sampling and statistical extrapolation constitutes a regulation within the meaning of section 11342, subdivision (b). [Citations.]" 219 Cal.App. 3d at ___, 268 Cal.Rptr. at p. 251.

In regards to the treatment of 1987 OAL Determination No. 10, which was submitted to the court for consideration in the case, the court further found

> "While the issue ultimately is one of law for this court, 'the contemporaneous administrative construction of a statute by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. [Citations.]'

> [Citations.] [Par.] Because [Government Code] section 11347.5, subdivision (b), charges the OAL with interpreting whether an agency rule is a regulation as defined in [Government Code] section 11342, subdivision (b), we accord its determination due consideration." (Id.; emphasis added.)

The court also ruled that OAL's Determination, that "the audit technique had not been duly adopted as a regulation pursuant to the APA, . . . [and therefore] deemed it to be an invalid and unenforceable 'underground' regulation," was "entitled to due deference." (Emphasis added.) 219 Cal.App.3d at ___, 268 Cal.Rptr. at p. 247.

Other reasons for according "due deference" to OAL determinations are discussed in note 5 of 1990 OAL Determination No. 4 (Board of Registration for Professional Engineers and Land Surveyors, February 14, 1990, Docket No. 89-010), California Regulatory Notice Register 90, No. 10-Z, March 9, 1990, p. 384.

5. Note Concerning Comments and Responses

In general, in order to obtain full presentation of contrasting viewpoints, we encourage not only affected rulemaking agencies but also all interested parties to submit written comments on pending requests for regulatory determination. (See Title 1, CCR, sections 124 and 125.) The comment submitted by the affected agency is referred to as the "Response." If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

No public comments were submitted in this proceeding.

DLSE's Response to the Request for Determination was received by OAL on April 26, 1990 and was considered in this proceeding.

6. If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Government Code section 11347.5, subd. (b)) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.)

7. Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on the first page of this Determination.

8. We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.

The rulemaking portion of the APA and all OAL Title 1 regulations are both reprinted and indexed in the annual APA/OAL regulations booklet, which is available from OAL's Information Services Unit for $3.00.

9. Government Code section 11347.5 provides:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

"(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a [']regulation['] as defined in subdivision (b) of Section 11342.

"(c) The office shall do all of the following:

1. File its determination upon issuance with the Secretary of State.

2. Make its determination known to the agency, the Governor, and the Legislature.

3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.

4. Make its determination available to the public and the courts.

"(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.

"(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:

1. The court or administrative agency proceeding involves the party that sought the determination from the office.

2. The proceeding began prior to the party's request for the office's determination.

3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a [']regulation['] as defined in subdivision (b) of Section 11342."

[Emphasis added.]

10. Labor Code section 50.

11. Labor Code section 79.

12. Statutes 1976, chapter 746, sections 16 and 17.

13. Labor Code sections 79 and 82. The Labor Commissioner is also the Chief of the Division of Labor Standards Enforcement.

14. Labor Code section 61.

15. Labor Code section 98.

16. We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. (Only persons who have formally requested notice of proposed regulatory actions from a specific rulemaking agency will be mailed copies of that specific agency's rulemaking notices.) Such public comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

17. Labor Code section 55 grants the director of the Department of Industrial Relations ("department") general rulemaking authority. Section 55 provides in part that:

> ". . . Notwithstanding any provision in this code to the contrary, the director may require any division in the department to assist in the enforcement of any or all laws within the jurisdiction of the department . . . . [T]he director may, in accordance with the [APA], make such rules and regulations as are reasonably necessary to carry out the provisions of this chapter [sections 50-64] and to effectuate its purposes." [Emphasis added.]

Labor Code section 56 provides:

> "The work of the department shall be divided into at least six divisions [one is] known as . . . the Division of Labor Standards Enforcement . . . ."

Labor Code section 59 provides:

> "The department through its appropriate officers shall administer and enforce all laws imposing any duty, power, or function upon the offices or officers of the department." [Emphasis added.]

Labor Code section 61 provides:

> "The provisions of Chapter 1 [Wages, Hours and Working Conditions] (commencing with Section 1171) of Part 4 of Division 2 shall be administered and enforced by the department through the Division of Labor Standards Enforcement."

18. Labor Code section 70.

19. See Labor Code section 1173.

20. The following sections of Title 8, CCR, set forth the orders regulating wages, hours, and working conditions of the particular industry or occupation:

> Section 11010 governs the Manufacturing Industry.
>
> Section 11020 governs the Personal Service Industry.
>
> Section 11030 governs the Canning, Freezing, and Preserving Industry.
>
> Section 11040 governs Professional, Technical, Clerical, Mechanical, and Similar Occupations.

Section 11050 governs the Public Housekeeping Industry.

Section 11060 governs the Laundry, Linen Supply, Dry Cleaning, and Dyeing Industry.

Section 11070 governs the Mercantile Industry.

Section 11080 governs the Industries Handling Products After Harvest.

Section 11090 governs the Transportation Industry.

Section 11100 governs the Amusement and Recreation Industry.

Section 11110 governs the Broadcasting Industry.

Section 11120 governs the Motion Picture Industry.

Section 11130 governs the Industries Preparing Agricultural Products for Market, on the Farm.

Section 11140 governs Agricultural Occupations.

Section 11150 governs Household Occupations.

21. Request for Determination, p. 8.

22. The first exhibit is set out in the text of the determination. The other four exhibits include: (1) a portion of a training manual concerning the Public Works Employment Act of 1977, (2) DLSE Policy/Procedural Memo 77-3 concerning the application of Industrial Welfare Commission orders to organized camps and day camps, (3) DLSE Policy/Procedural Memo 78-1 also concerning the application of Industrial Welfare Commission orders to organized camps, but reflecting the changes invoked by the enactment of Labor Code section 1182.3 (SB 408), and (4) section 10.69 of DLSE's Operations and Procedures Manual concerning wages and student employees of organized camps.

The Requester argues that these other four exhibits show that in certain situations DLSE has not required employers to pay for meal periods as "hours worked" when the employees are required to remain on the employment premises during meal periods, i.e., ambulance drivers, organized camps. After reviewing these exhibits, the applicable law and DLSE's Response, we find that DLSE's enforcement policy has been consistently applied except where the law allows for such exemptions.

23. See Request for Determination, pp. 21-22.

The Requester also argued that DLSE's enforcement policy "is flatly contradicted by the well-established regulations [see 29 C.F.R. section 785.19] that have been adopted under the federal wage and hour law, the Fair Labor Standards Act of 1938 ("FLSA")." Request, p. 10. "In short, the case law and regulations under the FLSA that have existed for decades firmly hold that meal periods during which employees are confined to their employers' premises do not constitute hours worked." Request, p. 14.

To this argument, DLSE responded that the federal regulations interpreting FLSA are not binding on DLSE, which is responsible for interpreting and enforcing state IWC orders, for the following reasons: (1) FLSA does not specifically define "hours worked" except as the term applies to time spent "changing clothes" and "washing" in employments covered by collective bargaining agreements; (2) IWC orders define "hours worked," whereas FLSA defines "workweek," which definition does not include "time during which an employee is subject to control of an employer"; and (3) federal regulations adopted by a federal agency to enforce a federal law is not binding on a state agency that is responsible for interpreting and enforcing a state law that is patterned on the federal law. (Hernandez v. Mendoza (1988) 199 Cal.App.3d 721, 726, fn. 1, 245 Cal.Rptr. 36, 39, fn. 1, citing Alcala v. Western Ag Enterprises (1986) 182 Cal.App.3d 546, 550, 227 Cal.Rptr. 453, "The Alcala court noted, that since California's wage laws are patterned on federal statutes, federal cases construing those federal statutes provide persuasive guidance to state courts [emphasis added].")

We agree with these arguments made by DLSE and find that the federal regulations interpreting FLSA are not binding on DLSE in interpreting IWC wage orders.

24. California Regulatory Notice Register 90, No. 11-Z, March 16, 1990, p. 425.

25. See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); and cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.

26. Government Code section 11342, subdivision (a). See Government Code sections 11343, 11346 and 11347.5. See also Auto and Trailer Parks, 27 Ops.Cal.Atty.Gen. 56, 59 (1956). For a complete discussion of the rationale for the "APA applies to all agencies" principle, see 1989 OAL Determination No. 4 (San Francisco Regional Water Quality Control Board and the State Water Resources Control Board, March 29, 1989, Docket No. 88-006), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, pp. 1026, 1051-1062; typewritten version, pp. 117-128.

27. See Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi-legislative activities); Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.

28. By "specific," we mean an exemption which pertains solely to one specific program or to one specific agency, such as the statute stating that the rule setting the California minimum wage is exempt from APA requirements (Labor Code section 1185). A specific exemption contrasts with a "general" exemption or exception, which applies across-the-board to all agency enactments of a certain type, such as the "internal management" exemption.

29. Roth v. Department of Veteran Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552.

30. Though time does not allow us to address in the text of the determination each argument raised by the Requester and DLSE, we did review them all thoroughly. We conclude that none of the arguments, including a number of peripheral arguments, would not require us to reach a different result here.

31. Labor Code section 1198.4.

32. DLSE's Response, p. 5.

33. (1985) 165 Cal.App.3d 239, 211 Cal.Rptr. 792.

34. Id., 165 Cal.App.3d at 253, 211 Cal.Rptr. at 800.

35. 1986 OAL Determination No. 2 (Coastal Commission, April 30, 1986, Docket No. 85-003), California Administrative Notice Register 86, No. 20-Z, May 16, 1986, pp. B-34--B-35; typewritten version, pp. 8-10.

1987 OAL Determination No. 4 (Department of Industrial Relations, Division of Labor Standards Enforcement, March 25, 1987, Docket No. 86-010), California Administrative Notice Register 87, No. 15-Z, April 10, 1987, pp. B-33--B-34; typewritten version, pp. 8-9.

1987 OAL Determination No. 7 (State Labor Commissioner, May 27, 1987, Docket No. 86-013), California Administrative Notice Register 87, No. 24-Z, June 12, 1987, p. B-45, typewritten version, pp. 9-11.

36. DLSE's Response, p. 9.

37. Winzler & Kelly v. Department of Industrial Relations, supra, note 27.

38. We wish to acknowledge the substantial contribution of Unit Legal Assistant Melvin Fong and Senior Legal Typist Tande' Montez in the processing of this Request and in the preparation of this Determination.

No. 13-55400

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSELUIS ALCANTAR,
on behalf of himself and all others similarly situated,

Plaintiff/Appellant,

vs.

HOBART SERVICE;
ITW FOOD EQUIPMENT GROUP, LLC,

Defendants/Appellees.

APPELLANT'S OPENING BRIEF

On Appeal from the United States District Court
for the Central District of California
D.C. No. 5:11-cv-01600-PSG-SP
(Hon. Philip S. Gutierrez)

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I. STATEMENT OF JURISDICTION

On November 28, 2012, the district court denied Appellant Joseluis Alcantar's motion for class certification. (Excerpts of Record "ER" 22-28) On December 13, 2012, the district court granted in part Hobart Service's, a division of ITW Food Equipment Group, LLC, and ITW FOOD EQUIPMENT GROUP, LLC's ("Hobart") motion for summary judgment. (ER12-21) On January 22, 2013, the district court granted Hobart's subsequent motion for summary judgment. (ER4-11) On March 4, 2013, the district court entered an order of dismissal. (ER2-3) On March 7, 2013, Alcantar filed a notice of appeal. (ER114-146) On May 13, 2013, the district court entered an order taxing costs. (ER1) On May 30, 2013, Alcantar filed an amended notice of appeal. (ER29-63) This court has jurisdiction to hear this matter pursuant to 28 U.S.C. section 1291, because the judgment entered by the district court is final and Alcantar timely filed a notice of appeal.

II. ISSUES PRESENTED

The issues before this Court are as follows:

1. Is time spent by Service Technicians transporting Hobart's tools and equipment, without which Technicians cannot do their jobs, to and from job sites in Hobart's service vehicles, for which Hobart forbade any personal use, compensable time?

2. Did the district court err when it denied certification of Alcantar's overtime claims based on its merits determination that Hobart's failure to pay Service Technicians for time spent transporting Hobart's tools and equipment to and from job sites in Hobart service vehicles did not give rise to a legal claim because this time, as a matter of law, is not compensable?

3. Did the district court err in denying Alcantar's motion for class certification of Alcantar's meal break claims by applying the wrong burden of proof and ignoring Alcantar's theory of liability that challenged the legality of Hobart's lack of a compliant meal break policy based on the uniform facts that Hobart took no action to relieve Service Technicians of duty for meal breaks, kept no meal break records, did not schedule meal breaks, did not tell Service Technicians that they were entitled to meal breaks at the 5-hour mark in the work day, that meal breaks should last at least 30 minutes, that they should be uninterrupted, and that no work should be done during the meal break, did not provide Service Technicians meal breaks if they work more than 10 hours in one day, and did not have a system in place whereby it could pay Service Technicians for missed meal breaks?

4. Did the district court err in denying Alcantar's motion for class

2000). The moving party bears these burdens regardless of whether the non-moving party bears the ultimate burden of proof at trial. Id. at 1107, citing Clark v. Coats & Clark, Inc., 929 F.2d 604, 607-08 (11th Cir. 1991).

Celotex does not alter the basic tenet that: "[t]he party seeking summary judgment bears the *exacting* burden of demonstrating that there is no actual dispute as to any material fact in the case." Clark, 929 F.2d at 607 (emphasis added, citations omitted.) There is a genuine issue for trial, precluding summary judgment, if the non-moving party presents evidence from which a reasonable jury *could* return a verdict in its favor. Anderson, 477 U.S. at 248. Anderson iterated that the opposing party need not win the day at this stage, explaining: "We repeat, however, that the plaintiff, to survive the defendant's motion, need only present evidence from which a jury *might* return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial." Id. at 257 (emphasis added.)

Following these analytical rules, at summary judgment, the court must view the evidence in the light most favorable to the non-moving party. Id. at 255. As Anderson stated: "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Id. The district court ignored all of this instruction.

2. At A Minimum, Factual Disputes Exist On The Question Of Whether Time Spent Transporting

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party's case, and on which that party will bear the burden of proof at trial."

Hobart's Tools And Equipment Is Compensable

The district court granted summary judgment on Alcantar's overtime claim on a single faulty ground. It erroneously found that there is no factual dispute as to whether Hobart required Technicians "to drive the service vehicle to [their] homes," and then held this fact determinative. (ER15) Ignoring all other evidence, the district court focused exclusively on a statement in the Rules/Understandings which reads that Technicians had the option of either (1) driving Hobart service vehicles, that Hobart assigned to them and in which they hauled Hobart's valuable tools and equipment, to their homes or (2) Technicians could park the vehicles at one of Hobart's locations. (ER16) Since the district court found that Technicians chose to drive the vehicles home and were not required to do so, it concluded that Hobart did not exercise enough control over Technicians' driving time to make that time compensable. (ER16, 2901)

The court reached this conclusion in disregard of its obligation to view the record in the light most favorable to the non-moving party and draw all justifiable inferences in Alcantar's favor. Anderson, 477 U.S. at 255 (1986). It gave no weight to evidence, on which a jury could find that this choice was notional and that Hobart effectively required Technicians to park the vehicles at their homes. This evidence raised a genuine factual dispute on this one issue as it pertained to whether time Technicians spend driving Hobart's vehicles to haul Hobart's

valuable contents to and from home and jobsites was subject to Hobart's control and, thus, constituted hours worked.

The trial court further erred in failing to consider whether Alcantar was "suffered and permitted to work" when he hauled Hobart's tools and equipment to and from his home and jobsites. Time an employee is "suffered and permitted to work," whether required to do so or not, constitutes an independent category of "hours worked" that is compensable under California law. Had the trial court analyzed this independent standard, and not halted its analysis after erroneously finding a lack of control, it would have faced, at a minimum, material disputed issues of fact as to whether Hobart suffered and permitted Alcantar to work when he drove Hobart's service vehicle, and the tools and parts it housed, between his home and jobsites.

3. The Trial Court Misconstrued Morillion's Definition of "Control"

Morillion, defined "hours worked," for which employers must compensate employees, as all time "during which an employee is subject to the control of an employer" *and* "time the employee is suffered or permitted to work, whether or not required to do so." 22 Cal. 4th at 582. Morillion held that these two circumstances are distinct and each separately defines when time spent is compensable as "hours worked." Id.

In determining whether travel time constitutes "hours worked" under the

"control" factor, Morillion stated: "[t]he level of the employer's control over its employees, rather than the mere fact that the employer requires the employees' activity, is determinative." Id. at 586. When employers dictate "when, where, and how [employees] must travel," they become responsible for paying employees for their travel time. Id. Morillion rejected the argument that "plaintiffs were not under [the employer's] control during the required bus ride because they could read on the bus, or perform other personal activities," explaining:

> Permitting plaintiffs to engage in limited activities such as reading or sleeping on the bus does not allow them to use 'the time effectively for [their] own purposes.' [Citation.]... [D]uring the bus ride plaintiffs could not drop off their children at school, stop for breakfast before work, or run other errands requiring the use of a car. Plaintiffs were foreclosed from numerous activities in which they might otherwise engage if they were permitted to travel to the fields by their own transportation. Allowing plaintiffs the circumscribed activities of reading or sleeping does not affect, much less eliminate, the control [the employer] exercises by requiring them to travel on its buses and by prohibiting them from effectively using their travel time for their own purposes. Id. at 586.

Morillion underscored the difference between the rule it articulated and federal law and was unequivocal that the Portal-to-Portal Act has no analogue in California. "The California Labor Code and IWC wage orders do not contain an express exemption for travel time similar to that of the Portal-to-Portal Act." Id. at 590. The Court was unconvinced that the IWC "inten[ded]... to adopt the federal standard for determining whether time spent traveling is compensable under state

law", "decline[d] to import any federal standard, which expressly eliminates substantial protections to employees, by implication," and found its "departure from the federal authority" "entirely consistent with the recognized principle that state law may provide employees greater protection than the FLSA." Id. at 592.

This Court also recognized the difference between California and federal law with regard to travel time. In Rutti, 596 F.3d at 1050, 1061-62, the plaintiff brought a putative class action against an employer in which he alleged claims under the FLSA and California law, seeking compensation for time he and putative class members spent travelling between their homes and worksites in employer owned vehicles. This Court affirmed summary judgment in favor of the employer on the FLSA claim, but reversed summary judgment on the state law claim. Id. at 1051-54, 1061-62. Citing to Morillion, this Court stated, "there... [was] simply no denying" that plaintiff was subject to the employer's control while en route to the first job of the day and on his way home at the end of the day and, therefore, entitled to compensation for his travel time under California law." Id. at 1061-62. The employer required plaintiff to drive a company-owned vehicle to and from worksites, but prohibited him from stopping for personal errands, taking passengers, or using his cell phone while driving except to answer calls from the employer. Id. The employer's computerized scheduling system also dictated plaintiff's first assignment of the day and the order in which plaintiff was to

complete the day's jobs. Id. at 1062. Rutti explained: "[u]nder California law it is the 'level of the employer's control over its employees' that 'is determinative,' not whether the employee just so happens to depart from, or return to, his home instead of some other location," id., quoting Morillion, 22 Cal. 4th at 587. This Court found that the level of control that the employer exercised over plaintiff during his commute was "total control." Rutti, 596 F.3d at 1062.

Following these decisions, the Rodriguez court, 2012 U.S. Dist. LEXIS 164383 at *51-56, based on facts akin to those in this case, held that Morillion *could* also be satisfied by showing "de facto" control. The Washington Supreme Court in Stevens v. Brink's Home Sec., Inc., reached the same conclusion. The Stevens court iterated that the analysis of the question of the level of control exercised by the employer when employees drive company vehicles to and from job sites hauling company tools and equipment necessary to perform the job is not impacted by the fact that the employer gives the employees the option of either parking the vehicles at the company's locations or at their homes at night. The point is what level of control does the employer exercise *when* the employee is driving the vehicle. 169 P.3d 473, 476-77 (Wash. 2007).

If the district court had properly applied the law on the "control" factor, Alcantar, at a minimum, demonstrated the existence of genuine issues of material fact. Alcantar's evidence establishes that Technicians drive service vehicles to and

from their homes and jobsites, hauling Hobart's tools and equipment, without which they cannot not do their jobs, *and* that Hobart dictated "when, where, and how" Technicians must drive while travelling.

Alcantar also presented evidence that he and other Technicians were de facto required to drive the service vehicles home and that parking the vehicles at a branch was not a meaningful alternative. His evidence established: (1) Hobart's written policies made Technicians financially responsible for the tools and equipment stored and transported in the service vehicles, which range in value from $5,000-$80,000; and, (2) Hobart's branch offices do not have space to park all service vehicles in secure locations at night. Alcantar did not leave the service vehicle at a branch location at night because he is "responsible for all the equipment in the van" and there is "no way to secure" the inventory and tools in the van at the branch. (ER2984-2985, 3033) Alcantar was not alone in his concern. Not a single Technician risked parking a service vehicle at a branch location at night: all drove the vehicles home. (ER2984-2985, 3044, 3048-3049, 3054, 3058-3059, 3065, 3070, 3086-3087, 3093, 3098)

The district court also erred by giving no weight to Alcantar's evidence of the restrictions Hobart placed on Technicians during their driving time. These restrictions were like the restrictions in Morillion and Rutti that convinced the courts that the employee's driving time constituted compensable hours. As in

Rutti, Alcantar offered evidence that Hobart controlled where Technicians were permitted to stop when they drove between home and jobsites. All Hobart policies prohibited personal use of service vehicles. The documents state that Hobart provides service vehicles to Technicians for business purposes only and personal use of the vehicles without prior management approval is strictly forbidden and may result disciplinary action. As in Morillion, 22 Cal. 4th at 586, Technicians were not free to use service vehicles to drop off their children at school, stop for breakfast before work, or run other errands requiring the use of a car without prior management approval. As in Rutti, 596 F.3d at 1062, Hobart's computerized scheduling system, uploaded by the DRDs, dictated the first assignment of the day and the order in which Technicians completed the day's jobs. (ER2983, 3044, 3048, 3053, 3059, 3064, 3076, 3087-3088, 3092, 3097) Until June 2012, Hobart required Technicians to answer cell phones assigned to them and respond to calls from a dispatcher while they were driving to and from the first and last jobs of the day. (ER3042, 3048, 3052, 3058, 3065, 3068, 3076-3077, 3087, 3091, 3096)

As in Rutti, Alcantar's evidence also established that Hobart determined how Technicians must travel between home and jobsites. Hobart's policies require that Technicians comply with "all traffic laws," operate the service vehicles in a "courteous manner," and use seat belts, expressly forbid Technicians from transporting passengers absent prior written approval from management and from

carrying alcohol, and require Technicians to agree that they would "exercise reasonable security while the service vehicle is parked at" their residence. (ER2258, 2260, 2263, 2268, 2272-73) The Rules/Understandings inform Technicians that "any infraction of these rules will result in disciplinary action up to and including termination." (ER2901) Even after June 2012, Hobart continued to place substantial restrictions on Technician's use of service vehicles. Hobart still prohibits Technicians from transporting alcohol in service vehicles, from using service vehicles on the weekends, and from using service vehicles after they arrive home from the last job of the day. Technicians may still only transport passengers in service vehicles only with the prior approval of management. (ER22236, 2859, 2903, 2927, 3008, 3027)

This is not a case where the district court had to mine the evidence to ferret out a disputed issue of fact. Hobart's policies and the fact that no Technicians parked at a branch location created a disputed issue of fact as to whether Hobart effectively required Technicians to park at home and thereby subject themselves to Hobart's substantial restrictions on their morning and evening commutes. Thus, the court committed reversible error when it ruled that there was no dispute of fact regarding whether the level of control Hobart exercised over Alcantar.

4. Disputed Issues of Fact Existed Regarding Whether Hobart Suffered And Permitted The Technicians Work

No. 13-55400

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSELUIS ALCANTAR,
on behalf of himself and all others similarly situated,

Plaintiff/Appellant,

vs.

HOBART SERVICE;
ITW FOOD EQUIPMENT GROUP, LLC,

Defendants/Appellees.

APPELLANT'S REPLY BRIEF

On Appeal from the United States District Court
for the Central District of California
D.C. No. 5:11-cv-01600-PSG-SP
(Hon. Philip S. Gutierrez)

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court erred when it denied certification of Alcantar's meal and rest break claims.

C. The District Court Erred When It Granted Summary Judgment Of Alcantar's Overtime Claim

Hobart ignores, as did the district court, the direction Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986), provides: "the plaintiff, to survive the defendant's motion, need only present evidence from which a jury *might* return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial." Id. at 257 (emphasis added.) Hobart also ignores, as did the district court, the instruction that courts must view evidence in the light most favorable to the non-movant. Id. at 255. Anderson emphasized: "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Id. If the district court had followed these rules, it would have denied Hobart's motion for summary judgment.

Campbell is again instructive. Like Hobart here, Best Buy sought summary judgment asserting that time technicians spend driving from the last job to their home was not compensable. 2013 U.S. Dist. LEXIS 137792 at *14. The court focused on the fact that although Best Buy's written policies indicated in certain sections that technicians had the option of leaving the company vehicle at a Best Buy location or taking it home in the evening, other sections of the documents contradicted this notional choice. Campbell iterated that, like here, Best Buy made

technicians responsible for the vehicles. Id. at *20. The court found that these conflicting statements of policy created a genuine issue of material fact precluding summary judgment. Id. The court also found that limitations placed on technicians' use of the vehicles was sufficient to, at a minimum, create issues of fact regarding the control Best Buy placed on the vehicles' use.

Like here, Best Buy required technicians to sign its "Vehicle Operation and Maintenance Acknowledgement" form, which provided: "I understand... that I may not drive the vehicle for personal use." Id. at *21. Because this statement conflicted with other statements in the Best Buy policy, such as "[i]f the vehicle is taken home it may be used to make incidental errands to and from the workplace," the court found that issues of fact precluded summary judgment. The court explained, "even if this second policy were viewed in isolation, it is not clear that it gives license to Techs to run any and all personal errands during their end of the day commutes. Thus, the policy does not state that a Tech is free to run any and all errands. Rather, it limits such errands to those that are 'incidental.'" Id. at *21-22. The court therefore found that a factual issue existed as to the "level of independence a tech had as to what could be done during a drive home." Id. at *22.

Like here, Best Buy's policies provided: "[n]on-employees are not allowed to ride in Company vehicles." Id. at *23. Best Buy also forbade technicians from

transporting alcohol in the company vehicles, which the court recognized would prohibit a technician from stopping "to purchase alcohol that he might present as a gift to someone else or use at his home." Id. Best Buy, like Hobart, required technicians to keep their cell phones on when in the vehicles so they could respond to calls. Id. These facts, coupled with Best Buy's warning that violations of the policies "may result in corrective action up to and including termination," were further evidence precluding summary judgment. Id. at *24.

Campbell applied the appropriate analytical framework when denying Best Buy's summary judgment motion. Unlike Campbell, the district court here ignored Hobart's policies that prohibit personal use of the service vehicles, focusing instead on one sentence in the Rules/Understandings indicating that Technicians have the "option" of either parking the service vehicles at their homes or at branch locations at night. As in Campbell, however, Alcantar presented evidence on which a jury could find that this "option" did not really exist. Given Technicians are responsible for the equipment in the vehicles, a jury could find that parking a service vehicle at a branch location that has no space to store the vehicles in a secure location at night, was not an option. The fact that in the last 20 years not a single Technician availed himself of this "option" would support such a finding.

The district court also did not address the restrictions Hobart placed on Technicians' use of the vehicles, restrictions that mirror the facts of both Morillion

and Rutti. As in Morillion, 22 Cal. 4th at 586, Technicians could not use service vehicles to drop off their children at school, stop for breakfast before work, or run other errands requiring the use of a car without prior management approval. As in Rutti, 596 F.3d at 1062, Hobart's computerized scheduling system, uploaded by the DRDs, dictated the first assignment of the day and the order in which Technicians completed the day's jobs. (ER2983,3044,3048,3053,3059,3064,3076, 3087-3088,3092,3097) As in Rutti, until June 2012, Hobart required Technicians to respond to calls from a dispatcher while driving to and from the first and last jobs of the day. (ER3042,3048,3052,3058,3065,3068,3076-3077,3087, 3091,3096) Even after June 2012, Hobart continued to place restrictions on Technician's use of service vehicles. (ER2236,2859,2903,2927, 3008,3027)

Like in Rutti, Alcantar's evidence established that Hobart determined how Technicians must travel between home and jobsites. Hobart's policies require that Technicians comply with "all traffic laws," operate the vehicles in a "courteous manner," use seat belts, and expressly forbid Technicians from transporting passengers or alcohol. (ER2258,2260,2263,2268,2272-73) Hobart makes clear that "any infraction of these rules will result in disciplinary action up to and including termination." (ER2901)

Hobart continues to rely on the Portal-to-Portal Act, and cases interpreting same, to support its assertion that the time that Technicians spend hauling Hobart's

equipment to and from the first and last job of the day is not compensable. Morillion, however, slammed the door on this argument, explaining: "The California Labor Code and IWC wage orders do not contain an express exemption for travel time similar to that of the Portal-to-Portal Act." Id. at 590. Hence, whether time spent by Technicians hauling Hobart's equipment, without which Technicians cannot do their jobs, is compensable must be determined under California, not federal law. Under each prong of the test to determine hours worked, either the "control" test or the separate and distinct "suffered and permitted" test, issues of fact permeate the record, such that the district court erred when it granted Hobart's motion for summary judgment.

D. The District Court Also Erred When It Granted Hobart's Late Summary Judgment Motion Of Alcantar's PAGA Claims

Hobart gives no justification for its delay in complaining about the sufficiency of Alcantar's PAGA letter. Hobart does not claim it was somehow misled or unaware of the bases of Alcantar's claims, including his rest and meal period claims, or that any lack of knowledge somehow prejudiced its ability to present its defenses to these claims. Hobart presents no such evidence because none exists.

Rather, relying on an unpublished California Appellate Court decision (which California Rule of Court 8.1115 prohibits), and decisions that do not

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AMANDA FRLEKIN et al., Plaintiffs-Appellants, v. APPLE INC., Defendant-Appellee.	No. 15-17382 D.C. Nos. 3:13-cv-03451-WHA 3:13-cv-03775-WHA 3:13-cv-04727-WHA Northern District of California, San Francisco ORDER

Plaintiffs-Appellants' Corrected Motion for Judicial Notice is GRANTED.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Omar Cubillos
Deputy Clerk
Ninth Circuit Rule 27-7

PROOF OF SERVICE

I, the undersigned, hereby declare under penalty of perjury that the following is true and correct:

I am a citizen of the United States; am over the age of 18 years; am employed by THE KRALOWEC LAW GROUP, located at 44 Montgomery Street, Suite 1210, San Francisco, California 94104, whose members are members of the State Bar of California and at least one of whose members is a member of the Bar of each Federal District Court within California; am not a party to the within action; and that I caused to be served a true and correct copy of the following documents in the manner indicated below:

1. **OPENING BRIEF ON THE MERITS;**
2. **MOTION FOR JUUDICIAL NOTICE; MEMORANDUM IN SUPPORT; DECLARATION IN SUPPORT; PROPOSED ORDER; and**
3. **PROOF OF SERVICE.**

- **By Mail**: I placed a true copy of each document listed above in a sealed envelope addressed to each person listed below on this date. I then deposited that same envelope with the U.S. Postal Service on the same day with postage thereon fully prepaid in the ordinary course of business. I am aware that upon motion of a party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing in the affidavit.

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Plaintiff and Appellant, Individually and on behalf of the Certified Class
Via email

Executed this 19th day of December, 2017 in San Francisco, California.

Gary M. Gray