S224853

SUPREME COURT OF CALIFORNIA

JENNIFER AUGUSTUS et al.,

Plaintiffs and Respondents,

v.

ABM SECURITY SERVICES, INC.,

Defendant and Appellant.

2d Civil Nos. B243788 & B247392

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

OPENING BRIEF ON THE MERITS

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

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

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ISSUES FOR REVIEW

(1) Do Labor Code § 226.7, and Industrial Welfare Commission (IWC) wage order No. 4-2001 require that employees be relieved of all duties during rest breaks?

(2) Are security guards who remain on call during rest breaks performing work during that time under the analysis of *Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833?

INTRODUCTION

IWC Wage Order 4 requires employers to provide their employees with two 10-minute rest periods per eight-hour shift. Labor Code section 226.7, subd. (b), prohibits employers from requiring employees to work during those rest breaks. Plaintiff Jennifer Augustus, representing a class of security guards employed by defendant ABM Security Services, Inc., sued ABM for violating section 226.7 by making its guards work while on their rest breaks.

Based on undisputed evidence that ABM did not relieve its guards of all duty during their rest breaks, the trial court granted summary judgment for the plaintiffs. The Court of Appeal reversed, but it did not find that there were any disputed issues of fact. Rather, it held that section 226.7 does not require employers to relieve their employees of all duty during rest breaks, and that ABM's guards were not actually "working" during their breaks because they were "simply on call."

Both aspects of the Court of Appeal's construction of section 226.7 are untenable. The failure to apply the relieved-of-all-duty standard is contrary to the text and purpose of the statute, as well as the terms and structure of the Wage Order. By definition, a rest break is a respite from labor. Therefore, rest breaks and meal breaks must be duty free.

The IWC has allowed employers and employees to agree to on-duty meal breaks in limited circumstances. But no similar provision authorizes on-duty rest breaks. Instead, employers are required to apply to the DLSE for an exemption if providing off-duty rest breaks would be a hardship. ABM certainly knew of the exemption process, having itself utilized the exemption for one year during the class period.

Section 226.7 confirms that rest breaks must be duty free, by expressly forbidding employers from making employees work during those breaks. When employees are required to perform a job duty, they are working — not resting.

The Court of Appeal's construction of section 226.7 cannot be squared with this Court's earlier decisions construing that statute, *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094 ("*Murphy*") and *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 ("*Brinker*").

Murphy describes rest breaks as a time when the employee is "free from employer control." (*Id.*, 40 Cal.4th at p. 1113.) Similarly, *Brinker* holds that section 226.7 requires that off-duty meal breaks be duty-free time when the employer relinquishes control over the employee. (*Brinker*, 53 Cal.4th at pp. 1038, 1040-1041.)

The Court of Appeal sought to distinguish *Brinker* as a case that dealt only with an employer's meal-break obligations. But section 226.7 forbids employees from working during either meal breaks or rest breaks. That prohibition must apply with equal force to both types of breaks unless the word "work" in the statute means different things depending on the type of break at issue. That would be an exceedingly odd way to construe the statute, but it is the central pillar of the Court of Appeal's holding.

The relieved-of-all-duty standard is not only integral to the work-free mandate for rest breaks established by the Wage Order and section 226.7, it is also a clear, easily administered rule that puts employees and employers alike on notice of their respective rights and responsibilities. This standard also protects employee welfare, which is a fundamental purpose of section 226.7. Any other standard would be less clear, harder to administer, and more easily subject to abuse.

The Court of Appeal's conclusion that ABM guards were not working during their rest breaks is belied by the record. The following chart, which is taken verbatim from the opinion below, compares the guards' duties while they are working and while they are on break.

Principal job duties of ABM security guard while on duty	**ABM guard responsibilities during rest breaks**
"The primary responsibility of Security at a guarded facility is to provide an immediate and correct response to emergency/life safety situations (i.e. fire, medical emergency, bomb threat, elevator entrapments, earthquakes, etc.) In addition, the Security officers must provide physical security for the building, its tenants and their employees. The security officer can accomplish this task by observing and reporting all unusual activities. In essence, the officer is the eyes and ears of the Building Management." (*Augustus v. ABM Security Services, Inc.* (2014) 182 Cal.Rptr.3d 679-680.)	"ABM admitted it requires its security guards to keep their radios and pagers on during rest breaks, to remain vigilant, and to respond when needs arise, such as when a tenant wishes to be escorted to the parking lot, a building manager must be notified of a mechanical problem, or an emergency situation occurs." (*Augustus v. ABM Security Services, Inc.*, 182 Cal.Rptr.3d at p. 680.)

Despite the clear overlap between what the guards were required to do while on duty and while on break, the Court of Appeal held that the guards were not working during rest breaks. Instead, the court concluded

that the guards were merely "on-call." It explained, "On-call status is a state of being, not an action. But section 226.7 prohibits only the action, not the status. In other words, it prohibits only working during a rest break, not remaining available to work." (*Augustus*, 182 Cal.Rptr.3d at p. 685.)

The court's analysis therefore holds that (a) the test for what constitutes compensable work under the Wage Order is broader than the prohibition on "work" in section 226.7, and (b) that ABM guards were not actually working while on rest breaks, they were simply remaining available to return to work.

Both aspects of the court's holding are wrong. This Court held in *Brinker* that compliance with section 226.7 required employers to relieve their employees of all duty and to relinquish control over how they spent their time. (*Id.*, 53 Cal.4th at pp. 1038, 1040-1041.) This test is virtually identical to the test for whether time is compensable.

And in *Mendiola*, this Court held that on-call security guards were "engaged to wait" — that is, their job was to wait for something to happen and to respond to it. (*Id.*, 60 Cal.4th at p. 842, n. 10.) The undisputed facts show that ABM required its guards to continue to do that job while they were taking rest breaks. They were not simply on call; they were actively serving as the building management's eyes and ears — which is why, in the trial court, ABM admitted that they were on duty.

In sum, the legislative mandate in section 226.7 is clear. It forbids employees from being required to work during their rest breaks. As this Court held in *Brinker*, unless employees have been relieved of all duty and their employer has relinquished control over how they spend their time, they are working. Since ABM admits that it never relieved its guards of all duty during rest breaks, it violated section 226.7.

STATEMENT OF THE CASE

A. Factual Summary

ABM Security Services, Inc. ("ABM"), formerly d/b/a American Commercial Security Services, Inc. ("ACSS"), employs thousands of security guards in California at residential, retail, office, and industrial sites. (10JA 2965-2966.) Some sites have only one guard on duty; others have multiple guards working at the same time. (ABM's appellant's opening brief in the Court of Appeal ("AOB") at 6.)

Named plaintiffs Jennifer Augustus, Emmanuel Davis, and Delores Hall are all former ABM security guards. (AOB at 6, 7.)

In 2006, after this litigation had commenced, ABM first applied to the DLSE and obtained an exemption from California's rest-break requirements. (10JA 2821-22.) The one-year exemption applied only to its single-guard sites, and it expired in late 2007. (*Id.*) Two years later, ABM received a second exemption, but declined to use it because it did not apply to guards working the day shift. (12JA 3367; AOB at 9.)

B. Procedural Summary

1. July 2005: Augustus files her class-action complaint against ABM, which becomes the lead case in a consolidated proceeding

Augustus filed her class-action complaint against ABM on July 12, 2005. (1JA 1.) It pleaded two causes of action— a violation of Labor Code section 226.7 for failing to provide rest periods, and a violation of the unfair competition law ("UCL"), Business & Professions Code section 17200, et seq., for the same conduct. (1JA 4, 5.) Augustus alleged that ABM required its security guards to work during rest periods and that ABM had not obtained an exemption from the mandatory rest-period requirement. (1JA 2-3 [paras. 9, 10], 4 [para. 17].)

In July 2006, the trial court granted Augustus's motion to consolidate her action with two other class actions filed against ABM. (1JA 63.) A "master complaint" was then filed, which included claims against ABM for failing to provide mandated rest and meal breaks and for failing to pay wages due immediately upon an employee's discharge. (1JA 70, 79 [paras. 30-33], 80-81 [paras. 39, 40].)

2. May 2008: ABM's designated "person most qualified" testifies that the company does not relieve its employees of all duties during rest breaks

Augustus took ABM's deposition in May 2008. ABM designated its Senior Branch Manager, Fred Setayesh, as the person most qualified to testify on its behalf about all subjects designated in the deposition notice, which included the subject of rest breaks. (2JA 476 [para. 6]; AOB at 42-45.) ABM gave the following testimony through Setayesh:

> Q: So it's your understanding that the security guards are taking rest breaks on an irregular basis during their shift while still conscious of their job requirements? In other words, you said they're not entirely relieved of all their job duties but they are receiving their rest breaks, is that correct?
>
> A: I said they're not relieved from all duties, but they are — they can take their breaks.
>
> Q: And that applies for rest breaks and meal breaks?
>
> A: Correct. (2JA 504.)
>
> * * *
>
> Q: Previously you said that some of the duties of the security officers are performed continuously even while taking rest breaks; correct?

A: I said they will not be relieved from all duties.

(2JA 505.)

Setayesh made changes to his testimony on 14 different pages of the deposition transcript, but he left the testimony quoted above unchanged. (2JA 522-523.)

3. February 2009: Plaintiffs successfully move for class certification

Plaintiffs filed a motion for class certification in June 2008, which sought certification of "rest break" and "meal break" subclasses. (1JA 101, 103.) The motion argued that all ABM security guards are subject to "a blanket policy of categorically denying them both off-duty meal breaks and duty-free rest periods." (1JA 111.) It argued that—because ABM has a uniform, company-wide policy and practice requiring all security guards to remain on duty during rest breaks—common factual and legal questions predominated over individual questions, making class certification appropriate. (1JA 124.)

The trial court granted the motion in February 2009, certifying both a meal-break subclass and rest-break subclass. The latter excluded the one-year period when ABM had an exemption from the DLSE from the rest-break requirements. (7JA 1999.)

4. July 2010: Plaintiffs move for summary adjudication of the rest-break cause of action, while ABM cross-moves for summary judgment

a. ABM argues in its summary-judgment motion that the nature of security-guard work requires that it keep its guards on duty at all times

ABM filed its own motion for summary judgment or class decertification, which was heard at the same time as plaintiffs' motion for summary adjudication. (7JA 2043.) In its motion, ABM sought to establish

that both the meal-break and rest-break violations alleged in the master complaint were without merit as a matter of law. The crux of its argument was: (a) the nature of ABM security-guard work required that ABM keep the guards on duty; (b) ABM accordingly had its guards sign on-duty meal agreements when they were hired; and (c) ABM authorized and permitted its employees to take rest breaks. (7JA 2045, 2049-2050.)

ABM's motion asserted that "[t]he nature of a security officer's job duties requires constant monitoring. The public will rightly presume they are on duty and ready to help when they are on the premises. They also must be available for unexpected emergencies . . . ." (7JA 2049.) ABM emphasized what had become its essential theme in this case: that "the nature of security work prevents guards from being relieved of all duty." (7JA 2050.)

It elaborated on that theme in the Statement of Facts, which explained: "All guards are expected to ensure the security of their properties as well as the tenants at their worksite. This includes being available should an emergency arise, such as a medical crisis or fire, *or an unexpected escort be needed.*" (7JA 2053, emphasis added.)

ABM argued that its policy of requiring guards to take on-duty meal breaks was lawful because the nature of security work prevented guards from being relieved of all duties during meal breaks. (7JA 2056-2057.) It insisted that this is true, not only for guards who worked alone, but also at sites with multiple guards: "While security officers at multi-guard locations may not work alone, *they too cannot always be relieved of all duties.* For example, should an emergency arise, which is not uncommon in security work, the officer must immediately be available via radio or cell phone to tend to the crisis." (7JA 2057, emphasis added.)

"Issue 2" within ABM's separate statement supporting its motion contended that ABM was entitled to judgment as a matter of law on plaintiffs' meal-break claim "because the nature of security officer work *prevents guards from being relieved of all duty* during meal periods." (8JA 2115, emphasis added.) In support of this issue, ABM listed the following undisputed facts:

> 20. When a facility is manned by just one security guard, he or she cannot desert his or her post for an extended period.
>
> 21. In the multi-guard situation, even though guards may often take scheduled, 30-minute off-duty breaks, *they must be available, via radio or cell phone,* should an emergency arise, like a tenant getting stuck in the elevator, a fight breaking out, a medical crisis, or someone slipping and falling in the hallway. (8JA 2116-2117, emphasis added.)

ABM also sought summary adjudication of the plaintiffs' rest-break claim. "Issue 5" of its separate statement said: "The undisputed material facts demonstrate that Defendant is entitled to judgment as a matter of law on Plaintiffs' first cause of action for failure to provide rest breaks according to Labor Code § 226.7 because ACSS authorized and permitted rest periods." (8JA 2126.) ABM supported its argument with a host of declarations from security guards who stated that they were allowed to take rest breaks. (7JA 2061, 2062.) But none of those guards said that they were relieved of all duties during those breaks. (*Id.*)

ABM's motion also addressed the exemptions it received from the DLSE for rest breaks. It explained that in late 2006 it obtained a one-year exemption for its single-guard sites. ABM claimed that after the exemption

expired, the replacement exemption that the DLSE offered "could not be administered" so ABM "decided to continue to provide rest breaks rather than attempt to administer the inconsistent exemption." (8JA 2128 [UMF 49].)

b. Plaintiffs move for summary adjudication of their rest-break claim, asserting that ABM does not relieve its guards of all duties during rest breaks

In July 2010, the plaintiffs moved for summary adjudication of their rest-break cause of action. (10JA 2679, 2705.) They argued that California law requires employers to relieve their workers of all duties during rest breaks, unless they obtain an exemption from the DLSE. (10JA 2692, 2693.)

Fact number 1 in the plaintiffs' separate statement in support of the motion was that "Defendant's security guard employees are not relieved of all duties at any time." (10JA 2708.) The evidentiary support for this fact came from ABM's own testimony, through Setayesh, that it had a company-wide policy and practice of not relieving its security guards of all duties during their rest breaks. (10JA 2693.)

Plaintiffs also relied on testimony from ABM's Regional Human Resources Manager, Sarah Knight. (10JA 2813, 2814, 2847.) She testified that ABM's guards are continuously on duty and are expected to interrupt their breaks in order to respond to emergencies. (10JA 2847.)

c. In its opposition, ABM concedes that it does not give its guards off-duty rest breaks

In its opposition to the plaintiffs' motion, ABM did not argue that it relieved its guards of all duties during rest breaks. Instead, it insisted that the guards were not really working during their rest breaks because it allowed them to do things they were forbidden to do while on duty. It asserted:

> Such leisure activities, like reading a book and smoking, are clearly prohibited during work hours. (Additional Fact 32, Declaration of Fred Setayesh, ¶¶ 3-4). Therefore, there is no question that when an officer engages in these non-work activities, he or she is taking a break, even if his or her cell phone or pager may (in some instances) still be on. (Additional Fact 33). (10JA 2914.)

ABM explained that it required its guards to keep their radios or pagers on during breaks so that they could respond to work-related needs that might arise:

> . . . Plaintiffs try to argue that class members' rest periods are not duty free based on Fred Setayesh's single comment that security officers are not "relieved from all duties" during rest breaks. Importantly, Plaintiffs did not set forth Mr. Setayesh's subsequent explanatory testimony *stating that guards simply must keep their radios or pagers on* in case an emergency should arise to ensure the safety of the facility and its tenants. (Additional Fact 33, Setayesh Deposition, 77:3-78:15). (10JA 2914, 2915, emphasis added.)

ABM also denied that California law required it to relieve its guards of all duties during their rest breaks, claiming that would make it impossible to provide rest periods to guards who were working alone. (10JA 2916.) Those were the guards whom the DLSE had previously agreed to exempt from the Wage Order's rest break requirements. (10JA 2822.) ABM insisted that, even after that exemption expired, it was still permitted to

require employees at single-guard sites to interrupt their rest breaks and attend to "business demands." (10JA 2916.)

ABM also argued that because companies can require on-duty meal breaks, they must logically also be allowed to require on-duty rest breaks. (10JA 2916.) It noted that some employees who work alone—like gas-station attendants or baristas in coffee kiosks—take on-duty meal breaks because it is not practical to relieve them of all duties. (*Id.*) According to ABM, "*It would naturally follow* that these workers may take rest breaks that comply with the law even if it means they may occasionally be interrupted by a customer or other business demand." (*Id.*, emphasis added.)

In response to Plaintiffs' Undisputed Fact 1—that ABM guards were not relieved of all duty during rest breaks—ABM stated: "Disputed. ACSS' security officers do not work and are entitled to engage in leisure activities during meal and rest breaks." (10JA 2885). In support of this response ABM cited a new declaration from Setayesh and 20 declarations from ABM security guards. (10JA 2885-2886.)

ABM included certain "additional facts" in its response to the plaintiffs' separate statement, which included:

> 31. Plaintiffs Augustus and Davis were smokers and, like other guards, they took several smoke or rest breaks throughout their employment with ACSS.
>
> 32. Leisure activities, like reading a book and smoking, are clearly prohibited during work hours.
>
> 33. Guards simply *must keep their radios or pagers on in case an emergency - fire, flood, criminal activity, medical crisis or bomb threat - should arise to ensure the safety of the facility and its tenants.* (10JA 2901-2902, emphasis added.)

d. ABM concedes during oral argument that it keeps its guards on duty during breaks

During oral argument of the cross-motions, ABM's counsel admitted that California's rest-break rules required employees to be relieved of all duty. (3RT 4526:24-26.) He argued that ABM complied with that requirement because "[b]eing relieved of duty doesn't mean that you are relieved of the mere possibility that you can be called back." (3RT 4526:26-28.) ABM's counsel also argued that because employees can be required to perform job duties during on-duty meal breaks, they can be required to do the same thing during rest breaks. (3RT 4529:1-18.) "It's just a question of whether it has to be paid," he said. "Every rest period was paid for. There's no off the clock rest period." (*Id.*)

He urged the court to remember that "the guards get paid for the on-duty lunch . . . Just like for a rest period." (3RT 4531:10-12.) ABM paid them to handle "the real life stuff that security guards do. From time to time they will be called to address issues that arise." (3RT 4531:14-18.) "It is the very nature of security guard services that when they will be needed is unknown. And that's why they need to remain on duty, and *that's why they keep them on duty.*" (3RT 4538:26-28, emphasis added.)

5. December 2010: The trial court denies ABM's summary judgment motion and grants the plaintiffs' cross-motion for summary adjudication

On December 23, 2010, the trial court (the Hon. Carolyn Kuhl) issued a written order granting the plaintiffs' motion for summary adjudication and denying ABM's motion. (13JA 3754-3755.) That order described the essence of this case: "Here, Defendant argues that it provides rest breaks, *but acknowledges that a guard's rest break is always an on-duty rest break.* (13JA 3757, emphasis added.)

Judge Kuhl supported that statement by cataloguing ABM's legal arguments and factual showings on the motion:

> Defendant's policies make all rest breaks subject to interruption in case of an emergency or in case a guard is needed (for example, when a tenant needs an escort to the parking lot, which could not be called a life threatening emergency but nonetheless is an important job duty for a security guard.) Because a guard must be available for these situations, guards must keep their cell phones or pagers on. Defendant's position is that interruptions are so rare that the guards are effectively getting their breaks; that plaintiffs have presented no evidence that a guard who was interrupted could not restart their break; and that, because a guard is free to engage in non-work related activities during the rest period (provided the rest break is not interrupted) such as smoking cigarettes, surfing the internet, reading a newspaper or book, having a cup of coffee, etc., that the breaks are in compliance with the wage order and should not be considered on-duty time.
>
> (13JA 3757-3758.)

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

6. February 2012: Plaintiffs bring their summary-judgment motion on behalf of the rest-break subclass

After Judge Kuhl's ruling, ABM cooperated with the plaintiffs in providing the data necessary for the plaintiffs' expert to calculate the appropriate damages, interest, and waiting-time penalties. ABM agreed that it would not object to the underlying data on the grounds of authenticity, foundation, or admissibility. (14JA 3943.)

On February 8, 2012, the plaintiffs filed a motion for summary judgment, which was heard by Judge Wiley. (14JA 3934, 3959; 27JA 7833.) Plaintiffs sought unpaid wages under Labor Code section 226.7 — an hour for each shift worked in excess of 3.5 hours, prejudgment interest on the unpaid wages, waiting time penalties under Labor Code section 203, an injunction, and an award of attorney's fees. (14JA 3943, 3944.)

In opposition, ABM argued that Judge Kuhl's ruling was invalid and that Judge Wiley could (and should) reconsider Judge Kuhl's ruling.[1] (22JA 6292, 6301-6304, 6315.) It also argued that there were disputed factual issues about damages — in particular whether all ABM guards had actually received rest breaks. ABM suggested that there was no evidence of a company "practice" to deny off-duty rest breaks—only a company "policy" not to provide them. (22JA 6308.)

It also argued that the eleven depositions it had taken of its guards after the 2010 summary-adjudication ruling showed that "the majority of the time" the guards received rest breaks and were seldom interrupted. (22JA 6306.) It noted that one guard, David Swagerty, testified that he did

[1] ABM argued that Judge Kuhl's ruling represented a procedurally improper "partial" summary judgment. ABM has not advanced this argument on appeal.

not bring his radio with him on breaks. (24JA 6811, 6814, 6815.) Swagerty did not explain whether he used his pager or cell phone instead. (*Id.*)

After ABM filed its opposition, this Court issued its opinion in *Brinker*. Plaintiffs argued in their reply that *Brinker* confirmed what Judge Kuhl had already determined: that employers are required to relieve their employees of all duties during rest breaks and that ABM's failure to do that violated Labor Code section 226.7. (26JA 7422.)

Plaintiffs also filed excerpts from the depositions of ten of the eleven security guards whom ABM had deposed. All ten of those guards testified that they always kept their radios or pagers on during rest breaks so that they could be contacted if necessary.[2]

7. July 2012: Judge Wiley grants the plaintiffs' motion for summary judgment and enters judgment in favor of the plaintiff class

Judge Wiley heard the plaintiffs' summary-judgment motion on July 6, 2012. (3RT 6301; 27JA 7831.) He issued a written tentative ruling

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[2] Robert Branch was required to carry his radio on breaks, was not allowed to turn it off, and said this meant that being on break was really no different from working. (26JA 7605-7608.) Leo Bennett was required to have his radio on during rest and meal breaks. (*Id.* at 7601.) Santos Delare was required to have his radio on at all times during his breaks. (*Id.* at 7615.) Johan Nowack kept his radio on so he could answer and respond to any call during a break. (*Id.* at 7620.) Stephen Powell always carried his radio during his rest breaks. (*Id.* at 7625-7626.) Carlos Ramirez was trained and instructed by ABM to always keep his radio with him while he was on rest breaks, and that he was not allowed to turn it off. (*Id.* at 7631-7632, 7633-7634.) Saul Torres was required to carry his radio while on meal and rest breaks, so he could be reached in an emergency. (*Id.* at 7645-7647.) Andre Walker trained guards to always carry pagers and radios while on break. (*Id.* at 7655.) Jesse Wallace always kept his radio on during breaks. (*Id.* at 7661.) Jesse Wright was required to have his radio with him at all times during his meal and rest breaks. (*Id.* at 7666, 7668.)

before the hearing, which he ultimately adopted. (3RT 6302:20-6303:6, 6335:27-28.) The essence of the ruling was this: "In general, ACSS balks at the notion that the employer must relieve workers of all duties for the rest break to be . . . legally valid." (Exh. A to ABM RFJN [p. 1].) The court determined that California law *did* require employers to relieve workers of all duty during rest breaks, which meant ABM's practice was illegal. (*Id.* [p. 2].)

Accordingly, Judge Wiley found that there were no triable issues of fact. He noted that even though Swagerty testified that he did not carry his radio on break, there were other ways to contact someone who was on call—such as cell phones. (*Id.*) He concluded that ABM "required all its workers to be on-call during their breaks, and so these on-call breaks are legally invalid." (*Id.*)

Judge Wiley entered judgment for the plaintiffs in the amount of $55,887,565 in statutory damages under Labor Code section 226.7; $31,204,465 in prejudgment interest; and $2,650,096 in waiting-time penalties under Labor Code section 203. (27JA , 7840, 7838-7841.)

8. December 2014: The Court of Appeal reverses the summary judgment, holding that employers need not relieve their employees from all duties during rest breaks

a. The Court of Appeal's original unpublished opinion

On December 31, 2014, the Court of Appeal issued an unpublished opinion that affirmed the class-certification order but reversed the summary judgment against ABM. The court did not find that there were triable issues of fact that precluded summary judgment. Instead, it determined that the trial court applied the wrong legal standard.

Its opinion acknowledged that California forbids employers from requiring their employees to "work" during rest breaks. But it held that

employers are not required to relieve their workers of all duties during rest breaks. The court encapsulated its reasoning in this paragraph from page 10 of its opinion:

> Here, although ABM's security guards were required to remain on call during their rest breaks, they were otherwise permitted to engage and did engage in various nonwork activities, including smoking, reading, making personal telephone calls, attending to personal business, and surfing the Internet. The issue is whether simply being on-call constitutes performing "work." We conclude it does not. (Typed opn. at 10; *Augustus*, 182 Cal.Rprt.3d at pp. 684-685.)

b. The plaintiffs' rehearing petition based on *Mendiola*

Eight days after the court filed its opinion, this Court issued its opinion in *Mendiola v. CPS Security Solutions, Inc.*, 60 Cal.4th 833. *Mendiola* holds that security guards who are kept on call by their employer are, in fact, "working" and are therefore entitled to compensation even if they are permitted to engage in other personal activities, "including sleeping, showering, eating, reading, watching television, and browsing the Internet." (*Mendiola* at p. 9.)

The *Augustus* plaintiffs argued that the holding in *Mendiola* — that security guards are working while they are kept on call — and the reasoning that this Court employed to reach that holding, were irreconcilable with the Court of Appeal's opinion. The plaintiffs asked the court to grant rehearing and to decide this case in light of *Mendiola.*

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

The Court of Appeal did not solicit a response to the rehearing petition from ABM. While the rehearing request was pending, the court received requests for publication from ABM, other security companies, the California Retailers Association, and others.

On January 29, 2015, the panel issued an order denying the petition, modifying its opinion, and granting publication. The court determined that instead of requiring it to reconsider its conclusion that being on call did not constitute "work," the opinion in *Mendiola* actually buttressed its decision because it implicitly distinguished between actually working and simply being available to work. As the court put it: "In sum, although on-call hours constitute 'hours worked,' remaining available to work is not the same as performing work. . . . Section 226.7 proscribes only work on a rest break." (*Augustus*, 182 Cal.Rptr.3d at p. 689, citation omitted.)

To reach this conclusion, the court stated that the term "work" is used as both a noun and a verb in Wage Order 4. When used as a noun it means "employment," that is, the time when an employee is subject to the employer's control. (*Id.* at p. 685.) By contrast, when work is used as a verb it means "exertion." (*Id.*) In the court's view, Labor Code section 226.7, which prohibits employers from requiring their employees to "work" while on rest breaks, "uses 'work' as an infinitive verb contraposed with 'rest.' It is evident, therefore, that 'work' in that section means exertion on an employer's behalf." (*Id.*)

Citing *Mendiola*, the court declared that:

> Not all employees at work actually perform work. '[A]n employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen ....

> [I]dleness plays a part in all employments in a stand-by capacity.'"[Citations omitted.] Remaining on call is an example. On-call status is a state of being, not an action. But section 226.7 prohibits only the action, not the status. In other words, it prohibits only working during a rest break, not remaining available to work." (*Id.*, duplicate internal quotation marks omitted.)

The panel bolstered its conclusion by noting that ABM guards who are on rest break do not perform all of the activities that they perform while on duty. (*Id.* at p. 686.) It also observed that the Wage Order expressly requires that employees be relieved of all duties during meal breaks, but contains no similar requirement for rest breaks. (*Id.* at p. 685.) In the court's view, "If the IWC had wanted to relieve an employee of all duty during a rest period, including the duty to remain on call, it knew how to do so. That it did not indicates that no such requirement was intended." (*Id.*)

The court acknowledged that on-call guards "must return to duty if requested, but as discussed above and as implicitly acknowledged in *Mendiola*, *supra*, remaining available to work is not the same as performing work." (*Id.* at p. 686.)

ARGUMENT

A. Employees in California are entitled to duty-free rest breaks

1. The scope of an employer's duty to provide rest breaks is governed by Labor Code § 226.7 and Wage Order 4-2001

a. Wage Order 4 mandates rest breaks and meal breaks and creates an exemption process

The Legislature established the Industrial Welfare Commission ("IWC") in 1913 to respond to the problem of inadequate wages and poor working conditions. (*Brinker,* 53 Cal.4th at p. 1026.) It delegated certain authority to the IWC, including the power to promulgate wage orders that prescribed minimum wages, maximum hours, and working conditions for various industries. (*Id.*)

The Legislature has also enacted statutes that regulate wages, hours, and working conditions directly. (*Id.*) "Consequently, wage and hour claims are today governed by two complementary and occasionally overlapping sources of authority: the provisions of the Labor Code, enacted by the Legislature, and a series of 18 wage orders adopted by the IWC."[3](*Id.*)

The IWC wage order at issue in this appeal is Wage Order 4-2001, codified at California Code of Regulations, title 8, section 11040 ("Wage Order 4.") Wage Order 4 applies to "Professional, Technical, Clerical, Mechanical, and Similar Occupations," which it defines to include, *inter alia*, "guards." (*Id.*, § 11040, subd. (2)(O); see also *Faulkinbury v. Boyd & Associates, Inc.* (2013) 216 Cal.App.4th 220, 233 [applying Wage Order 4 to

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[3] "Of the 18 wage orders in effect today, 16 cover specific industries and occupations, one covers all employees not covered by an industry or occupation order, and a general minimum wage order amends all others to conform to the amount of the minimum wage currently set by statute." (*Mendiola*, 60 Cal.4th at pp. 838-839 [citations and internal quotation marks and brackets omitted].)

meal and rest-break claims brought by security guards].) It requires employers to pay their employees for "all hours worked in the payroll period." (*Id.*, § 11040, subd. 4(B); *Mendiola*, 60 Cal.4th at p. 839.)

Subdivision 12 of the Wage Order deals with rest periods. It says, "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." (*Id.*, § 11040, subd. (12)(A).) Rest-period time "shall be counted as hours worked for which there shall be no deduction from wages." (*Id.*) Employers must provide a 10-minute rest period to employees for each 3.5 hours worked—which means two rest breaks per 8-hour shift. (*Id.*)[4]

Subdivision 11 of Wage Order 4 deals with meal periods. In general, it requires employers to provide employees who work 5 hours or longer with a 30-minute meal period. (*Id.*, § 11040, subd. (11).)[5]

Subdivision 17 is titled "Exemptions." It authorizes the Department of Labor Standards Enforcement ("DLSE") to grant employers exemptions from some of the Wage Order's requirements in order to avoid undue hardship. The Wage Order's rest-break requirements are among the specified provisions for which exemptions can be obtained. (*Id.*, § 11040, subd. (17).) Under this provision the DLSE has the discretion to exempt an employer from the rest period requirement where it finds that an exemption "would not materially affect the welfare or comfort of employees" and that its denial "would work an undue hardship on the employer." (*Id.*, § 11040, subd. (17).)

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[4] This is a simplified version of the Wage Order's timing requirements. *Brinker* explained the actual calculations in detail. (*Brinker*, 53 Cal.4th at pp. 1029-1030.)

[5] Labor Code section 512 codifies this requirement.

Most wage orders contain the same standard meal-break and rest-break provisions that appear in Wage Order 4, but the IWC chose to modify the requirements for certain industries.[6] The IWC's belief that those changes were necessary sheds light on the meaning of the unmodified language in Wage Order 4, as explained below at pages 24-30.

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[6] Wage Orders 1, 2, 3, 4, 6, 7, 8, 9, 11, 13, and 15 have rest-break provisions that are identical. (8 CCR §§ 11010, subd. 12; 11020, subd. 12; 11030, subd. 12; 11040, subd. 12; 11060, subd. 12; 11070, subd. 12; 11080, subd. 12; 11090, subd. 12; 11110, subd. 12; 11130, subd. 12; 11150, subd. 12 .) The rest-break provision in Wage Order 10, which governs the amusement and recreation industry, has the standard rest-break provision but adds a special provision for crew members employed on commercial fishing boats on overnight trips. (8 CCR § 11100, subd. 12(C). Similarly, Wage Order 12, regulating the motion-picture industry, has an additional paragraph (C), requiring additional interim rest periods for "performers engaged in strenuous physical activities." (*Id.*, § 11120, subd. 12(C).) Wage Order 14, dealing with agricultural occupations, includes the language that is normally placed in paragraph (A) of the standard rest-break provision, which requires rest breaks; but it omits the language usually found in paragraph (B), which provides a remedy of an hour's pay for employees denied a legally compliant rest break. (*Id.*, § 11140, subd. 12.) Wage Order 16, covering "certain on-site occupations in the construction, drilling, logging and mining industries," has an additional sentence included in standard paragraph (A), which says, "Nothing in this provision shall prevent an employer from staggering rest periods to avoid interruption in the flow of work and to maintain continuous operations, or from scheduling rest periods to coincide with breaks in the flow of work that occur in the course of the workday." (*Id.*, § 11160, subd. 11(A).) In addition, unlike any of the rest-break provisions in any of the other wage orders, it contains a provision allowing an employer not to authorize rest breaks, "in limited circumstances when the disruption of continuous operations would jeopardize the product or process of the work." (*Id.*, subd. 11(B).) But when rest periods are missed, the employer must either make up the missed rest-break provision within the same workday, or pay the employee for an additional ten minutes of work. (*Id.*)

b. Labor Code § 226.7 forbids employers from making employees work during meal breaks and rest breaks

Labor Code section 226.7, subdivision (b), states, "An employer shall not require an employee to work during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health."[7]

Subdivision (c) states that, if an employer fails to provide a meal break or rest period in accordance with the applicable wage order, it must pay the employee an additional hour of pay for each workday that the break is not provided.

Subdivision (d) explains that a rest period mandated by state law "shall be counted as hours worked, for which there shall be no deduction from wages. This subdivision is declaratory of existing law." Subdivision (e) declares that the statute does not apply to employees who are exempt from the State's meal, rest, or recovery period requirements.

2. The text and structure of Wage Order 4 preclude on-duty rest breaks

a. The very concept of a "rest break" implies relief from all duty

An "on duty" rest break would be an oxymoron. By definition, a rest break is a period in which an employee is freed from performing his or her work duties. (See Merriam-Webster.com [**rest:** "freedom from activity or labor"; **break:** "a respite from work, school, or duty"].) For this reason the

[7] Section 226.7 was amended in 2013. (Stats. 2013, ch. 719 (S.B. 435), § 1.) Among other things, the amendment redesignated former subdivisions (a) and (b) as subdivisions (b) and (c), respectively, and added subdivisions (d) and (e).

DLSE has construed the Wage Order to require that all rest breaks be duty free. (DLSE Opinion Letter 2002.02.22 ["the rest period must be, as the language implies, duty free"]; *see also* DLSE Opinion Letter 1994.09.28, ["the employer cannot require that the employee perform duties during the paid rest break"].)[8]

Until this case, the Court of Appeal had uniformly agreed with the DLSE and had held that rest breaks must necessarily be "off duty" periods where the employee is relieved of all duties. (*See, e.g., Faulkinbury*, 216 Cal.App.4th at pp. 236, 237 [finding that there is no provision in the Wage Order for on-duty rest breaks, citing Opinion Letter 2002.02.22; *Bufil v. Dollar Financial Group, Inc.* (2008) 162 Cal.App.4th 1193, 1199 [rest breaks did not comply with wage order because employees were unable to "close, tell customers they are off duty, ignore or stop monitoring customer traffic, or otherwise relieve the employee of all duty for 10 consecutive minutes every four hours"]; *Godfrey v. Oakland Port Services Corp.* (2014) 230 Cal.App.4th 1267, 1272, 1286-1287 [approving trial court finding that employer liable for failing to provide rest breaks to truck drivers who were waiting in their trucks to enter the port].)

b. The IWC purposely declined to allow on-duty rest breaks in Wage Order 4

Subdivision 11 of Wage Order 4, which deals with meal periods, distinguishes between on-duty and off-duty breaks. It requires employees to

[8] The DLSE's opinions letters, arranged by date and subject, are available on its website, http://www.dir.ca.gov/dlse/DLSE_OpinionLetters.htm.

be relieved of all duty during meal breaks, except when certain specified conditions are satisfied.[9]

Subdivision 12 of the Wage Order, which mandates rest periods, gives no indication that there are multiple types of rest breaks. It simply mandates breaks, without ever using the phrase "off duty" or "on duty."

Because the wage order does not expressly prohibit on-duty rest breaks, the Court of Appeal concluded that they must be legal. As the court explained it, "If the IWC had wanted to relieve an employee from all duty during a rest period . . . it knew how to do so. That it did not indicates that no such requirement was intended." (*Augustus*, 182 Cal.Rptr.3d at p. 685.)

The Court of Appeal began with a faulty premise. The terms and structure of Wage Order 4 clearly show that, by default, all breaks must be duty free. On-duty breaks are only permitted when the IWC has specifically authorized them. Unless a break falls within one of those specific exceptions, it must be duty free.

The Wage Order *only* allows on-duty meal periods when three conditions are satisfied: (1) the nature of the work must prevent an employee from being relieved of all duty; (2) the employee is being paid for remaining on duty; and (3) the arrangement is documented in a written contract that the employee can revoke at any time. (*Id.*) These restrictions show that on-duty meal breaks are the exception, not the rule, and must be specifically justified by the nature of the work involved, and agreed to by both sides.

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[9] Employees are entitled to a 30-minute meal break if they work more than five hours, but it can be waived by mutual agreement during shifts of less than six hours. (8 CCR § 11040, subd. 11(A).)

There is no comparable authorization for on-duty rest breaks in Subdivision 12. This led the court in *Faulkinbury v. Boyd & Associates, Inc.*, to conclude: "There does not appear to be an on-duty rest break exception as there is for meal breaks." (*Id.*, 216 Cal.App.4th at p. 236.) Because there is no exception, the default rule remains in effect.

In the instant case, the Court of Appeal did not believe that the IWC only intended to exempt meal breaks from the normal relieved-of-duty standard. "On the contrary," it argued, "the IWC's order that an on-duty meal period must be paid implies an on-duty rest period, which is also paid, is permissible." (*Augustus*, 233 Cal.App.4th at p. 685.) This is incorrect. It inverts the settled rule that "the creation of a limited express exemption suggests that a broader implied exemption could not have been intended." (*Wildlife Alive v. Chickering* (1976) 17 Cal.3d 190, 196; accord *Quarry v. Doe I* (2012) 53 Cal.4th 945, 970.)

As Judge Kozinski has noted, this approach would result in a peculiar maxim — *expressio unius est inclusio alterius* — i.e., the expression of one is the inclusion of others. (See *Alvarez v. Tracy* (9th Cir. 2014) 773 F.3d 1011, 1025-1026 (Kozinski, J., dissenting.) ["What good are maxims if judges can stand them on their heads whenever it suits them?"].) Logically, the rule must be (and is) the opposite.

When a statute lists certain exceptions, "a Court cannot say that other exceptions were intended, though not mentioned." (*People ex rel. Melony v. Whitman* (1858) 10 Cal. 38, 45.) Doing so is "in essence a legislative Act" because the court is "saying the law should have been so made, but was not . . ." (*Lee v. Evans* (1857) 8 Cal. 424, 430-431, rhetorical question marks omitted.) Here, the Court of Appeal's opinion redrafted the

Wage Order to authorize a category of breaks that the IWC chose not to recognize.

The court believed "[i]t would make no sense to permit a 30-minute paid, on duty meal break but not a 10-minute paid rest break." (*Augustus*, 233 Cal.App.4th at p. 685.) Actually, it makes perfect sense. Employees are not paid during off-duty meal periods, so they gain something of value when they agree to remain on duty in exchange for an extra half hour of wages. But employees are always paid during their rest breaks, so they gain nothing from agreeing to stay on duty for their normal wage. They are already legally entitled to that compensation; by remaining on duty they are merely performing 10 minutes of free work. (*Murphy*, 40 Cal.4th at pp. 1104-1105.)

The internal logic of the Court of Appeal's holding was also flawed. Even if the IWC's authorization of on-duty meal breaks implicitly encompassed rest breaks as well, employers would not be able to unilaterally force workers to remain on duty. They would still have to comply with the requirements listed in Subdivision 11 — including the need for a written, revocable contract in which the employee agrees to remain on duty in exchange for consideration. None of those conditions were satisfied in this case, so ABM's rest breaks were illegal by *any* standard.

The Court of Appeal's approach would allow employers to require their workers to remain on duty, without their written consent, in exchange for no additional compensation. This would make rest breaks indistinguishable from any other portion of the workday.

The unqualified right to force employees to remain on duty would also render superfluous the portion of Wage Order 4 that allows employers to apply to the DLSE for an exemption from the rest-break requirements when the nature of their operations makes it impractical to relieve

employees of all duty. (*Id.*, subd. (17).) If on-duty rest breaks were legal, then the DLSE exemption process would be pointless.

The rule requiring that rest breaks be off-duty unless the DLSE has granted an exemption applies to almost every industry governed by the wage orders, since the IWC used virtually identical provisions concerning rest breaks in every wage order. But there is an important exception.

In 2001 the IWC modified the rest-break provision in Wage Order 5, which governs the public housekeeping industry, to include a limited exception from the general requirement of off-duty rest breaks. This exception applies only to employees who work in 24-hour residential-care facilities for children, the elderly, the blind, or the developmentally disabled. It allows employers to require employees with direct responsibility to supervise the residents of those facilities "to remain on the premises and maintain general supervision of residents during rest periods if the employee is in sole charge of residents." (8 CCR § 11050, subd. 12(C).) If an employee is "affirmatively required to interrupt his/her break to respond to the needs of residents" then the employer must provide the employee with another rest period. (*Id.*)

This standard for residential-care workers is, in effect, the very standard that the Court of Appeal in this case adopted for all workers. Yet, if that approach to rest breaks had already been permissible under the general rest-break provisions in all the wage orders, there would have been no need for the IWC to create a special provision in Wage Order 5. The fact that the IWC had to modify the standard rest-break provision to create a narrow and specific exemption for residential-care workers is another clear example of "the exception that proves the rule."

For employers whose workers are not eligible for this limited exception (like ABM), the alternative to providing duty-free rest breaks is to apply to the DLSE and obtain an exemption from the wage order's rest-break requirement. ABM knew this, but it chose to ignore the law.

3. The prohibition on "work" during rest breaks in § 226.7 and the logic of this Court's decisions in *Murphy* and *Brinker* dictate that rest breaks must be duty free

The conclusion that rest breaks must be duty free is confirmed by the text of section 226.7, which commands that, "No employer shall require any employee to work during any meal or rest period mandated by an applicable order of the [IWC]." (Labor Code § 226.7, subd. (b).) On its face, the statute seems to require that employees be relieved of all job duties on those breaks, because employees are plainly working whenever they are performing job duties.

The legislative history of section 226.7 bears out this construction. [10] As introduced in the Assembly, AB 2509 proposed to add section 226.7 to the Labor Code. Subdivision (a) of that proposed provision said, "No employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission." (AB 2509, § 12, as introduced on Feb. 24, 2000.)[11] This section of the bill was never changed in the legislative process, and ultimately became Labor Code section 226.7, subdivision (a), as it was originally enacted. (*See Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1102 ("*Murphy*")[citing the original version of section 226.7, subdivision (a)].)

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[10] The respondents have concurrently filed a motion for judicial notice ("MFJN"), which includes relevant excerpts of the statute's legislative history.

[11] MFJN, Exh. 1 [p. 20].)

The portion of the proposed bill that was amended concerned the remedy for violations of subdivision (a). This Court discussed the evolution of the remedy provision in *Murphy*, explaining that when the bill was originally introduced it proposed both a $50 penalty on the employer plus a separate payment to the employee. (*Id.*, 40 Cal.4th at p. 1106.) The separate payment was to be an "amount equal to twice [the employee's] average hourly rate of compensation for the full length of the meal or rest periods during which the employee *was required to perform any work.*" (*Id.*, citing Bill No. 2509, § 12, as introduced on Feb. 24, 2000, emphasis added.)

The penalty provision was deleted when the bill was considered in the Senate. (*Murphy*, 40 Cal.4th at p. 1107.) And the amount of the monetary payment was modified to an additional hour of pay per violation. (*Id.*) This change was made to make the provision track the existing provisions of the IWC's wage orders. (*Id.*)

In sum, the text of section 226.7, which makes it illegal for an employer to require an employee to work during a rest break, and the legislative history, which showed that the Legislature considered the statute to be violated if the employee was required to perform "any" work during a rest break, demonstrates that the Legislature intended that rest breaks be duty free.

This Court's two earlier decisions interpreting section 226.7, *Murphy* and *Brinker*, confirm that the statute means what it says, and that rest breaks must be duty free.

The issue addressed in *Murphy* was whether the premium time that an employer must pay for violating the statute constitutes a wage or a penalty, an issue that dictates the applicable statutes of limitations for claims made under the statute. *Murphy* held that the employer's payment

for violating section 226.7 was a wage, not a penalty. (*Id.*, 40 Cal.4th at p. 1114.) Several aspects of the reasoning the Court employed to reach that conclusion confirms that rest breaks must be duty free.

First, the Court explained the IWC had mandated rest breaks since the 1930s (and meal breaks since 1916), but until 2000 the only remedy available to employees who failed to receive these breaks was injunctive relief to prevent future abuses. (*Id.*, 40 Cal.4th at p. 1105.) The IWC added a pay remedy to the wage orders in 2000. The same year the Legislature considered the bill that included proposed section 226.7. (*Id.* at pp. 1005-1006.) The Court explained that the problem that the Legislature sought to address with section 226.7 was that "employees [were] being forced to work through their meal and rest periods." (*Id.*, 40 Cal.4th at p. 1106.)

Second, the Court explained the nature of the economic injury that employees sustain when they do not receive rest periods:

> If denied two paid rest periods in an eight-hour work day, an employee essentially performs 20 minutes of "free" work, i.e., the employee receives the same amount of compensation for working through the rest periods that the employee would have received had he or she been permitted to take the rest periods. (*Id.*, 40 Cal.4th at p. 1104.)

Hence, the Court recognizes that rest breaks are, by design, a period during the employees' workday when the employee is paid, but is not performing any work. In order to meet this mandate, an employee must be relieved of all duty.

Third, the Court also noted that employees who were denied rest breaks also suffer non-economic injury:

> Employees denied their rest and meal periods face greater risk of work-related accidents and increased stress, especially low-wage workers who often perform manual labor. [Citations omitted.] Indeed, health and safety considerations (rather than purely economic injuries) are what motivated the IWC to adopt mandatory meal and rest periods in the first place. [Citation omitted.] Additionally, being forced to forgo rest and meal periods *denies employees time free from employer control* that is often needed to be able to accomplish important personal tasks. (*Id.*, 40 Cal.4th at p. 1113, emphasis added.)

This paragraph plainly reveals that the Court understood that rest breaks, just as much as meal breaks,were designed to be time when an employee was "free from employer control." Since an employee who has not been relieved of all duties remains, to some degree, under the employer's control, *Murphy* plainly shows that section 226.7 requires that rest breaks be duty free.

Brinker confirms this reading of the statute. As relevant here, *Brinker* held that in order for a meal break to qualify as an "off duty"break employers must relieve their employees of all duties during the break and must relinquish control over how the employees spend their time. (*Brinker*, 53 Cal.4th at pp. 1038, 1040-1041.) This obligation is derived from three sources: the wage order,[12] Labor Code section 512[13], and Labor Code section 226.7.

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[12] *Brinker* construed Wage Order 5. The meal break provisions in Wage Orders 4 and 5 are identical. As explained in footnote 6, above, the rest-break provisions in the two wage orders are also identical, except that Wage

Brinker accordingly holds that, for the purposes of section 226.7, employees are "working" on meal breaks unless they have been relieved of all job duties and the employer has relinquished control over how they spend their time. Since section 226.7 forbids employees from being required to work during *either* meal breaks *or* rest breaks, the relieved-of-all duty standard must necessarily apply to both meal breaks and rest breaks.

The only way that this could not be true would be if the word "work" in section 226.7 meant one thing for meal breaks and something entirely different for rest breaks. But this conclusion would be wholly at odds with the statutory language, which simply says that, "An employer shall not require an employee to work during a meal or rest . . . period . . . ."

To date ABM has never argued that what constitutes "work" varies depending on the type of break involved. To the contrary, in the trial court it expressly conceded that section 226.7 required it to relieve its guards of all duties during rest breaks. (3RT 4526:24-26.) Nor did the Court of Appeal suggest that the word "work" in section 226.7 has dual meanings, which turn on the type of break at issue.[14]

Order 5 contains a specific provision allowing for on-duty rest breaks for certain employees who provide 24-hour residential care. (8 CCR § 11050, subd. 12(C).)

[13] *Brinker* explained that in the late 1990s the IWC rolled back certain employee protections, prompting the Legislature to write into statute various guarantees that had previously been left to the IWC, including meal-break guarantees. (*Id.*, 53 Cal.4th at pp. 1037-1038.) Labor Code section 512 was intended to codify the IWC's existing meal-break protections. (*Id.*)

[14] The Court of Appeal did observe meal breaks and rest breaks are "qualitatively different" because meal breaks are longer and because employees are paid for rest breaks but not for off-duty meal breaks. (*Augustus*, 182 Cal.App.4th at p. 689.) But it did not suggest that these differences meant that what constituted prohibited work during a meal break might be acceptable during a rest break.

The conclusion that the relieved-of-all-duty standard applies to both meal breaks and rest breaks is also borne out by this Court's conclusion in *Brinker* that the trial court had properly certified the rest-break subclass in that case, which consisted of employees who had not been relieved of all duties during their rest breaks. (*Id.* at pp. 1032-1033.)

In sum, the relieved-of-all-duty requirement is compelled by the text of section 226.7, which forbids employees from being required to work during either meal breaks or rest breaks, and by this Court's decisions in *Murphy* and *Brinker* construing that statute.

4. The relieved-of-all duty standard produces a workable, easily administered rule that benefits employers and employees alike

"Meal and rest periods have long been viewed as part of the remedial worker protection framework." (*Murphy*, 40 Cal.4th at p. 1105.) Legislative enactments regulating wages, hours, and working conditions are construed broadly in favor of protecting employee welfare. (*Brinker*, 53 Cal.4th at p. 1027; *Murphy,* 40 Cal.4th at p. 1103.) In *Murphy*, this Court specifically acknowledged that this rule applied to the construction of section 226.7. (*Id*, 40 Cal.4th at p. 1104.)

In addition, the Legislature has declared that vigorous enforcement of the state's minimum labor standards is State policy—both to prevent employees from being forced to work under unlawful conditions "and to protect employers who comply with the law from those who attempt to gain a competitive advantage at the expense of their workers by failing to comply with minimum labor standards." (Labor Code § 90.5.)

Adoption of the relieved-of-all duty standard for rest breaks serves each of these goals. As noted above, this Court recognized in *Murphy* that

providing employees with duty-free rest breaks reduces job stress and work-related accidents. (*Id.*, 40 Cal.4th at p. 1113.)

The relieved-of-all duty standard is also clear to employers and employees alike, allowing both to understand their respective rights and obligations. The clarity of the standard would make it difficult for employers to offer non-compliant breaks and easy for employees to know if their employers were not following the law. This clarity would also allow employers to avoid rest-break litigation. And if cases were brought, the clear standard would make meritorious claims easier to prove and non-meritorious claims easier to defend.

Not only does the relieved-of-all-duty standard offer the administrative advantages of a bright-line rule, it does so without the chief disadvantage of such rules — their inflexibility and concomitant potential for unfairness. This is because the wage orders themselves contain built-in flexibility through the exemption process — a process that ABM itself has twice invoked.

In fact, the IWC consistently declined to weaken the wage orders' rest-break requirements because of the availability of exemptions. For example, in 1976 the IWC stated:

> In response to arguments that in some situations workers are almost continually resting while they monitor machines and cannot be spared from their places, the Commission provides for the possibility of exemptions in accord with the requirements of Section 18." (IWC, Rest Periods - Order 4-76.)[15]

[15] MFJN, Exh. 2.

Similarly, when the IWC reviewed the rest period requirement again in 1982 and rejected making changes to the requirement, it explained:

> As to the concerns of impracticality and economic unfeasibility, the commission does not find that the rest period provisions to be impractical or unfeasible or that the OAL criteria are not met. Moreover, Section 17 provides for exemption from the above regulation [the rest period requirement] where hardship is found. (AB 1111 Review of Existing Regulations (Aug. 24, 1982), at p. 106.)[16]

ABM will no doubt urge the Court to adopt some standard other than the relieved-of-all duty standard. But the only alternative to that standard is one where employees are relieved of "most" or "some" duties. This type of indeterminate standard is inconsistent with the terms of the statutory and regulatory framework and with its purposes, as well. In addition, a standard that allowed employers to require employees to perform "some" work on rest breaks would fail to protect worker rights and would invite abuse.

This indeterminate standard would also spawn a plethora of unresolved legal questions: What part of an employee's duties would be allowed while on break? To what extent can an employee perform work before the rest break becomes no break at all? Would the range of permissible duties while on break vary by job type and industry?

There is no reason to clog the courts with endless lawsuits about these issues. Anything less than the relieved-of-all-duty standard is unworkable and unfair to employers and employees alike. The Court should

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[16] MFJN, Exh. 3.

enforce section 226.7 as written, and prohibit employers from making their employees work during rest breaks.

5. ABM failed to relieve its guards of all duties during their rest breaks

The Court of Appeal cited ABM's "post orders," which details the principal job responsibilities of ABM guards. (*Augustus*, 182 Cal.Rptr.3d at pp. 679-680.) The listed responsibilities include providing an immediate response to emergency or life-safety situations, such as a fire, a medical emergency or an elevator entrapment; observing and reporting all unusual activities; assisting building tenants and visitors; and providing escorts to parking lots. (*Id.*)[17]

ABM required its guards to perform many of these same responsibilities while they were on rest breaks. As the Court of Appeal explained, "ABM admitted it requires its security guards to keep their radios and pagers on during rest breaks, to remain vigilant, and to respond when needs arise, such as when a tenant wishes to be escorted to the parking lot, a building manager must be notified of a mechanical problem, or an emergency situation occurs." (*Augustus*, 182 Cal.Rptr.3d at p. 680.)

Given the overlap between what ABM guards did while they were on duty and what they were required to do during their rest breaks, there can be no dispute that they were never relieved of all duties during their rest breaks. Accordingly, their rest breaks violated section 226.7. The Court can affirm the summary judgment in favor of the plaintiffs on this basis alone.

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[17] Additional responsibilities included patrolling guarded buildings, identifying and reporting safety issues, hoisting and lowering flags, greeting visitors, ejecting trespassers, monitoring property moved into or out of guarded buildings; directing traffic; and making reports. (*Augustus*, 182 Cal.App.4th at p. 680.)

B. Even if ABM's security guards were merely kept on call during their rest breaks, they were still working

1. *Mendiola* recognizes that the time that security guards are on call at the jobsite qualifies as compensable work

The Court of Appeal held that ABM had not violated section 226.7 because it did not require its guards to work during rest breaks. The court explained its conclusion this way:

> Here, although ABM's security guards were required to remain on call during their rest breaks, they were otherwise permitted to engage and did engage in various non-work activities, including smoking, reading, making personal telephone calls, attending to personal business, and surfing the Internet. The issue is whether simply being on-call constitutes performing "work." We conclude it does not. (*Augustus*, 182 Cal.Rptr.3d at pp. 684-685.)

In light of the responsibilities that ABM placed on its guards during their rest breaks, as described above, it is problematic to characterize the guards as "simply being on-call" during their rest breaks. That term encompasses a disparate variety of arrangements between employer and employee. Some of these on-call arrangements qualify as work, while others do not. (See, e.g., *Madera Police Officers Assn. v. City of Madera* (1984) 36 Cal.3d 403, 408 [police were working while "on call" in uniform but not when "on call" for 24 hours away from work].)

The "on call" status in this case clearly was work, because guards were required to perform their primary job duty by remaining vigilant at all times and available for an instantaneous response. Their responsibilities while "on call" are categorically different from those of, for example, a doctor who can have dinner at a restaurant while carrying a pager.

Evidently, the Court of Appeal concluded otherwise because of the "non-work activities" that ABM allowed its guards to engage in while they were on break. But this conclusion was rendered untenable by this Court's decision in *Mendiola*, which held that the time that security guards were kept on call at the jobsite constituted compensable "hours worked" under Wage Order 4. (*Id.*, 60 Cal.4th at p. 841.)

While on call, the guards in *Mendiola* stayed in residential trailers at the jobsite where they were assigned. They could eat, sleep, read, watch television, or browse the Internet while in the trailers. (*Id.*, 60 Cal.4th at pp. 837, 842.) But they were obligated to respond immediately and in uniform if they were either contacted by a dispatcher or simply became aware of any suspicious activity. (*Id.* at p. 841.)

Like ABM, the employer in *Mendiola* argued that its guards were not working when on call because they were free to engage in various non-work activities. (*Id.* at p. 842.) This Court rejected the argument: "The fact that guards could engage in limited personal activities does not lessen the extent of CPS's control. It is the extent of employer control here that renders on-call time compensable hours worked under Wage Order 4." (*Id.*)

The Court relied on its earlier decision in *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 586, which held that agricultural workers who were required to ride their employer's buses to the fields where they worked were entitled to compensation for the travel period, because they were under their employer's control. *Morillion* rejected the employer's claim that the workers were not under its control during the mandatory bus ride because they were allowed to read, sleep, or perform other personal activities during the travel period. (*Id.*, 22 Cal.4th at p. 586.)

The *Mendiola* Court also noted that, even when guards were not actively responding to disturbances, the guards' "mere presence" on the jobsite was integral to their employer's business, and that the employer would have been in breach of its service agreement with its customers if a guard had not been present at the worksite for all contracted hours. (*Id.*)

These conclusions apply with equal force to ABM's guards in this case. As noted above, the Court of Appeal held that ABM required its guards to remain vigilant during rest breaks, and to provide an immediate response "when needs arise."[18] (*Augustus*, 182 Cal.Rptr.3d at p. 680.) ABM insisted in the trial court that, "the nature of security work prevents guards from being relieved of all duty." (7JA 2053.)

In the introduction to its motion for summary judgment ABM insisted that it would be "dangerously misguided" to equate the job duties of its guards to fast-food servers or retail personnel. (7JA2049.) It said, "The nature of a security officer's job requires constant monitoring. The public will rightly presume they are on duty and ready to help when they are on the premises." (7JA2049, emphasis in original.) These are the same basic job duties that ABM guards perform during their rest breaks. Thus, like the guards in *Mendiola*, ABM's guards are required to engage in compensable work during their rest breaks.

[18] ABM and its amici went to great lengths below to recast this case as seeking to impose liability on employers for calling back their employees from a break due to an emergency. In reality, that is not what this case is about. ABM's guards were not only required to respond to emergencies, but were also required to perform many of their routine duties during rest breaks. (*Augustus,* 182 Cal.Rptr.3d at p. 680.)

2. There is no textual or policy justification to construe "work" in § 226.7 more narrowly than "hours worked" in the Wage Order

After the plaintiffs sought rehearing below based on *Mendiola*, the Court of Appeal re-tooled its opinion. The amended opinion concludes that, even though ABM's guards may have been engaged in compensable work while they were on call on their rest breaks, they were nevertheless not actually "working" and therefore there was no violation of section 226.7. As the court put it, "although on-call hours constitute 'hours worked,' remaining available to work is not the same as performing work. Section 226.7 proscribes only work on a rest break." (*Augustus*, 182 Cal.Rptr.3d at p. 689, citations omitted.)

Hence, the court held that the test for what constitutes compensable work under the Wage Order is distinct from and broader than the test for whether an employee has been required to work in violation of section 226.7. If true, this means that employers can lawfully require employees to perform compensable "work" during rest breaks — without violating Section 226.7's prohibition on requiring employees "to work" during those breaks.

Nothing in the text of either section 226.7 or Wage Order 4 supports this bewildering conclusion. The Court of Appeal purported to derive its interpretation from the rules of English grammar:

> The word "work" is used as both a noun and verb in Wage Order No. 4, which defines "Hours worked" as "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." (Cal. Code Regs., tit. 8, § 11040, subd. 2(K).) In

this definition, "work" as a noun means "employment"—time during which an employee is subject to an employer's control. "Work" as a verb means "exertion"—activities an employer may suffer or permit an employee to perform. [Citation omitted.] "].) Section 226.7 . . . uses "work" as an infinitive verb contraposed with "rest." It is evident, therefore, that "work" in that section means exertion on an employer's behalf. (*Augustus*, 182 Cal.Rptr.3d at p. 685.)

It is not clear what the court meant when it stated that "work" is used as a noun in the definition of "hours worked." The only noun in that phrase is "hours," which is modified by "worked" — a postpositive past-participle verb.[19] "The collocation 'hours worked' . . . stands for 'hours during which work was done'. . ." (Visser, F. Th. (1963) "An Historical Syntax of the English Language II," § 1140, p. 1242.) By definition, if an employee is required *to work* during an hour, then that hour becomes an *hour worked.*

The court's second justification for its conclusion is that, "[n]ot all employees at work actually perform work." (*Id.*) This is undeniably true, and rest breaks are a clear example. Rest breaks are time at work when, by statute, employees are forbidden from being required to work; yet the time they spend on rest breaks is included in "hours worked" under the Wage Order. (Wage Order 4, subd. (12)(A) ["Authorized rest period time shall be

[19] Some other examples of nouns modified by postpositive past-participle verbs are: issues raised, skills required, product used, efforts made, and ideas produced. (Furuta, Yae, "Postpositive Past Participles Used on Their Own" (Nov. 2012) International Journal of Social Science and Humanity, Vol. 2, No. 6.)

counted as hours worked for which there shall be no deduction from wages."].)

The Court of Appeal, however, chose a different example —time when employees are on call. (*Augustus,* 182 Cal.Rptr.3d at p. 685.) It cited the U.S. Supreme Court's famous observation that an employer "may hire a man to do nothing, or to do nothing but wait for something to happen." (*Id.*, quoting *Mendiola,* 60 Cal.4th at p. 840, quoting *Armour & Co. v. Wantock* (1944) 323 U.S. 126, 133, 65 S.Ct. 165, 89 L.Ed. 118.)

But the Supreme Court's point in *Armour* was that an employee hired to "do nothing" or to "wait for something to happen" was nevertheless working, and therefore entitled to compensation. *Armour* held that firefighters were entitled to overtime compensation for the time they spent sitting around, playing cards, and waiting for a fire. "That inactive duty may be duty nonetheless is not a new principle," the Court explained. (*Id.* at p. 133.) Even if workers are "waiting, doing nothing," they are still on duty if they are "liable to be called upon at any moment, and not at liberty to go away." (*Id.*, quoting *Missouri, K. & T. Ry. Co. of Texas v. U. S.* (1913) 231 U.S. 112, 119.)

In short, *Armour* reached the same conclusion that this Court reached in *Mendiola*, which was why this Court cited it. Nothing in either case suggests the meaning of "work" in section 226.7 was narrower than the meaning of "hours worked" in the Wage Order.

The Court of Appeal also offered a third justification for its conclusion that 226.7 did not forbid employees from engaging in compensable work on their rest breaks — that the IWC included a "relieved of all duty" requirement for off-duty meal breaks, but failed to include a similar requirement in the Wage Order's rest-break provision.

(*Augustus*, 182 Cal.Rptr.3d at p. 685.) The plaintiffs have already explained, at pages 21-30, above, that the terms of the Wage Order clearly demonstrate that the IWC intended that rest periods be duty free.

In fact, the test that this Court adopted in *Brinker* for compliance with section 226.7 completely parallels the test for compensability in the Wage Order. As explained above, *Brinker* held that section 226.7 requires *both* that employees be relieved of all duties during breaks *and* that the employer relinquish control over how they spend their time. (*Brinker*, 53 Cal.4th at pp. 1038, 1040-1041.)

Brinker therefore wholly undercuts the idea that employers can make their employees perform compensable work during their rest breaks without running afoul of section 226.7.

Nor is there anything in the statute's 868-page legislative history that suggests that the Legislature ever intended the word "work" as used in the statute to mean something different or less than compensable work under the Wage Order. Rather, every reference to the statute simply tracked the statutory language, explaining that it prohibited employers from requiring their employees to work during meal or rest breaks. (See *Murphy*, 40 Cal.4th at pp. 1106-1111 [surveying section 226.7's legislative history].)

The Court of Appeal did not discuss or rely on the statute's legislative history. In its general discussion of California's regulatory scheme concerning workers' wages and hours, the appellate court did cite the portion of *Brinker* that explained that section 226.7, like other remedial legislation governing worker rights, should be liberally construed to promote the protection and benefit of employees. (*Augustus*, 182 Cal.Rptr.3d at p. 684, citing *Brinker*, 53 Cal.4th at pp. 1026-1027.) But

the court jettisoned this rule once it began its analysis of "the nature of a rest period." (*Id.*)

Even if there was some warrant in the text of the statute or its legislative history for construing the term "work" in section 226.7 narrowly, the rule that worker-protection statues should be broadly construed to protect worker rights would militate against that narrow construction unless the Legislature's intent to enact a less protective rule was clear. Here, there is no indication in either the statutory text or in its legislative history that suggests that the Legislature intended to allow employees to be made to perform compensable work during rest breaks.

3. Even under the narrow definition of "work" suggested by the Court of Appeal, ABM's guards were working while on their rest breaks because they were required to continue to perform their principal job duties

The Court of Appeal characterized ABM's guards as "simply being on-call" during their rest breaks, or "remaining available to work." In the court's view, the guards were not working unless and until something happened during a rest break that required a guard to respond. At that point the guard "must return to duty if requested." (*Id.*, 182 Cal.Rptr.3d at p. 686.) This is essentially the same position advanced by the employer to the U.S. Supreme Court in *Armour* and to this Court in *Mendiola*.

In *Armour*, the Court held that firefighters were entitled to overtime compensation for the time they spent sitting around, playing cards, and waiting for a fire. "That inactive duty may be duty nonetheless is not a new principle," the Court explained. (*Id.*, 323 U.S. at p. 133.) The Court held that even if workers are "waiting, doing nothing," they are still on duty if they are "liable to be called upon at any moment, and not at liberty to go away." (*Id.*, quoting *Missouri, K. & T. Ry. Co. of Texas v. U. S.* (1913) 231 U.S. 112, 119.)

It was in this context that the Court observed that an employer could "hire a man to do nothing, or do nothing but wait for something to happen." (*Id.*, 323 U.S. at p. 133.) The Court added that, "Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer. (*Id.*, 323 U.S. at p. 133.)

This Court cited and relied on this analysis in *Mendiola*. (*Id.*, 60 Cal.4th at p. 840 [citing *Armour*].) This Court held that the guards in *Mendiola* had been "engaged to wait." (*Id.*, 60 Cal.4th at p. 842, n. 10, citing *Skidmore v. Swift & Co.* (1944) 323 U.S. 134, 137.) In other words, the guards' job was principally to "wait for something to happen" and then to respond to it immediately.

Here, the Court of Appeal correctly recognized that ABM required its guards to remain "vigilant" during their rest breaks, "and to respond when needs arise, such as when a tenant wishes to be escorted to the parking lot, a building manager must be notified of a mechanical problem, or an emergency situation occurs." (*Augustus*, 182 Cal.Rptr.3d at p. 680.)

Under *Mendiola* and *Armour*, these rest-break responsibilities amount to more than simply "being available to work" or being ready to "return to duty if requested." Rather, because the guards were required to perform many of their core duties, ABM was making its guards work on their rest breaks. It was therefore violating section 226.7.

CONCLUSION

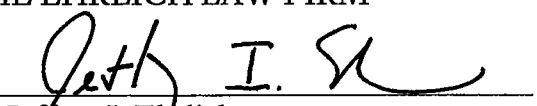
Section 226.7 compels the application of the relieved-of-all-duty standard to both meal breaks and rest breaks. It is undisputed in this case that ABM did not relieve its guards of all duties during their rest breaks. It therefore violated section 226.7, as the trial court correctly determined. The judgment for the plaintiffs should be affirmed in all respects.

Dated: June 29, 2015.

Respectfully submitted,

ROXBOROUGH, POMERANCE, NYE & ADREANI, LLP

THE EHRLICH LAW FIRM

By 

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Dated: June 29, 2015.

Jeffrey I. Ehrlich

Lead Case: *Augustus, et al. v. ABM Security Services, Inc., etc.*
Supreme Court No. S224853
Court of Appeal No. B243788 (consolidated No. B247392)
Superior Court Case Nos.: Lead Case No. BC336416
[consolidated Case Nos. BC345918 and CGC5444421]

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

On **June 29, 2015,** I served the foregoing documents described as **OPENING BRIEF ON THE MERITS** on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

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

Executed on **June 29, 2015,** at Claremont, California.

Isabel Cisneros-Drake, Paralegal

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Supreme Court No. S224853
Court of Appeal No. B243788 (consolidated No. B247392)
Superior Court Case Nos.: Lead Case No. BC336416
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