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 document, a true and correct copy of which is attached hereto:

Exhibit 12: Response of the Division of Labor Standards Enforcement ("DLSE") to Request for Determination, Docket No. 89-018 (April 26, 1990).

A portion of this document was quoted by the California Office of Administrative Law ("OAL") in its Letter Upholding Determination No. 11, Docket No. 89-018, Determination Dated July 31, 1990 (Sept. 7, 1990), which was attached as Exhibit 7 to petitioners' Motion for Judicial Notice filed on December 19, 2017.

By this motion, petitioners seek judicial notice of the full DLSE document, which just came into their possession. *See* Kralowec Decl., below, ¶2.

The document is the proper subject of judicial notice by this Court because it relates to Official Determination No. 11, Docket No. 89-018, of the OAL; is maintained as part of the OAL's official records; and constitutes an official act of the DLSE. *See* Kralowec Decl., ¶2. 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). Like Exhibit 7 to petitioners' motion filed on December 19, 2017, the document is relevant because it addresses the reasons for the IWC's 1947 amendment to the definition of "hours worked."

The Court is respectfully asked to grant the motion for judicial notice in full.

Dated: January 31, 2018

Respectfully submitted,

By: _____
Kimberly A. Kralowec
THE KRALOWEC LAW GROUP

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. This month, my office received a copy of Response of the Division of Labor Standards Enforcement to Request for Determination, Docket No. 89-018 (April 26, 1990), attached hereto as Exhibit 1. The document was provided to us by the California Office of Administrative Law ("OAL") in response to a public records act request. Previous efforts to obtain a copy of this full document, including from the California Department of Industrial Relations ("DIR") and the Division of Labor Standards Enforcement ("DLSE"), had been unsuccessful.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on January 31, 2018 at San Francisco, California.

Kimberly A. Kralowec

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

[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

EXHIBIT 12

CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

SACRAMENTO, CALIFORNIA

In re: Request for Determination Concerning The Underground Enforcement Policy Of The California Division Of Labor Standards Enforcement That Regulates Meal Periods Taken On An Employer's Premises	)	Docket No. 89-018

RESPONSE OF

THE DIVISION OF LABOR STANDARDS ENFORCEMENT

TO REQUEST FOR DETERMINATION

DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
State of California
On Behalf Of
The State Labor Commissioner

By: H. THOMAS CADELL, JR.
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REQUEST FOR DETERMINATION

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AFFECTED STATE AGENCY:
DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
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QUESTION:
Does the enforcement policy of the Division of Labor Standards Enforcement as set out in a letter written in response to a request for an opinion or in a declaration filed in a civil case amount to a regulation which was not issued in accordance with the requirements of the APA or does the issuance of such enforcement policies simply comply with the requirements of Labor Code §1198.4?

I. INTRODUCTION

On January 5, 1988, then State Labor Commissioner addressed a letter to Richard S. Rosenberg, an attorney with the firm of Ballard, Rosenberg & Golper, in which Mr. Aubry, in reply to an earlier letter from Mr. Rosenberg, reiterated a long-held enforcement policy of the Division of Labor Standards Enforcement (hereinafter "DLSE") regarding the interpretation of the term "hours worked" in connection with "employees required to remain on the employer's premises during meal periods." (See Request for Determination (hereinafter "REQUEST"), Exhibit 'A') Commissioner Aubry stated:

> "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'."

In support of the statement that this was a long-standing position, Commissioner Aubry attached to his January 5, 1988, letter, a copy of a declaration signed by former Labor Commissioner C. Robert Simpson which stated:

> "3. It is the policy of the Division of Labor Standards Enforcement that whenever an employer has employees under his dominion, direction or control, that employer is required to pay for the employees' 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."

The Requester, Richard J. Simmons, contends that it is not clear to him when the DLSE first adopted the enforcement policy because DLSE "never provided the public with a copy of its enforcement policy, mailed it to employers, or provided interested members of the public notice of or any opportunity to comment on the enforcement policy."

It is respectfully submitted that Requester provides no evidence that DLSE has "never provided the public with a copy of its enforcement policy" or that DLSE has never "mailed [the enforcement policy] to employers." Additionally, it is not clear to DLSE what authority Requester relies upon in concluding that the agency had any duty to "provide[d] interested members of the public notice of or any opportunity to comment on the enforcement policy".

As will be clearly shown, the interpretation of the IWC Orders which requires that the employee be allowed to leave the employer's premises is the only "legally tenable 'interpreta-

tion'" This conclusion is shared by the Requester as evidenced by the following language from "Wage and Hour Manual for California Employers" written and edited by Mr. Simmons:

> "Meal periods do not have to be counted as hours worked, either for purposes of the F.L.S.A. or the California Wage Orders, if (a) the employee is completely relieved of all duties, active or inactive; (b) the employee is free to leave his work station and the employer's premises; and (c) the meal period is at least 30 minutes long (a shorter period may be sufficient under special conditions under the F.L.S.A. but not under the Wage Orders). (Wage and Hour Manual, 3d ed., p. 179; See Exhibit 'A' Attached hereto)

The very documents which Requester submits clearly show that the DLSE has, pursuant to the mandate of the Legislature, provided the public with the enforcement policy statement and its opinion as to the interpretation of the provisions of the IWC Orders as evidenced by the letter which Requester attaches as Exhibit 'A' to the Request for Determination.

II. ARGUMENT

A. THE ROLE OF THE DIVISION OF LABOR STANDARDS ENFORCEMENT IS TO ENFORCE THE INDUSTRIAL WELFARE COMMISSION ORDERS AND INTERPRETATION NECESSARILY PRECEDES ENFORCEMENT

The "enforcement policy" of the DLSE is, in fact, nothing more than the only logical interpretation of the IWC Orders. In particular the policy arises from an interpretation of the term "Hours Worked" as defined in the Industrial Welfare Commission Orders. The interpretation is entirely consistent with the provisions of the IWC Orders which interpret the term "Hours Worked" as follows:

"'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)

1. The California Industrial Welfare Commission Is The Administrative Body Charged With Adopting The Minimum Standards While The DLSE Is The Agency Charged With The Power To Adequately Enforce Those Minimum Standards

The case of Skyline Homes, Inc. v. Department of Industrial Relations (1985) 165 Cal.App.3d 239, 253, states:

"The relationship between the DLSE and the IWC is similar to that between the Occupational Safety and Health Standards Board and the Division of Occupational Safety and Health. The Division is charged with the power to 'adequately enforce and administer all laws and lawful standards and orders...' regarding safety in workplaces (§§ 60.5, 6307). The standards board, like the IWC, is responsible for adopting standards (§§ 140, 142.3).
In the case of Bendix Forest Products Corp. v. Division of Occupational Saf. & Health (1979) 25 Cal.3d 465, the standards board had adopted a regulation providing that hand protection may be required for employees whose work exposes their hands to dangerous substances, cuts or burns (Cal. Admin. Code, tit. 8, § 3384). Pursuant to this standard the division ordered the employer, a lumber company, to provide hand protection to its employees at company expense. The employer contended that the division was attempting to legislate a new standard and was encroaching on the authority of the standards board. The court held that "[t]he decision of the Division was not a quasi-legislative judgment promulgating a new regulation or standard but rather a specific application of laws and existing regulations. We see no conflict in the exercise of power vis-à-vis the Standards Board." (Id., at p. 471.)
Similarly, in this case, the DLSE is not promulgating regulations. The regulation is wage order 1-76, properly promulgated by the IWC. The DLSE is charged with enforcing the wage orders, and to do so, it must first interpret them. The enforcement policy is precisely that--an interpretation --and need not comply with the APA.

It is, of course, indisputable, that all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. Since decisions of the Office of Administrative Law are reviewable in the Superior Court and since, beyond question, the Superior Court, under the doctrine of stare decisis is bound by decisions of the District Courts of Appeal, it is equally beyond question that the Office of Administrative Law is bound by the holdings in the Skyline and Bendix Forest Products cases, supra. (See Auto Equity Sales, Inc. v. Superior court of Santa Clara County 57 Cal.2d 450)

Equally clear, is that the Legislature fully intended that the Division was to formulate "enforcement policy statements or interpretations" of IWC Orders and to make those statements or interpretations available to the public "[u]pon request" (Labor Code §1198.4). Had the Legislature intended that these "enforcement policy statements or interpretations" were to be made available to the public only after compliance with the procedures of the Administrative Procedures Act it could have simply relied upon the power of the agency to promulgate regulations which, of course, would be "available to the public". Additionally, why would the Legislature have referred to "enforcement policy statements or interpretations" if it meant "regulations" and why, if the Legislature intended that the DLSE was to comply with the APA procedures before promulgating these "policy statements or interpretations", did it require that the DLSE furnish copies to the IWC?

The answers to all of these questions requires only the

exercise of common sense. Common sense would teach that it is ridiculous to conclude that an agency must adopt administrative regulations to interpret administrative regulations which have already been validly adopted. Where would such an absurd conclusion lead? Would such a process not require still more regulations to interpret those regulations?

2. Requiring The Division Of Labor Standards Enforcement To Comply With The Provisions Of The APA Before Adopting An Enforcement Policy Dealing With The IWC Orders Would Lead To Absurd Results

When an administrative agency is charged with enforcing a particular statute, its interpretation of the statute will be accorded great respect by the courts and will be followed if not clearly erroneous. (Judson Steel Corp. v. Workers' Comp Appeals Board (1978) 22 Cal.3d 658, 668) This deference is especially appropriate where the agency's interpretation is congruent with the statute's language and obvious purpose. "(W)here the language of a statutory provision is susceptible of two constructions, one of which, in application, will render it reasonable, fair and harmonious with its manifest purpose, and another which would be productive of absurd consequences, the former construction will be adopted." (Clements v. T.R. Bechtel Co. (1954) 43 Cal.2d 227, 233) This statutory rule has direct application to the narrow interpretation which Requester seeks to place on Government Code §11347.5

If, as the Requester contends, DLSE may not interpret the IWC Orders absent compliance with the provisions of the APA, the

usual practice of furnishing information to the public would have to be abated despite the requirement contained at Labor Code §94. The letter from Mr. Rosenberg which is alluded to in Commissioner Aubry's letter of January 5, 1988 (REQUEST, Exhibit 'A') could not be answered without full compliance with the Act despite the mandate to the Division contained at Labor Code §1198.4. Thus, in a situation where an employer sought to implement a pay practice and contacted the DLSE requesting information as to how the agency would view such a pay practice, the DLSE would be required to notify all interested parties that this question had arisen and advise each interested party of the proposed answer to the question. If any interested party requested a hearing on the matter, the agency would have to convene hearings statewide in order to give all the interested parties an opportunity to address their concerns.

Obviously, such is not the state of the law. As the Supreme Court recognized in the Bendix Forest Products case and the Fourth District Court of Appeal reiterated in Skyline, the question of the interpretation of the IWC Orders in the Request under consideration here, arises in the context of "a specific application of laws and existing regulations." (Bendix Forest Products Corp. v. Division of Occupational Saf. & Health, supra, 25 Cal.3d 465, 471) Commissioner Aubry's letter to Mr. Rosenberg and the declaration of Labor Commissioner Simpson which was attached to that letter involved answers provided by DLSE in response to specific questions raised regarding existing regulations. In the case of the letter from Commissioner Aubry, the

response was to a letter from Mr. Rosenberg which posed the question regarding the position the Division takes in regard to payment of wages when the worker is required to remain on the premises during the meal period. In the case of the declaration of Commissioner Simpson, the response was to a law suit brought by J-M Manufacturing Company which raised the same issue.

Respondent is unaware of any requirement in the Government Code which would require an administrative agency to convene a hearing (after giving notice to all interested parties) to determine how it will answer a letter that it is required by law to answer. (See Labor Code §§ 94[1/] and 1198.4[2/]) Nor is there any requirement that an administrative agency such as the Division must hold a hearing (coupled with the notice requirements of the APA) to determine what answer it will give to a law suit filed against it or what arguments it will raise in its points and authorities to support its interpretation of the law it is mandated to enforce.

In summary, the specific documents (the January 5, 1988, Aubry letter and the May 16, 1985, Simpson declaration) relied

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1/ Labor Code §94:
"The office of the division shall be open for business from 9 o'clock a.m. until 5 o'clock p.m. every day except nonjudicial days, and the officers thereof shall give to all persons requesting it all needed information which they may possess."

2/ Labor Code §1198.4:
"Upon request, the Chief of the Division of Labor Standards enforcement shall make available to the public any enforcement policy statements or interpretations of orders of the Industrial Welfare Commission. Copies of such policy statements shall be furnished to the Industrial Welfare Commission."

upon by the Requester in this case are not "underground regulations" prohibited by the APA. Those documents 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".

It is interesting to note that while the letter from Commissioner Aubry to Mr. Rosenberg enclosed a copy of the points and authorities outlining the legal theory upon which the Division had relied, the Requester has failed to attach those points and authorities.

The provisions of Labor Code §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 Industrial Welfare 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 with the APA. 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. In addition, the language of §1198.4 requires the DLSE to make those policy statements or interpretations available only "upon request" and does not require that the DLSE notify all "interested parties" or send each such opinion to every employer in the State of California.

B. THE REQUESTER'S DISCUSSION OF THE FACTS AND DESCRIPTION OF THE LAW AND THE ENFORCEMENT POLICY OF THE DLSE DOES NOT ADDRESS THE ISSUE OF THE IWC DEFINITION OF "HOURS WORKED"

The enforcement policy which the Requester has chosen to question is that which requires "employers to treat 'off-duty' meal periods of employees as 'hours worked' whenever employees are asked (required) to remain on their employer's business premises during the meal period." (REQUEST, pgs. 4-5) The enforcement policy, the Requester admits, results from the DLSE's interpretation of the term "Hours Worked". (REQUEST, p. 4)

The term "Hours Worked" is defined in the IWC Orders[3/] as follows:

> "'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."

3/ The provisions of Order 5-89 covering the Public Housekeeping Industry, provides at section 2(H) (C.C.R., tit. 8, §11050(2)(H)) that the term "Hours Worked" "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." This language was added to the provisions of Order 5 in 1976 and, despite the unsupported allegations of the Requester (REQUEST, p. 5, fn. 3) the language does not apply to all 15 of the IWC Orders. The IWC in its "Statement of Basis" for Order 5-76, stated: (Footnote Continued on page 11)

In his analysis, Requester relies upon the second clause of the above provision and emphasizes the language "suffered or permitted to work". Requester points out, correctly, that the "suffer or permit to work" language is identical to that contained in the Fair Labor Standards Act. However, Requester fails to 1) mention that in that Act the term defined is "employ" not "hours worked", and 2) mention that the first clause of the definition of the term "hours worked" in the IWC Orders provides that the term:

> "means the time during which an employee is subject to the control of an employer, and includes..."

Requester also fails to discuss the fact that the federal Fair Labor Standards Act contains no definition of the term "hours worked" except in the limited context of "changing clothes" and "wash-up time" where the employment is covered by a union contract. (29 U.S.C. 203(o) and 29 C.F.R. 785.6)

Requester alleges in footnote 3 that what he refers to as a "minor variation" is contained in Order 5 which adds the language "and in the case of an employee who is required to reside

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(Footnote 3, continued from page 10)

> "The definition of "hours worked" was expanded in Order 5, Public Housekeeping, to deal with the difficulty that resident managers of apartment houses and motels have in keeping track of hours actually worked. The language allows for recognition of agreements which would realistically reflect hours worked, without requiring detailed record-keeping. Any estimate of hours worked incorporated in such an agreement must bear a reasonable relationship to the duties required, the size of the establishment, and the amount of time on the premises that the employee is free to devote to his or her own uses." (Statement of Basis attached hereto as Exhibit 'A' at page 8)

on the employment premises, that time spent carrying out assigned duties shall be counted as hours worked." This language, according to Requester, is "uniformly applied under all 15 Wage Orders." (Emphasis in original) As pointed out in fn. 3, supra, that is incorrect. The DLSE is fully aware of the fact that the IWC, as evidenced by the Statement of Basis for Order 5-76, intended that the language regarding those who must reside on the employment premises was to be applied to employees under that order such as resident managers of apartment complexes. The DLSE never perceived any intent to "uniformly" apply the language to any other order and never did so.

By application of the rule of statutory construction "inclusio unius est exclusio alterius" the very fact that the IWC found it necessary to adopt the additional language regarding employees who are required to live on the premises of the employer indicates that the IWC intended that, in the case of those employees, the general rule that all hours "under the control of the employer" should be limited so that only those hours when the employee is actually carrying out assigned duties should count as "hours worked". Obviously, the Commission recognized that absent the additional language, any time the employee spent on the premises might be considered compensable inasmuch as he was required to live there.

Thus, far from being a "minor variation" as the Requester would have us believe, the language in Order 5 constitutes a specific exemption from the obligation of the employer to count all hours "under the control of the employer" as "hours worked".

1. The Provisions Of Section 11 Of The Order Requiring Employers To Allow Meal Periods Has No Relationship To The Question Of Whether The Employer Must Pay For All The Hours The Worker Is Under His Control

Requester cites the language of Section 11(A) of the IWC Order which provides that except under the circumstances listed therein, the employer must provide each worker employed more than five hours in a work period with a thirty-minute meal period. A completely duty-free meal period of less than thirty minutes duration is considered an "on-duty meal period" and must be "counted as time worked". Under certain circumstances, (i.e., "when the nature of the work prevents an employee from being relieved of all duty") the employer and the employee can agree to "on duty" meal periods.

The above provisions simply explain what happens if the employer does not allow a worker a 30-minute meal period and how the parties may, when the nature of the work prevents the employee from being relieved of all duty, provide for an on-duty meal period. There is no mention in section 11(A) of "premises". The worker may not even be employed on the employer's premises to qualify for an "on-duty" meal period. But, in the event that the employee is required to eat on the employer's premises, "a suitable place for that purpose shall be designated". (Section 11(B)) The requirement that a suitable place be provided in the event the employee is required to "eat on the premises", has nothing whatsoever to do with whether such a meal period must be counted as "hours worked". Simply put, the requirement of section 11(B) speaks to health concerns, not monetary concerns.

There is no argument that duty-free meal periods need not be compensated. Therefore, the fact that the IWC felt constrained to provide that in the case of rest periods the time "shall be counted as time worked" reinforces the DLSE's position that the employee must be paid for all time "during which an employee is subject to the control of an employer." Again, the "rest period" is the exception. If the definition of "hours worked" was followed, the rest period would not have to be compensated because the employee is not under the control of the employer nor is the employee performing work during that time. Had the IWC said nothing, the ten-minute rest period would have been uncompensated. As Requester states, the IWC "is plainly aware of the proper method of specifying when time must be considered working time under its Wage Orders." (REQUEST, p. 6)

C. DLSE ENFORCEMENT POLICY HAS CONSISTENTLY HELD THAT ABSENT A SPECIFIC EXCEPTION IN THE IWC ORDER THE WORKER MUST BE COMPENSATED FOR ALL TIME UNDER THE EMPLOYER'S CONTROL OR WHEN HE IS SUFFERED OR PERMITTED TO PERFORM WORK

Requester has chosen to attach copies of documents which represent Division training materials and policy and procedure memorandums. Each of these documents must be addressed separately.

1. The Training Material Referred To By The Requester At Exhibit 'B' Involves Only Employees Subject To Specific Rules

The material which Requester has submitted at Exhibit 'B' to the REQUEST is actually a portion of a training manual prepared for a federally funded program (PWEA, Public Works

Employment Act) which was designed to train individuals with college educations but no practical work experience.

In the portion of the training materials submitted as Exhibit 'B', the definition of "hours worked" contained in most of the Industrial Welfare Commission Orders is plainly stated:

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

As the Requester points out, the second clause of the above-cited language does correspond to the language used in the FLSA to define the term "employ" (See 29 U.S.C. §203(g)) What Requester fails to point out is that there is no language in the FLSA equal to that in the IWC Orders dealing with "the time during which an employee is subject to the control of an employer". Therefore, as the document points out, we have "no problem "in determining hours worked based on active duties... [T]he problem arises when the job is a combination of assigned duties and time subject to varying degrees of employer control." One of these problem areas arises, as pointed out by the document, "[I]f the employee is subject to 24-hour employer control." Under those circumstances, as the document advises, "sleep time, meal time, and other non-active times which the employee may use for private pursuits or during which the employee is free to leave the premises have not been considered work time." The document then details the differences between the Orders and FLSA.

The document continues by pointing out that in situations involving employment of "[L]ess than 24-Hour Duty (Non Live-in)

...an employee who is required to be on duty for less than 24 hours is considered to be working even though the employee is permitted to sleep or engage in other personal activities when not busy." There is nothing in the subdivision 'A' dealing with non-resident employees which, either expressed or implied, could be interpreted to relieve the employer of the obligation to pay the employee for a meal period when the employee is not allowed to leave the premises.

Subdivision B (beginning at the top of the second page of Exhibit 'B') which covers duty of 24 hours or more where the employee does not "live-in" (ambulance drivers, etc.), states the Division policy at that time, and presently, which is based on the exception found in some of the IWC Orders which provides:

> "The daily overtime provisions of subsection (A) above shall not apply to ambulance drivers and attendants scheduled for twenty-four (24) hour shifts of duty who have agreed in writing to exclude from daily time worked not more than three (3) meal periods of not more than one hour each and a regularly scheduled uninterrupted sleeping period of not more than eight (8) hours. The employer shall provide adequate dormitory and kitchen facilities for employees on such a schedule." (See IWC Order 5-89, Section 3(I); Tit. 8, C.C.R., 11050(3)(I) (Emphasis added)

The above language regarding adequate "kitchen facilities" clearly implies that the IWC understood individuals such as ambulance drivers, who must be immediately available in the event of emergency, may eat their meals on the premises of the employer and not be paid for such time under the employer's control if they had so agreed in writing to exclude such time from time worked. The provision recognizes a reality and specifi-

cally deals with that reality. The DLSE's enforcement policy does not require that employees in the category of ambulance drivers be paid for meals they are required to eat on the employer's premises if they have so agreed in writing.

The language at subdivision C covering "Resident Employees" is, likewise, predicated upon the exemption provided in the definition of "Hours Worked" contained in Order 5 which, in addition to the language cited above, provides:

> "...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."

The provisions of subdivision C of Exhibit 'B' also rely, in part, on Section 3(D) of Order 5, which provides an exemption from the "Hours and Days of Work" provisions of the Order for employees employed in homes for the aged of less than eight (8) beds and for employees having responsibility for children under eighteen years of age ("house parents") and to organized camp counselors.[4/] The important fact in this discussion is that the IWC felt compelled to carve out an exception from the general definition of "Hours Worked".

However, there is nothing in subdivision C of Exhibit 'B' covering "Resident Employees" which would relieve the employer of the obligation of paying for the meal period where the employee is not allowed to leave the premises. The provision that "on-duty" time does not include "uninterrupted meal periods

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4/ See also the discussion, infra, regarding Exhibits 'C', 'D' and 'E' involving organized camps.

of not less than 30 minutes nor more than one hour per meal" does not indicate an intent by the DLSE that the employee is not free to leave the employer's premises during that "meal period". The language simply assures that in the event the employee is on call (See Exhibit 'B', subdivision F) during the meal period, he or she will be paid if the meal period is interrupted. The requirement that the meal period not be in excess of one hour is intended to assure that there is no confusion between bona fide meal periods and "split shifts". (Tit. 8, C.C.R., §11054(C))

Similar exceptions, of course, apply to "apartment house and motel managers", and "live-in household workers". In the case of apartment house and motel managers who are required to live on the premises there is no indication in the document (See Exhibit 'B', subdivision C(5)(a)) that employees who are required to "remain on the premises" as opposed to "reside on the premises" would not be entitled to recover for each hour they are required to "remain on the premises."

The requirements of IWC Order 15 regarding "Live-In Household Occupations" (Tit. 8, C.C.R. §11150(3)(A)) are simply restated at subdivision C(6)(a) of Exhibit 'B'. Exhibit 'B' at subdivision C(6)(2) provides that "uninterrupted meal periods of not less than 30 minutes nor more than one hour per meal" are not to be counted toward "hours worked". That remains the policy of the DLSE. However, it appears that Requester infers from that language that the employer would not be required to pay for the meal period in the event that the employee is not allowed to leave the premises during the meal period. Requester

has, again, confused "reside on the premises" with "remain on the premises."

Again, the Division policy in 1977 as it is in 1990, is to follow the dictates of the IWC. In this case, the IWC has chosen to exempt these employees from the general "Hours Worked" definition and the DLSE is complying.

Thus, the statement by the Requester that the DLSE's 1977 publication noted that meal periods did not constitute hours worked is, to put it in its best light, mistaken. However, it is true that despite the fact that the training material does not specifically address the issue, the specific work classifications of ambulance drivers and attendants (including firefighters in those classifications) which the IWC had specifically exempted, may be required to remain on the employer's premises during meals without being paid <u>if they agreed in writing</u>.

2. Exhibit 'C' Deals With Organized Camps Which Have Always Enjoyed An Exemption From The "Hours And Days Of Work" Provisions Of The IWC Orders

As noted above, the provisions of Order 5 subsection 3(D) have historically exempted "organized camp counselors" from the "Hours and Days of Work" requirements of the Orders. The 1977 Interpretive Bulletin (77-3) provides that camp counselors are not to be paid for meal time when only indirect supervision of campers is involved. The Bulletin recognizes that some camp counselors do eat their meals at camps which are often in isolated locations; and that by the very nature of the job, the counselor is in a leadership position. The language of the

Bulletin which indicates that "meal time when only indirect supervision is involved" would not be compensable is intended to convey the meaning to the reasonable person that where the counselor chooses to eat his meal at the camp, such a situation would not constitute an "on-duty" meal period if "indirect supervision" of the campers was required. The language can in no way be construed to reflect a policy by the DLSE which would allow the camp to require the counselor to remain on the premises during the meal period.

3. Exhibits 'D' And 'E' Are Simply Extensions Of Division Policy Set Out In Exhibit 'C'

The language contained in both Exhibits 'D' and 'E' is identical to the language contained in Exhibit 'C' and needs no more explanation than that set out above. Interpretive Bulletin 78-1 (Exhibit 'D') was necessitated by the passage, in 1978 of what is now Labor Code §1182.4. Exhibit 'D', the excerpt from the Operations and Procedure Manual of the DLSE, is nothing more than a restatement of the then Division policy in regard to enforcement of the IWC Orders at organized camps. It is interesting to note that Requester fails to point out that the Legislature amended Labor Code §1182.4 in 1980 to provide that camp counselors are not subject to the IWC Orders.

In summary, the documents which Requester submits do not reflect that the DLSE has ever taken the position that an employer may require (or, as Requester puts it, "ask") an employee to remain on the employer's premises during the meal period without paying for the time. The only exception is that

exception designed by the IWC covering ambulance drivers and attendants. However, that exception is not directly addressed in the documents introduced by Requester.

D. REQUESTER'S CONTENTION THAT THE INDUSTRIAL WELFARE COMMISSION'S PROVISIONS CONCERNING PAYMENT OF HOURS FOR MEAL PERIODS ARE PATTERNED AFTER FEDERAL LAW IS ERRONEOUS

Requester's contention that the meaning of an 'on duty' meal period in Wage Order 1-89 must be given the same interpretation as an 'on duty' meal period under the federal wage law assumes, first, that the federal "wage law" contains the same provision as the state law and, second, assumes that the provisions of the IWC Order which address the facilities which the employer must provide when requiring "on-premises" meals is what is in issue here. Both contentions are fallacious.

The federal Fair Labor Standards Act never refers to "on-premises" meal periods[5/]. The California Industrial Welfare Commission Orders do have a provision which provide that "where employees are required to eat on the premises, a suitable place for that purpose shall be designated." (C.C.R., tit. 8, §11010(11). The language of that section doesn't address the question of whether the employee must be paid for the meal period, it simply states that if the employer requires the

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5/ The federal regulation which Requester insists should be binding upon the DLSE is found in the Code of Federal Regulations (29 C.F.R. §785.19). Subsection (b) provides: "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 lunch period."

employee to remain on the premises for the meal period, "a suitable place for that purpose shall be designated."

The Regulation adopted by the Secretary of Labor (See fn. 5) conforms to the Fair Labor Standards Act which does not have a definition of the term "hours worked"[6/]. 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." (See Exhibit 'A' to Declaration of Karla Yates)

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." (See Exhibit 'B' to Declaration of Karla Yates)

The IWC's 1947 change in the language of the Orders

6/ As noted above except in the limited context of "changing clothes" and "wash-up time" the FLSA does not define the term "hours worked". (29 U.S.C. §203(o) and, specifically, 29 C.F.R. §785.6)

which defined "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. Mt. Clemens Pottery Co. (1946) 328 U.S. 680, 690-691, 66 S.Ct. 1187 to define "workweek"[7/]. 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

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7/ The language of the U.S. Supreme Court in the case of Anderson v. Mt. Clemens Pottery Co., supra, 328 U.S. 680, 690-691, 66 S.Ct. 1187 which provides that "all the time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace" differs from the language used by the IWC in the 1942 Orders which stated the above requirements in the disjunctive:
"'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." (See Exhibit 'A' to Declaration of Karla Yates; emphasis added)
Under this U.S. Supreme Court definition of workweek, the employee must be on the employer's premises and "on duty" or "at a prescribed workplace." The original IWC definition contained in the 1942 Orders simply required that the employee "be on the employer's premises or to be on duty or to be at a prescribed workplace. Thus, even under the original definition the IWC requirements were more strict than the requirements set out by the Mt. Clemens Pottery court.

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, 328 U.S. 680, 690-691, 66 S.Ct. 1187, (which was similar to, but less restrictive than, the definition in the 1942 IWC Orders) was to apply in 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. If, as a condition of employment, the employer requires that the employee remain on the premises the employee is subject to the control of the employer. It matters not whether the employee is required to remain on the employer's premises during the meal period, before the shift begins or after the shift ends. So long as the employer controls the activities of the employee, the employer must pay the employee.

E. THE USE OF FEDERAL CASES CONSTRUING FEDERAL STATUTES MAY BE LOOKED TO FOR PERSUASIVE GUIDANCE UNLESS THE LANGUAGE OF THE FEDERAL STATUTE DIFFERS FROM THE STATE STATUTE

There are some provisions of the IWC Orders which are similar to the provisions of the FLSA and, when the intent of the legislation concerning particular provisions of the Act is clearly the same, the federal cases interpreting the Fair Labor Standards Act may be relied upon; but the same rationale does not apply to the federal regulations adopted by the Secretary of Labor. (Cf. Skyline Homes v. Department of Industrial Relations (1985) 165 Cal.App.3d 239, 247-248, 211 Cal.Rptr. 792; Alcala v. Western Ag Enterprises (1986) 182 Cal.App.3d 546, 551) Yet the Requester continues to insist that the federal regulation, (29 C.F.R. §785.19(b)) adopted by the Secretary of Labor, which relieves an employer of its obligation to pay for meal periods when the employee is not allowed to leave the premises, should be adopted by the Division of Labor Standards Enforcement for purposes of enforcement of the Industrial Welfare Commission Orders.

As noted above, the Fair Labor Standards Act does not, specifically, define the term "hours worked" except as the term applies to time spent "changing clothes" and "washing" in employments covered by collective bargaining agreements. (29 U.S.C. §203(o)) However, each of the California Industrial Welfare Commission Orders contain a definition of the term "hours worked" which specifically provides that it "means the time during which an employee is subject to the control of an em-

ployer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." (Emphasis added).

In interpreting the language of the Fair Labor Standards Act (which, as noted, does not contain a definition of "hours worked"), the United States Supreme Court had originally stated that employees subject to the Act must be paid for all time spent in "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer of his business." Tennessee Coal Iron & Railroad Co. v. Muscoda Local No. 123 (1944) 321 U.S. 590. Subsequently, and still without defining the term "Hours Worked", the U.S. Supreme Court concluded 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., supra, 328 U.S. 680, 690-691, 66 S.Ct. 1187. (Emphasis added)

The Department of Labor regulation which allows an employer to require the employee to remain on the premises during the meal period so long as the employee need not be "on duty or at a prescribed workplace" is consistent with the definition of "workweek" contained in the Fair Labor Standards Act. But that regulation is not consistent with the Industrial Welfare Orders which specifically define "Hours Worked" as all "time during which an employee is subject to the control of an employer."

The California definition of "hours worked" contained in the IWC Orders does not require the performance of any exertion (physical or mental); but simply requires that the employee be paid for all time when the worker is "subject to the control of the employer" and further includes (as does the F.L.S.A.) any time the employee is "suffered or permitted to work"[8/] whether subject to the control of the employer or not. This definition of hours worked is broad in and of itself. When interpreted in light of the dictates of the California Supreme Court which requires a liberal construction of the the wage and hour laws with an eye to promoting the protections which they are designed to effect (see Industrial Welfare Commission v. Superior Court (1980) 27 Cal.3d 690, 702, 166 Cal.Rptr. 331), there is little doubt that the definition of "hours worked" contained in the IWC Orders is designed to encompass much more than "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., supra, 328 U.S. 680, 690-691, 66 S.Ct. 1187

The definition of "hours worked" adopted by the IWC includes all time that the worker is "subject to the control of an employer". Thus, the definition of "workweek" provided by the U.S. Supreme Court cannot be equated with the definition of

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8/ The F.L.S.A. defines the word "employ" to include "suffer or permit to work." (29 U.S.C. §203(g)) but does not speak of "control by the employer".

"Hours Worked" provided by the IWC. In view of the substantial difference, it is clear that the regulation adopted in 1955 by the Secretary of Labor, though compatible with the Supreme Court's definition of "workweek", cannot be relied upon in interpreting the Industrial Welfare Commission Orders.

1. There Is No Authority For The Assertion That The California Courts Should Look To Federal Regulations For Guidance In Interpreting The Minimum Wage Orders

The court in Hernandez v. Mendoza (1988) 199 Cal.App.3d 721, 726, fn. 1 stated: "since California's wage laws are patterned on federal statutes, federal cases construing those statutes provide persuasive guidance to state courts." However, the court did not, as Requester states, hold that federal regulations could be relied upon in interpreting California law. The operative word in the Hernandez court's language is "cases." The Requester has cited no authority, and it is respectfully submitted that none exists, which would allow a California Court to utilize regulations, adopted by a federal agency to enforce a federal law, to interpret California law. Yet, that is exactly what Requester asks.

The Code of Federal Regulations which Requester would have this court rely on recognizes, as did the court in Skyline Homes v. Department of Industrial Relations, supra, 165 Cal.App. 3d 239, 250, that neither the Fair Labor Standards Act nor the Federal Regulations adopted to enforce that Act preempt the California Industrial Welfare Commission Orders. Title 29 United

States Code section 218(a) specifically states that "No provisions of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter."

Additionally, the Federal Regulations at 29 C.F.R. §500.2 provide:

> "The Act [The Fair Labor Standards Act] and these regulations are intended to supplement State Law; compliance with the Act or these regulations shall not excuse any individual from compliance with the appropriate State law or regulation." (emphasis added).

2. The DLSE, Not The U.S. Department of Labor, Is Charged With Enforcing And Interpreting The California IWC Orders

The court in Alcala v. Western Ag Enterprises, supra, 182 Cal.App.3d 546, 551, stated:

> "The Division is specifically empowered to administer and enforce IWC orders (Labor Code §§ 61, 1193.5), and is the agency charged with interpreting the intent of the IWC. Its interpretation is entitled to great weight and under established principles of statutory construction, unless it is clearly unreasonable, it will be upheld. (citing Skyline Homes, supra, at 249)

Relegating the authority of the DLSE to the United States Department of Labor, Division of Wage and Hour, would be a unique departure from established California state law.

F. THE CONTENTION BY THE REQUESTER THAT HE IS UNAWARE OF THE REQUIREMENT THAT THE WORKER MUST BE PAID FOR MEAL PERIODS WHEN HE OR SHE IS NOT ALLOWED TO LEAVE THE EMPLOYER'S PREMISES IS BELIED BY HIS OWN PUBLICATION

Requester's contention that he is unaware of when the DLSE adopted the enforcement policy is really unbelievable. The Requester, Mr. Simmons, is a labor lawyer who publishes the "Wage and Hour Manual For California Employers" (Castle Publications, Ltd., Van Nuys, California) The fourth edition of this Manual, a 548-page compendium of federal and state labor law information, is used extensively by California employers and, in fact, the DLSE subscribes to the publication for limited use by the staff.

The Wage and Hour Manual discusses "Meal Periods" at page 184 of the Fourth Edition. A copy of the pertinent pages are attached hereto as Exhibit 'B'. The Manual states, inter alia:

> "7.6 MEAL PERIODS
> Meal periods do not have to be counted as hours worked, either for purposes of the F.L.S.A. or the California Wage Orders, if (a) the employee is completely relieved of all duties, active or inactive; (b) the employee is free to leave his work station and the employer's premises; and (c) the meal period is at least 30 minutes long..."

In view of the position he takes in his own publication, it must be very difficult to contend, as does the Requester, that the position of the DLSE is not supported by a clear reading of the statute or that he was unaware of the enforcement position of the DLSE in this regard.

III. CONCLUSION

For all of the reasons cited above, the Office of Administrative Law should determine that 1) Exhibits 'A' and 'B' submitted by Requester do not represent "underground regulations" and 2) the enforcement policy of the DLSE in regard to the issue of the interpretation of "Hours Worked" as applied to the meal periods during which the employee is subject to the control of the employer represents an existing regulatory requirement (See, for example, Tit. 8, C.C.R. §11050(2)(H)) that has only one legally tenable interpretation clear from a reading of the adopted IWC regulations and is, therefore, not quasi-legislative in nature.

Dated: April 26, 1990

Respectfully submitted,

H. Thomas Cadell, Jr.

H. THOMAS CADELL, JR.
Chief Counsel
Division of Labor Standards Enforcement
Department of Industrial Relations

CERTIFICATION OF SERVICE BY MAIL

(C.C.P. 1013a)

I, MARIBETTE SIFFORD, do hereby certify that I am employed in the County of San Francisco, over 18 years of age, not a party to the within action, and that I am employed at and my business address is 30 Van Ness Avenue, Suite 4400, San Francisco, California 94102.

On April 26, 1990, I served the within RESPONSE OF THE DIVISION OF LABOR STANDARDS ENFORCEMENT TO REQUEST FOR DETERMINATION by placing a true copy thereof in an envelope addressed as follows:

California Office of Administrative Law
555 Capitol Mall, Suite 1290
Sacramento, California 95814

Richard J. Simmons, Esq.
Musick, Peeler & Garrett
One Wilshire Blvd., Suite 2100
Los Angeles, CA 90017

and then sealing the envelope with postage thereon fully prepaid, depositing it in the United States mail in this city by ordinary first class mail.

I certify under penalty of perjury that the foregoing is true and correct.

Executed on April 26, 1990, at San Francisco, California.

Maribette Sifford
MARIBETTE SIFFORD

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. **MOTION FOR JUDICIAL NOTICE; MEMORANDUM IN SUPPORT; DECLARATION IN SUPPORT; PROPOSED ORDER; and**
2. **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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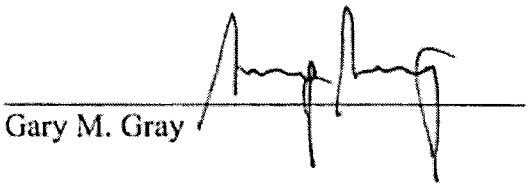
Executed this 31st day of January, 2018 in San Francisco, California.



Gary M. Gray