No. S224853

IN THE SUPREME COURT OF CALIFORNIA

JENNIFER AUGUSTUS, et al.,

Plaintiffs and Respondents,

v.

ABM SECURITY SERVICES, INC.,

Defendant and Appellant,

SUPREME COURT
FILED

AUG 3 1 2015

Frank A. McGuire Clerk

Deputy

After a Decision of the Court of Appeal of the State of California,
Second Appellate District, Division One, Case Nos. B243788 & B247392

The Superior Court of Los Angeles County,
The Honorable John Shepard Wiley Jr.
Case Nos. BC336416, BC345918, & CG5444421

DEFENDANT-APPELLANT'S MOTION FOR JUDICIAL NOTICE; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; DECLARATION OF THEANE EVANGELIS

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Service on the Attorney General required per Bus. & Prof. Code, § 17209

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MOTION FOR JUDICIAL NOTICE

Pursuant to Evidence Code sections 451, 452, and 459 and California Rules of Court, rule 8.520(g), Appellant ABM Security Services, Inc. ("ABM") respectfully requests that this Court take judicial notice of the following statutory and regulatory enactments and history, which are referenced in ABM's answering brief and are relevant to the interpretation of section 226.7 of the Labor Code and Wage Order No. 4, which govern this proceeding:

I. Assembly Bill No. 2509

1. Assembly Committee on Labor and Employment, Analysis of Assembly Bill No. 2509 (1999-2000 Reg. Sess.) as introduced February 24, 2000, attached as Exhibit A to the Declaration of Theane Evangelis ("Evangelis Declaration").

2. Senate Judiciary Committee, Analysis of Assembly Bill No. 2509 (1999-2000 Reg. Sess.) as amended August 7, 2000, attached as Exhibit B to the Evangelis Declaration.

II. Rulemaking File for 1952 Revisions to Wage Order No. 4

3. Industrial Welfare Commission Order No. 4-52, attached as Exhibit C to the Evangelis Declaration.

4. Industrial Welfare Commission, Minutes of a Meeting of the Industrial Welfare Commission of the State of California, May 16, 1952, 1952

Wage Order Rulemaking File, attached as Exhibit D to the Evangelis Declaration.

III. Rulemaking File for 2000 Revisions to Wage Order No. 4

5. History of Basic Provisions in a Representative Order of the Industrial Welfare Commission, the Order Covering the Manufacturing Industry, 2000 Wage Order Rulemaking File, attached as Exhibit F to the Evangelis Declaration.

6. Industrial Welfare Commission, Statement as to the Basis, 2000 Wage Order Rulemaking File, attached as Exhibit E to the Evangelis Declaration.

* * *

The foregoing items are appropriate subjects of judicial notice and comply with the criteria for judicial notice under the California Rules of Court:

1. They are relevant to ABM's arguments relating to the interpretation of Wage Order No. 4 and Labor Code section 226.7 (Cal. Rules of Court, rule 8.252(a)(2)(A));

2. None of the items submitted with this motion relates to proceedings occurring after the judgment that is the subject of this appeal (Cal. Rules of Court, rule 8.252(a)(2)(D)); and

3. Although they were not presented to the trial court, they are admissible regulatory and legislative history (Cal. Rules of Court, rules 8.252(a)(2)(B) and 8.252(a)(2)(C); Evid. Code, §§ 451, 452, 459).

DATED: August 31, 2015

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: /KRD

Theodore J. Boutrous, Jr.

Attorneys for Defendant and Appellant
ABM Security Services, Inc.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This action concerns whether, under Labor Code section 226.7 and Wage Order No. 4-2001, on-call rest breaks are impermissible as a matter of law. Accordingly, this motion seeks judicial notice of (i) selected legislative history of Labor Code section 226.7, which codified certain provisions of AB 2509, and (ii) selected regulatory history of Wage Order No. 4. These materials are referenced in the accompanying answering brief of Defendant-Appellant ABM Security Services, Inc. ("ABM") and confirm that neither the California Legislature nor the Industrial Welfare Commission intended to create a *per se* rule prohibiting on-call rest breaks.

These materials satisfy the requirements for judicial notice under the California Rules of Court, rules 8.520(g) and 8.252(a), because they are relevant to this proceeding; they do not relate to proceedings occurring after the judgment that is the subject matter of this proceeding; and, although they were not presented to the lower courts, they are proper subjects of judicial notice under Evidence Code section 452.

II. ARGUMENT

The legislative and regulatory materials for which ABM seeks judicial notice meet all of the applicable requirements under the California Rules of Court:

First, the materials to be judicially noticed are highly relevant to the central issue in this appeal—whether on-call rest breaks are *per se* invalid under Wage Order No. 4 (the "Wage Order") and Labor Code section 226.7 ("Section 226.7"). (See Cal. Rules of Court, rule 8.252(a)(2)(A)). The selected legislative and regulatory histories of the Wage Order and Section 226.7 will aid this Court in interpreting these authorities and in determining the intent of the Legislature and Industrial Welfare Commission in creating the rest break requirement. This Court regularly considers such materials when determining the purpose and effect of specific statutes and regulations. (See, e.g., *Associated Builders & Contractors, Inc.* (1999) 21 Cal.4th 352, 374 fn. 4 [taking "judicial notice of administrative agency records"].)

Second, although ABM believes these materials were not presented to the trial court, the materials are subject to judicial notice under Evidence Code sections 452 and 459. (See Cal. Rules of Court, rule 8.252(a)(2)(C)). Evidence Code section 459, subdivision (a), provides that the "reviewing court may take judicial notice of any matter specified in Section 452." In turn, Section 452 provides that a court may take judicial notice of "[r]egulations and legislative enactments issued by or under the authority of . . . any public entity in the United States," and of "[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States." Such official acts include "relevant legislative history." (*United*

Teachers of Los Angeles v. Los Angeles Unified School Dist. (2012) 54 Cal.4th 504, 528.)

California courts have taken judicial notice of the same types of legislative and regulatory documents that are the subject of this motion. (See *Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 138 [considering analysis by Assembly Committee on Labor and Employment, similar to Exhibit A to the Evangelis Declaration]; *Boehm & Associates v. Workers' Comp. Appeals Bd.* (2003) 108 Cal.App.4th 137, 146 [considering analysis by Senate Judiciary Committee, similar to Exhibit B to the Evangelis Declaration]; *California School of Culinary Arts v. Lujan* (2003) 112 Cal.App.4th 16, 26-27 [considering meeting minutes and other administrative records of Industrial Welfare Commission, similar to Exhibits C through F of the Evangelis Declaration].)

Finally, none of the materials to be noticed relates to proceedings that have occurred after the orders and judgments that are the subject of this appeal. (See Cal. Rules of Court, rule 8.252(a)(2)(C)). The earliest order at issue here is the trial court's 2009 order granting class certification, but the materials to be noticed do not relate to any proceedings that took place after 2000.

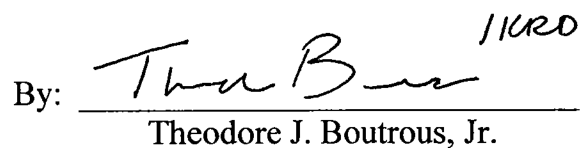
III. CONCLUSION

For the foregoing reasons, ABM respectfully requests that the Court grant its Motion for Judicial Notice.

DATED: August 31, 2015

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: 

Theodore J. Boutrous, Jr.

Attorneys for Defendant and Appellant
ABM Security Services, Inc.

DECLARATION OF THEANE EVANGELIS

I, Theane Evangelis declare as follows:

1. I am an attorney duly licensed to practice law in the State of California and am a partner in the law firm of Gibson, Dunn & Crutcher LLP, counsel of record for Defendant-Appellant ABM Security Services, Inc. ("ABM"). I have personal knowledge of the facts stated herein unless indicated otherwise, and, if called as a witness, I could and would testify competently thereto. I make this declaration in support of ABM's Motion for Judicial Notice.

2. I am informed and believe that attorneys at my firm retained Legislative Intent Service, Inc. ("LIS") to obtain the legislative history for Assembly Bill No. 2509. Exhibits A and B are true and correct copies of relevant portions of the legislative history provided by LIS in the form provided by LIS.

3. Attached hereto as Exhibit A is a true and correct copy of the relevant portion of the Assembly Committee on Labor and Employment's analysis of Assembly Bill 2509, as provided to my firm by LIS.

4. Attached hereto as Exhibit B is a true and correct copy of the relevant portion of the Senate Judiciary Committee's analysis of Assembly Bill 2509, as provided to my firm by LIS.

5. I am informed and believe that attorneys from my firm further retained LIS to obtain the rulemaking file and other regulatory history relating to the 1952 revision of the Industrial Welfare Commission Order No. 4. Exhibits C and D are true and correct copies of relevant portions of the 1952 rulemaking file and other regulatory history provided by LIS in the form provided by LIS.

7. Attached hereto as Exhibit C is a true and correct copy of the Industrial Welfare Commission Order No. 4-52, as provided to my firm by LIS.

8. Attached hereto as Exhibit D is a true and correct copy of the relevant portion of the Minutes of a Meeting of the Industrial Welfare Commission of the State of California, dated May 16, 1952, as provided to my firm by LIS.

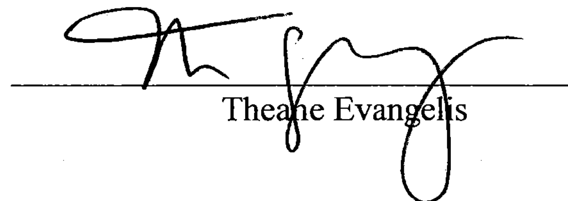
9. I am informed and believe that attorneys from my firm further retained LIS to obtain the rulemaking file and other regulatory history relating to the 2000 revision of the Industrial Welfare Commission Order No. 4. Exhibits E and F are true and correct copies of relevant portions of the 2000 rulemaking file and other regulatory history provided by LIS in the form provided by LIS.

10. Attached hereto as Exhibit F is a true and correct copy of the History of Basic Provisions in a Representative Order of the Industrial Welfare Commission, the Order Covering the Manufacturing Industry, part of the

rulemaking file for the 2000 revision of Wage Order No. 4, as provided to my firm by LIS.

11. Attached hereto as Exhibit E is a true and correct copy of the Industrial Welfare Commission's Statement as to the Basis, part of the rulemaking file for the 2000 revision of Wage Order No. 4, as provided to my firm by LIS.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on this 28th day of August, 2015, in Los Angeles, California.



Theane Evangelis

Exhibit A

Date of Hearing: April 12, 2000

ASSEMBLY COMMITTEE ON LABOR AND EMPLOYMENT
Darrell Steinberg, Chair
AB 2509 (Steinberg) – As Introduced: February 24, 2000

SUMMARY: Revises statutes relating to the administrative and civil enforcement of wage and hour laws including wage collection and enforcement procedures before the Labor Commissioner (Commissioner). Specifically, this bill:

1) Provides that in an administrative wage claim proceeding (Berman hearing) before the Commissioner, a notice for production of documents, which is served by mail, may be used in lieu of subpoena, which requires personal service.

2) Provides that the legal rate of interest on due and unpaid wages at a Berman hearing shall be at the rate established by Civil Code Section 3289(b), which is 10%.

3) Provides that following a Berman hearing, an employer filing an appeal shall post an undertaking in the amount of the Commissioner's final order, decision or award. Provides further that the requirement of judicial arbitration does not apply in such proceedings. Provides that in cases where the Commissioner represents the wage claimant in such proceedings, the Commissioner may be awarded attorneys fees in the same manner as private counsel representing a wage claimant.

4) Provides if the United States Department of Labor (Labor Department) determines that the Commissioner has erred in dismissing the complaint of an employee of unlawful retaliation, as specified, the Commissioner shall, within 15 days after receipt of the Labor Department's determination, either notify the parties of the ongoing of the investigation of the employees complaint, or shall issue a new determination in the matter.

   Provides that an employee may file a civil action for unlawful retaliation, as specified, without first filing a discrimination claim before the Commissioner, and that the limitation periods for such administrative remedies do not apply in such a civil action.

5) Provides that the parent of and substantial shareholders in a corporation are jointly and severally liable with the corporation for unpaid wages and penalties. Defines "substantial shareholder" as provided in Labor Code section 3717, as a shareholder who owns at least 15 percent of the total value of all classes of stock, or fifteen percent of the beneficial interests in the corporation.

6) Provides that a successor, as defined, to an employer who owes wages to his or her former employees is liable for those wages.

7) Provides that in cases where wages are paid with a check for which payment is refused due to insufficient funds, the imposition of up to 30 days' waiting time penalties applies to all employers, rather than employers only in the building and construction industry.

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8) Clarifies that Labor Code Section 1194, which provides for an award of attorneys fees for an employee in cases involving failure to pay minimum wage and overtime wages, is separate from, and not controlled by Labor Code Section 218.5, which provides for prevailing party attorneys fees in other wage cases.

9) Provides that the legal rate of interest on due and unpaid wages in a civil action for unpaid wages shall be established by Civil Code Section 3289(b), which is 10%.

10) Provides that an employer's itemized wage statement shall include, among other information, the number of piecework units earned and any applicable piece rate if paid on a piecework basis, and for non-exempt employees, the applicable hourly rates in effect during the pay period and the hourly rate of pay and hours worked, where applicable.

Clarifies that the employer shall keep specified payroll records for employees paid in cash and by check.

Provides, in the case of a knowing and intentional failure by an employer to comply with the itemized wage statement requirements, for an employee to recover a penalty of up to $100 per payroll period up to a maximum of $10,000. Provides that an employee may bring a complaint before the Commissioner or file a civil action for damages or penalties, and attorney's fees.

11) Provides that in a case where an employer fails to maintain records that identify each employee to whom wages are paid, penalties shall be computed by multiplying the number of employees employed on the date the penalty for the preceding year, unless the employer affirmatively establishes evidence that supports a lesser penalty based upon proof of a lesser number of affected employees.

12) Provides for penalties for an employer who violates the requirement that no employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission (IWC). Provides for penalties of $50 per employee per pay period and payment of an amount equal to twice the average hourly rate of compensation for the employee for the full length of the meal or rest period. Provides that an employee may bring a complaint before the Commissioner or file a civil action or for damages or penalties, and attorney's fees.

13) Provides that the Commissioner may order an employer to post a bond if the employer fails to satisfy a final judgment for interest, penalties and other demands for compensation within the jurisdiction of the Commissioner, as well as unpaid wages. Provides that the bond shall cover such interest, penalties, or other demands, as well as unpaid wages.

14) Provides that the Commissioner shall, under specified circumstances, order the employer to post a workplace notice describing the nature of a violation and related information.

15) Provides that any amounts paid directly by a patron to a dancer employed by an employer subject to IWC Order No. 5 or 10 shall be deemed a gratuity.

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16) Prohibits an employer from deducting from a gratuity indicated by a patron on a credit card slip any credit card payment processing fee or cost. Requires payment of gratuities made by credit card to be made to the employees not later than the next regular payday following the date the patron authorized the credit card payment.

17) Provides that an employer shall maintain payroll records showing the number of piece-rate units earned by and any applicable piece rate paid to employees.

18) Provides that the civil penalty for an employer who willfully fails to maintain specified payroll records includes, in addition to records required by statute, records required by any applicable wage orders of the IWC. Revises the penalty for a violation of this section from $500 to $100 per employee for each payroll period up to a maximum period of three years.

19) Provides that the liquidated damages for a violation of minimum wage laws may be awarded in a hearing before the Commissioner in the same manner as a civil action under current law.

20) Provides that with respect to a claim for a failure to pay minimum wages, the Commissioner may, in the same proceeding, order both payment of wages owed, interest thereon, statutory liquidated damages and civil penalties.

<u>EXISTING LAW</u>:

1) Provides in a Berman hearing for documents to be obtained by subpoena served by personal service, but not a notice delivered by mail.

2) Establishes the rate of interest on unpaid wages a Berman hearing based on a statute which has been repealed.

3) Provides for the appeal to and a de novo review in court of the Commissioner's order, decision, or award following a Berman hearing.

4) Provides for an appeal to the Labor Department of a dismissal of an employee's complaint of unlawful discrimination.

5) Provides under Labor Code section 2717 for a civil action to hold substantial shareholders of a corporation without workers' compensation insurance liable for reimbursement of the Uninsured Employers Fund.

6) Provides under Labor Code section 2684 that in garment manufacturing, a business which is a successor to an employer who owes wages to the former employees is liable for those wages if the successor meets specified criteria.

7) Provides a penalty of up to 30 days' wages for an employer in the building and construction trades who intentionally pays wages with a check for which payment is refused due to insufficient funds.

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8) Provides for an employee to recover in a civil action for a failure to pay minimum wage or overtime compensation reasonable attorney's fees, and costs of suit.

9) Provides under Civil Code Section 3289(b) for recovery of interest at a rate of 10% in a civil action for a breach of contract, as specified.

10) Provides that when wages are paid, an employer shall issue an itemized wage statement including specified information including net and gross wages earned; total hours worked; the dates of the period covered; and all deductions.

Provides, in the case of a knowing and intentional failure by an employer to comply with the itemized wage statement requirements, an employee may recover a penalty of actual damages or $100, whichever is greater, plus costs and reasonable attorneys fees.

11) Provides that an employer who violates the itemized wage statement requirements is subject to a civil penalty in the amount of $250 per employee per violation in an initial citation and $1,000 per employee for each violation in a subsequent citation. Provides that the Commissioner shall take into consideration whether the violation was inadvertent, and may decide not to penalize an employer for a first violation when that violation was due to a clerical error or inadvertent mistake.

12) Provides, under Wages Orders of the IWC for meal periods and rest periods. Provide under the Wage Orders for an "on duty" meal period when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to.

13) Provides that the Commissioner may order an employer to post a bond to ensure future payment of wages in cases where the employer has failed to satisfy a final judgment for nonpayment of wages.

14) Provides for employers to post specified information including applicable wage orders of the IWC, information on safety and health, harassment and discrimination in employment, and rights under the Family and Medical Leave Act.

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15) Defines "gratuity" to mean any tip, gratuity, money or part thereof, which has been paid or given to or left for an employee by a patron of a business over and above the actual amount due for services rendered or for goods, food, drink, or articles sold or served to the patron.

16) Provides that no employer shall collect, take or receive any gratuity or part thereof paid, given or left for an employee by a patron, or deduct any amount form wages due an employee on account of such gratuity. Provides that this prohibition does not apply under specified circumstances.

17) Requires an employer to keep payroll records containing specified information including the names, addresses and hours worked daily by employees.

18) Provides a civil penalty of $500 for an employer who fails to keep specified payroll records.

19) Provides that the liquidated damages in an amount equal to the wages unlawfully unpaid and interest thereon for a violation of minimum wage laws may be awarded in a civil action.

20) Provides for the Commissioner to issue a civil penalty citation of $50 for an initial violation of minimum wages and $250 for subsequent violations, and establishes a proceeding to contest such a penalty citation.

Provides for the Commissioner to order payment of minimum wages owed to an employee in a separate proceeding before the Commissioner under Labor Code section 98.

FISCAL EFFECT: Unknown

COMMENTS:

1) Current statutes, regulations, and wage orders of the IWC establish requirements for the payment of wages including minimum wages and overtime, hours of work, and a framework of administrative and civil remedies for violations of wage and hour laws. This bill revises the administrative and civil procedures, remedies and record keeping requirements for the stated purpose of strengthening enforcement of existing wage and hour standards. It does not increase minimum wages or revise overtime requirements.

2) Revisions in the administrative procedures for wage claims before the Commissioner and appeals of the Commissioner's decision include:

   a) Allowing records to be obtained through a notice, rather than a subpoena. A subpoena, which is allowed under current law requires personal service. A notice may be mailed.

   b) Allowing the commissioner to combine two separate proceedings established under current law, one for payment of minimum wages owed, and another for civil penalties for failure to pay minimum wage, into a single proceeding.

   c) Providing that the Commissioner may award liquidated damages for a minimum wage violation instead of requiring the Commissioner or employee to file a civil suit to recover such damages. Under current law such damages may be recovered in a civil action by the Commissioner or the wage claimant, but not in an administrative hearing before the Commissioner.

   d) Establishing the rate of interest on unpaid wages at 10% in both administrative and civil court cases. Current law cites a repealed section and is confusing.

   e) Requiring an employer appealing a Commissioner's order following a hearing to post an undertaking and waiving the requirement for judicial arbitration in such cases. The judicial arbitration hearing may be viewed as redundant to the Berman hearing in these cases.

3) Revisions related to wage and payroll records include:

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a) Providing that itemized wage statements and central payroll records include piece rate and hourly pay rate information for piece rate and hourly workers.

b) Increasing the penalties for violation of itemized wage statement and central payroll records requirements.

c) Shifting the burden of proof concerning the number of workers at an establishment where payroll records are missing.

4) Revisions related to penalties for violations of other wage and hour standards include:

a) Applying penalties for intentionally issuance of a bad (insufficient funds) payroll check applies to all employers rather than construction employers only. Under current law, the penalty is limited to construction employers.

b) Requiring an employer determined by the Commissioner to have engaged in a pattern and practice of wage law violations to post a workplace notice of findings and the Commissioner's telephone number to report further violations.

5) Revisions for the purpose of clarifying existing law include:

a) Clarifying that an employee may bring a civil action for unlawful retaliation without exhausting administrative remedies, as specified, with the Commissioner.

b) Clarifying that Labor Code Section 1194, which provides for an award of attorneys fees for an employee in cases involving failure to pay minimum wage and overtime wages, is separate from, and not controlled by Labor Code Section 218.5, which provides for prevailing party attorneys fees in other wage cases.

6) This bill also provides for unpaid wages to be collected from substantial shareholders and successor entities under specified circumstances. The substantial shareholders provision is based on substantial shareholder liability for corporations which lack workers' compensation insurance. The successor entity provision is based on the existing provision related to successor liability for unpaid wages in the garment manufacturing industry.

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7) Last year the supporters sponsored similar legislation in AB 633 and AB 1652, which passed and were vetoed. This bill does not contain a number of controversial provisions proposed in last year's legislation. For example, it does not establish a private right of action to recover and share in a portion of the state's civil penalties for wage violations, and for minimum wage and overtime violations. It does not carry forward a proposal to establish liquidated damages for overtime violations. It does not prescribe the Commissioner's required efforts to collect wage judgements.

8) Supporters state that California has a large and growing "underground economy" of employers who are chronic violators of wage and hour, safety, and tax laws. Such employers pay cash under the table or with checks that bounce, fail to report and pay employment taxes,

work their employees long hours without rest breaks, and avoid paying wage judgments issued against them. They cheat workers out of billions of dollars in wages owed to them under minimum wage and overtime laws. California's underground economy supplants an estimated $60 billion in legal business transactions. According to executive orders concerning the expanding underground economy issued by Governor's Deukmejian and Wilson, the state's loss of income taxes alone increased from $2 billion in 1986 to $3 billion in 1993.

They state that this bill streamlines the Commissioner process by allowing document requests by mail; by allowing the commissioner to re-open a discrimination case on remand from the Department of Labor; and providing for a "one-stop" civil penalty system where both wages and penalties can be recovered at one time; ensures that workers are provided adequate record keeping information, ensures that employers cannot easily escape wage liability, and that this bill clarifies areas of the law.

9) Opponents state that they have serious concerns regarding nearly all of the twenty-nine changes proposed by this bill and their impact on California's employers who even inadvertently violate a wage and hour law. These include: authorizing the Commissioner to create new, different rules of evidence and subpoenas process for wage and hour claims; eliminating judicial discretion to require non-binding arbitration on appeals; reopening of previously dismissed claims when letters criticizing a state program are filed with the U.S. Department of Labor; establishment of joint, and several liabilities for substantial shareholders, parent corporations and successors for unpaid wages and penalties; mandated private taxpayer payment of civil servant attorneys; wage and hour claims permitted in civil court prior to exhaustion of administrative remedies; new commissioner authority to assess civil damages, including liquidated damages; and new mandated payment of restitution plus civil penalties for failure to pay minimum wage consisting of all underpaid wages, any interest owed and statutory liquidated damages.

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REGISTERED SUPPORT / OPPOSITION:

Support

American Federation of State, County and Municipal Employees
California Conference Board of the Amalgamated Transit Union
California Conference of Machinists
California Labor Federation, AFL-CIO
Employment Law Center, Legal Aid Society of San Francisco
Engineers and Scientists of California
Exotic Dancers Alliance
Hotel Employees, Restaurant Employees International Union
Mexican American Legal Defense and Educational Fund
Region 8 States Council of the United Food & Commercial Workers
Service Employees International Union
Transport Workers Union of America

Opposition

Associated General Contractors
California Chamber of Commerce
California Manufacturers and Technology Association
California Retailers Association
Civil Justice Association of California
Western Growers Association

Analysis Prepared by: Ralph Lightstone / L. & E. / (916)319-2091

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Exhibit B

Post-it® Fax Note 7671 | Date 7/8 | # of pages ▶ 20
To Ralph | From
Co./Dept. | Co.
Phone # | Phone #
Fax # | Fax #

SENATE JUDICIARY COMMITTEE
Adam B. Schiff, Chairman
1999-2000 Regular Session

AB 2509
Assembly Member Steinberg
Amended August 7, 2000
Hearing Date: August 8, 2000
Labor Code
DLM:pjs

A B 2 5 0 9

SUBJECT

Wage and Hour Law: Remedies and Procedures

DESCRIPTION

This bill proposes to make various changes to the Labor Code relative to rights, remedies, and procedures. Specifically, this bill would provide that:

- In an administrative wage claim proceeding (Berman hearing) before the Commissioner, a notice for production of documents, which is served by mail, may be used in lieu of subpoena, which requires personal service.
- The legal rate of interest on due and unpaid wages at a Berman hearing shall be at the rate established by Civil Code Section 3289(b), which is 10%.
- Following a Berman hearing, an employer filing an appeal with the court shall post an undertaking in the amount of the Commissioner's final order, decision or award.
- The requirement of arbitration of civil court cases does not apply in an appeal of an administrative hearing decision.
- In cases where the Commissioner represents the wage claimant in a judicial appeal of an administrative decision, the Commissioner may be awarded attorney's fees in the same manner as private counsel representing a wage claimant.
- If the United States Department of Labor (Labor Department) determines that the Commissioner has erred in dismissing the complaint of an employee of unlawful retaliation, the Commissioner shall, within 15 days after receipt of the Labor Department's determination, either notify the parties of the

(more)

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ongoing investigation of the employees complaint, or shall issue a new determination in the matter.

In addition, AB 2509 would:

- Clarify that an employee may file a civil action for unlawful retaliation, without first filing a discrimination claim before the Commissioner
- Declare that when a plaintiff opts to bypass the administrative process and sue in court, the existing civil statute of limitations period would apply, rather that the limitations period for filing with the Labor Commission (six months from date of violation.)
- Clarify that Labor Code Section 1194, which provides for an award of attorney's fees *for an employee* in cases involving failure to pay minimum wage and overtime wages, is separate from, and not controlled by Labor Code Section 218.5, which provides for *prevailing party* attorney's fees in other wage cases. (Emphasis added.)
- Provide that the legal rate of interest on due and unpaid wages in a civil action for unpaid wages shall be established by Civil Code Section 3289(b), which is 10%.
- Provide, in the case of a knowing and intentional failure by an employer to comply with the itemized wage statement requirements, for an employee to recover a penalty of up to $100 per payroll period up to a maximum of $10,000. The bill would further provide that an employee may bring a complaint before the Commissioner or file a civil action for damages or penalties, and attorney's fees for this type of violation.
- Provide for penalties of fifty dollars ($50) per employee per pay period and payment of an amount equal to twice the average hourly rate of compensation for the employee for the full length of the meal or rest period. Provides that an employee may bring a complaint before the Commissioner or file a civil action or for damages or penalties, and attorney's fees for violation of this provision.
- Existing law authorizes the Commissioner to order an employer to post a bond in the amount of unpaid wages, if the employer fails to satisfy a final judgment for interest, penalties and other demands for compensation within the jurisdiction of the Commissioner. This bill would provide that the bond shall cover such interest, penalties, or other demands as well as unpaid wages.

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- Provide that the liquidated damages for a violation of minimum wage laws may be awarded in a hearing before the Commissioner in the same manner as a civil action under current law.

- Provide that, with respect to a claim for a failure to pay minimum wages, the Commissioner may, in the same proceeding, order both payment of wages owed, interest thereon, statutory liquidated damages and civil penalties.

BACKGROUND

Existing law provides a framework for the enforcement of laws relating to the payment wages and overtime compensation, and working conditions by the Labor Commissioner, chief of the Division of Labor Standards Enforcement (DLSE) in the State Department of Industrial Relations (DIR).

Despite the efforts of DIR, California has a large and growing "underground economy" of employers who are chronic violators of wage and hour, safety, and tax laws. Such employers pay cash under the table or with checks that bounce, fail to report and pay employment taxes, work their employees long hours without rest breaks, and avoid paying wage judgments issued against them. In so doing, according to executive orders issued by Governor's Deukmejian and Wilson, it is estimated that the state's loss of income taxes alone increased from $2 billion in 1986 to $3 billion in 1993.

AB 2509 was previously approved by Senate IR on a 4-1 vote. It was double-referred to Judiciary Committee for review of the civil enforcement and procedure provisions.

CHANGES TO EXISTING LAW

1. Existing law provides the Labor Commissioner, his or her deputies, and agents to issue subpoenas for the purpose of carrying out the laws which the Division of Labor Standards Enforcement is responsible for enforcing.

   This bill would provide that in an administrative wage claim proceeding before the Commissioner, (Berman hearing) a notice for production of documents, which is served by mail in compliance with Code of Civil Procedure Section 1013, may be used in lieu of a subpoena. The notice would have the same force and effect as a subpoena.

2. Existing law provides that interest on all due and unpaid wages shall accrue at the rate established in Section 19269 of the Revenue and Taxation Code. This section of law has been repealed.

   This bill would provide that the legal rate of interest on due and unpaid

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wages shall be at the statutory rate established by Civil Code Section 3289(b), which is 10%.

3. Existing law provides that any order, decision, or award made by the Labor Commissioner in a Berman administrative hearing may be appealed to the municipal or superior court.

   This bill would exempt those appeal proceedings from the requirement of mandatory arbitration.

4. Existing law provides that the court may award costs and attorney's fees to the prevailing parties in an unsuccessful appeal.

   This bill would provide that the award of costs and attorney's fees applies, regardless of whether the successful party is represented by his or her own attorney or by the Labor Commissioner.

5. Existing law does not require an appellant to post a bond as a condition of filing an appeal from an adverse Berman hearing decision.

   This bill would require employers filing an appeal of the Commissioner in a Berman hearing to post a prescribed undertaking and would provide for disposition thereof.

6. Existing law provides that any person may file a complaint for unlawful discharge or unlawful discrimination with the Labor Commissioner, who is empowered to provide prescribed relief if the complaint is found meritorious.

   If the Labor Commissioner dismisses such a complaint, the Labor Commissioner is required to notify the complainant of the right to bring a court action or to file a complaint against the state program with the United States Department of Labor.

   This bill would specify that if a timely complaint is filed against the state program with the United States Department of Labor, the Labor Commissioner's decision dismissing the complaint is vacated pending issuance of findings by the United States Department of Labor.

   The bill would require the Labor Commissioner, within 15 days of receiving those findings, either to notify the parties of the reopening of the investigation or to issue a new determination of the complaint.

7. Existing law provides that any wage claimant may sue directly or through an assignee for any wages or penalty due him under this article.

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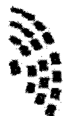

<u>This bill</u> would expressly provide that an employee may file a civil judicial action without exhausting any administrative remedy under the jurisdiction of the Labor Commissioner, and may in such a civil action seek any relief that would be available from the Labor Commissioner. The bill would make the six month limitation period for filing a complaint with the Labor Commissioner inapplicable to such a civil action.

8. <u>Existing law</u> provides that an employer in the building and construction industry is liable for a penalty of up to 30 days' wages and fringe benefits to any employee paid by a check, draft, or voucher that is drawn on a nonexistent account or that is dishonored for insufficient funds if the instrument is presented for payment within 30 days of receipt. This penalty does not apply if the employer can establish that the violation was unintentional.

   <u>This bill</u> would make this penalty applicable to all employers, and would make related conforming and technical, nonsubstantive changes.

9. <u>Existing law</u> provides that employers are required to provide employees semimonthly, with payment of wages, an itemized statement listing gross wages, total hours worked of employees paid by the hour, specified deductions, net wages, and certain other information. Violation of these requirements is a misdemeanor.

   <u>This bill</u> would provide that total hours need not be disclosed for salaried employees exempt from payment of overtime compensation.

   The bill would require disclosure of the number of piece-rate units and the applicable piece rate for employees paid on that basis, and would require disclosure of all applicable hourly rates and the number of hours worked by the employee at each rate.

10. <u>Existing law</u> provides an employee suffering injury as a result of the employer's knowing or intentional failure to comply with the above disclosure requirement is entitled to recover the greater of actual damages or one hundred dollars ($100), plus costs and reasonable attorney's fees.

    <u>This bill</u> would revise the liability of employers for knowing or intentional noncompliance with this disclosure requirement to entitle an aggrieved employee to recover the greater of actual damages or penal damages of $100 for each pay period in which the violation occurs up to $10,000, plus costs and reasonable attorney's fees.

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The bill would authorize an aggrieved employee to seek recovery in administrative proceedings before the Labor Commissioner or in a civil action.

11. Existing law provides that any employer that violates subdivision (a) of Section 226 shall be subject to:

- A civil penalty in the amount of two hundred fifty dollars ($250) per employee per violation in an initial citation, and;
- One thousand dollars ($1,000) per employee for each violation in a subsequent citation.

This bill would provide that any employer that violates subdivision (a) of Section 226 shall be subject to:

- A civil penalty in the amount of two hundred fifty dollars ($250) per employee per violation in an initial citation, and;
- One thousand dollars ($1,000) per employee for each violation in a subsequent citation.

In the event that an employer fails to maintain records that identify each employee to whom wages are paid, the penalties under this section shall be computed by multiplying the number of employees employed on the date the penalty is assessed by the 24 semimonthly pay periods of the immediately preceding 12 months. However, the bill would allow the employer to affirmatively establish that the evidence supports a lesser penalty based upon proof of a lesser number of affected employees.

The civil penalties provided for in this section would be in addition to any other penalty provided by law.

The bill would provide that in enforcing this section, the Labor Commissioner shall take into consideration whether the violation was inadvertent and, in his or her discretion, may decide not to penalize an employer for a first violation when that violation was due to a clerical error or inadvertent mistake.

12. Existing law authorizes the Industrial Welfare Commission to adopt orders respecting wages, hours, and working conditions. Under this authority, IWC Wage Orders require meal and rest periods.

This bill would make any employer that requires any employee to work during a meal or rest period mandated by an order of the commission subject to a civil penalty of $50 per violation and liable

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to the employee for twice the employee's average hourly or piecework pay.

An aggrieved employee could bring an administrative or civil action for recovery of these amounts, and if the employee prevailed in a civil action, the employee would be entitled to recover their attorney's fees.

In addition, this bill would provide that if an employer fails to provide and maintain necessary tools or equipment in violation of an applicable wage order of the Industrial Welfare Commission and an employee purchases the tools or equipment in order to perform his or her work, the employer shall either purchase the tools or equipment from the employee in an amount equal to the price paid by the employee or pay sufficient wages to the employee as stated in the wage order for a period of six months to qualify for an exemption to the wage order.

13. Existing law authorizes the Labor Commissioner to require an employer to deposit a bond if the employer is convicted of violating specified provisions respecting paying employees or if a judgment for unpaid wages against the employer remains unsatisfied for ten days after expiration of the appeal period with no appeal on file. The bond is conditioned on the employer paying employees for up to six months in compliance with specified laws and payment of any judgment for unpaid wages.

    This bill would revise these provisions to make the authorization for a bond requirement applicable to unpaid judgments for interest, penalties, or other demands for compensation within the jurisdiction of the Labor Commissioner, in addition to judgments for unpaid wages. The bond would remain conditioned on payment of such an unsatisfied judgment.

14. Existing law provides that an aggrieved employee, or the Department of Industrial Relations or its Division of Labor Standards Enforcement, may bring a civil action to recover unpaid minimum wages. In these actions the employee is entitled to additional liquidated damages equal to the unpaid wages and interest thereon.

    This bill would allow the Labor Commissioner to award liquidated damages, as the court may in a civil action.

15. Existing law provides for the Commissioner to issue a civil penalty citation of fifty dollars ($50) for an initial violation of failure to pay minimum wages and two hundred and fifty dollars ($250) for subsequent violations.

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Existing law also provides for the Commissioner to order payment of minimum wages owed to an employee in a separate proceeding before the Labor Commissioner.

This bill would allow that with respect to failure to pay minimum wages, the Commissioner may, in the same proceeding, order both payment of wages owed, interest, statutory liquidated damages, and civil penalties.

This bill would also add restitution in an amount sufficient to recover all underpaid wages and interest thereon, as an element of damages.

COMMENT

1. Stated need for legislation and support

According to the California Teamsters Public Affairs Council, " For too long, California has experienced a downward spiral of labor law enforcement. Unfortunately, this lax enforcement has sent the message to unscrupulous employers that it is permissible to take advantage of vulnerable employees. AB 2509 addresses these problems by restoring the ability of California's workers to receive the wages they worked so hard to earn."

AB 2509 is sponsored by the California Labor Federation, who offers the following in support: "AB 2509 will streamline the labor commissioner process. Under AB 2509 the labor commissioner would be assured of receiving attorney fees when a worker files a complaint with the labor commissioner, wins and the commissioner then represents the worker in a 'de novo' review when the employer appeals to the court. AB 2509 would also allow the labor commissioner to request documents via mail; provide the labor commissioner an efficient means of calculating penalties for failure to provide itemized wage statements; allow the labor commissioner to re-open a discrimination case on remand from the US department of Labor; provide for a "one-stop" civil penalty system where both wages and penalties can be recovered at one time; and permit the labor commissioner to order an employer who has failed to satisfy a judgment for unpaid interest and penalties to post a bond. (Currently, the labor commissioner can require the employer to post a bond for unpaid *wages*.)"

Finally, they assert, "AB 2509 ensures that workers are provided adequate record keeping information. Workers are often provided little information about their wages. This bill will remedy that problem. Under AB 2509 workers will be told about their hourly rate for all hours worked. Stiffer penalties will also be imposed for failing to provide workers information about their wages. According to the Wilson Administration, California loses

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approximately 3 billion dollars a year in much needed taxes when employers pay workers subminimum wages and cash under the table."

The Golden Gate University School of Law, Women's Employment Rights Clinic, adds that the bond requirement of this bill is needed, based upon their experience that, "(O)nce a person receives a judgment in his or her favor through the labor commissioner process, we find that it is not uncommon for an employee to encounter extreme difficulty recovering the unpaid wages from the employer. In addition, employees often have to wait unnecessary lengths of time for a judgment to be satisfied when an employer files a *de novo* court appeal. AB 2509 remedies this problem by requiring employers to post bonds, not only for unpaid wages, but also for interest and penalties, as well as requiring any employer who appeals to the superior court to post a bond. AB 2509 also includes a critical provision that imposes penalties for bounced paychecks."

California Rural Legal Assistance Foundation states that, "(A)lthough the federal Migrant and Seasonal Agricultural Worker Protection Act has required since 1983 that farm labor contractors, agricultural growers and agricultural associations provide piece rate pay stub information to workers, and keep such records for three years, there is no comparable state law provision." They add that, in addition to pay stub violations, a recent CRLAF survey found that farm workers were forced to labor during either meal or break periods. "We believe this practice is also widespread, and contributes to increased job place injuries. Although the practice is prohibited under California's wage orders, there are no effective penalties for violations. AB 2509 remedies that, and in addition provides the types of private enforcement tools that will help insure future compliance."

2. Opposition

Most of the opposition letters received by this Committee reflected concern with the entire package of proposals contained in AB 2509. However, some of the bill's provisions caused particular concern. The California Chamber of Commerce letter is typical of those the Committee received, in saying: "California Chamber members have serious concerns regarding nearly all of the twenty-nine changes proposed by AB 2509 and their impact on California's employers who even inadvertently violate a wage and hour law. AB 2509 contains many issues of deep concern to businesses throughout California, some of which are:

- Authorizing the labor commissioner to create new, different rules of evidence and subpoena process for wage and hour claims;
- Eliminating judicial discretion to require non-binding arbitration on appeals;

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- Reopening of previously dismissed claims when letters criticizing a state program is filed with the U.S. department of Labor.
- Mandated private taxpayer payment of civil servant attorneys;
- Wage and hour claims permitted in civil court prior to exhaustion of administrative remedies;
- New state labor commissioner authority to assess civil damages, including liquidated damages;
- New mandated payment of 'restitution' plus civil penalties for failure to pay minimum wage consisting of all under paid wages, any interest owed and statutory liquidated damages."

The Associated General Contractors and Associated General Contractors San Diego add that, "AB 2509 contains provisions similar to AB 1652 (Steinberg) which was vetoed by Governor Davis last year mainly because the provisions were 'excessive' and 'overly broad.' This legislation goes far beyond last year's bill and we fail to understand the justification for it. The Division of Labor Standards Enforcement has received additional funding and augmentations to its staffing in order to allow the Labor Commissioner's office to fulfill its enforcement duties. Now that the Division is fully staffed, it seems reasonable to allow them an opportunity to do their job before increasing penalties and creating new violations."

The California Employment Law Council opposes the bill based, in part, upon the deletion of mandatory arbitration in de novo review of commission decisions, saying, "this legislation would create an exception for appeals from Labor Commissioner orders. This is senseless. Arbitration generally serves a useful purpose because it leads to the resolution of disputes efficiently and quickly, without significant costs, and here a quick resolution by an independent decision maker is even more desirable."

3. <u>Recent amendments delete controversial shareholder and successor liability provisions</u>

As originally drafted AB 2509 would have provided that the parent of and substantial shareholders in a corporation would be jointly and severally liable with the corporation for unpaid wages and penalties. The bill also would have extended liability to expressly cover a successor to an employer who owes wages to his or her former employees, for those wages. These two provisions drew heated opposition from many quarters. As a result of the concerns expressed, and in an attempt to moderate the bill, the author agreed to remove these provisions.

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4. Major remaining provisions in Committee's jurisdiction

a) Notice in lieu of subpoena

Currently the Commissioner may compel attendance of witnesses and the production of documents through service of a subpoena, which is enforced by the courts. AB 2509 would provide that in an administrative wage claim proceeding before the Commissioner, a notice to compel attendance may also be used in lieu of subpoena.

Generally, under the California Code of Civil Procedure, the process by which the attendance of a witness is required is the subpoena. It is a writ or order directed to a person and requiring the person's attendance at a particular time and place to testify as a witness. It may also require a witness to bring any books, documents, or other things under the witness's control which the witness is bound by law to produce in evidence. Service of a subpoena is made by delivering a copy to the witness personally.

In the case of the production of a party, personal service is not required if written notice requesting the presence of a party is served upon the attorney of that party or person. The giving of the notice to the attorney has the same effect as service of a subpoena on the witness. The service upon an attorney may be made at the attorney's office, the attorney's residence, or mail.

Proof of service by mail may be made by affidavit of a person over the age of 18 years, or certificate signed by a member of the State Bar of California, setting forth the exact title of the document served and filed in the cause, showing the name and residence or business address of the person making the service, attesting that the person is not a party to the cause, and showing the date and place of deposit in the mail, the name and address of the person served as shown on the envelope, and also showing that the envelope was sealed and deposited in the mail with the postage thereon fully prepaid.

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AB 2509 would extend this procedure to apply to production of witnesses as well as parties to an administrative action. According to the legal treatise, *California Civil Procedure Before Trial*, "In most instances it is sound to attempt service initially by mail and acknowledgment of receipt because the approach saves costs if the defendant cooperates...The approach should not be used, however, when prompt service is essential or when the person to be served is unaware of the filing of the action and likely to make service difficult after being informed of the action by

receipt of the notice form." *California Civil Procedure Before Trial 3d ed.* CEB (1998) Section 24.33.

Here, the concerns over timeliness should be met by the requirements contained in Section 1013 of the Code of Civil Procedure which AB 2509 references. That section provides that "service is complete at the time of the deposit, but any period of notice and any right or duty to do any act or make any response within any period or on a date certain after the service of the document, which time period or date is prescribed by statute or rule of court, shall be extended five days, upon service by mail, if the place of address is within the State of California, 10 days if the place of address is outside the State of California but within the United States, and 20 days if the place of address is outside the United States." In addition, the CCP provides for service by "Express Mail" which would allow one day delivery of the notice to appear.

b) Deletion of requirement for judicial arbitration in de novo reviews of Berman hearing decisions

Under existing law, cases of under $50,000 which are brought before superior courts with counties with 10 or more judges must go through mandatory arbitration prior to trial. This bill would do away with this requirement in cases which have already been adjudicated at the administrative level, and are presented, to the court as an appeal. This is consistent with other provisions of law.

For instance, actions that include a prayer for equitable relief need not be submitted to judicial arbitration. (CCP 1141.13). Under this provision, judicial actions under the Fair Employment and Housing Act are not subjected to mandatory judicial arbitration. In addition, other exceptions exist, including and actions found by the court to be "not amenable to arbitration on the ground that arbitration would not reduce the probable time and expense necessary to resolve the litigation." (California Rule of Court 1600. [f]). Here, the bill would only negate the requirement for arbitration in cases which appear before the trial court on appeal. These cases have already been adjudicated at the administrative level, therefore it is unlikely that subjecting the parties to yet another process prior to trial will "reduce the probable time and expense necessary to resolve the litigation."

c) No administrative exhaustion requirement before bringing suit in court

Existing law, Labor Code Section 216 provides that "Nothing in this article shall limit the authority of the district attorney of any county or prosecuting attorney of any city to prosecute actions, either civil or

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criminal, for violations of this article or to enforce the provisions thereof independently and without specific direction of the division. Nothing in this article shall limit the right of any wage claimant to sue directly or through an assignee for any wages or penalty due him under this article."

AB 2509 would clarify that this language intends that claimants in wage claim cases need not exhaust administrative remedies with the Commissioner prior to resorting to court. To date, there is no court interpretation of this language in relation to wage and hour claims which are the subject of AB 2509.

d) Penalties

AB 2509 proposes to raise penalties for numerous violations of the Labor Code. While not all penalties fall within this Committee's jurisdiction, a complete listing of all the changes are provided for informational purposes. These include:

Labor Code Sec.	Current Law	AB 2509
203.1 Bounced Checks	30 day waiting time penalty applies to construction industry	Apply 30 day penalty to all employers
226 Itemized wage statements	For knowing and intentional violation an employee may recover actual damages or $100, whichever is greater.	For knowing and intentional violation, employee may recover actual damages or $100 per pay period, whichever is greater, up to a max aggregate penalty of $10,000.
226.3 Itemized wage statements	Civil penalties	Penalty remains same. Creates rebuttable presumption on number of employees where no records exist. Uses formula, number of current employees x 24 semimonthly payperiods.
226.7 Meal &	No penalty	$50 civil penalty plus

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breaktime		twice hourly wages for length of meal or break period.
226.8 Tools	Purchase tools	Purchase tools or back pay
245 Posted notice	No posting requirement	Pattern and practice violators must post notice stating violation, etc...
1174.5 Payroll records	Willful failure to maintain records $500.	Willful failure to maintain records $100 per employee For each payroll period up to three years maximum.

Of these, the two most controversial are the increase in the civil penalty for failure to itemize wage statements and central payroll records. It should be noted that some of these issues are within the Senate IR Committee's jurisdiction. As detailed above, penalties for violation of these areas would be dramatically increased. The author makes a convincing argument for the need of the Commissioner and employees to have access to this information, given that most penalty provisions in the Labor Code are based upon the wages lost by either the individual employee or the employer's entire labor force.

By way of comparison, if one looks at the penalties available under The Fair Employment and Housing Act, one finds substantial penalties for violation. As the administrative procedures under the Labor Code and FEHA are quite similar, it may be instructive to look to the FEHA when considering wage claim violations. (See *Leibert v. Transworld Systems* (1995) 32 Cal. App. 4th 1693.)

Under the Fair Employment and Housing Act, the Commission may award actual damages as may be available in civil actions. However actual damages shall not exceed, in combination with the amounts of any administrative fines one hundred fifty thousand dollars ($150,000) per aggrieved person per respondent. Here, the proposed raise in damages for knowing and intentional failure to comply with wage statement requirements would be capped at an aggregate amount of ten thousand dollars ($10,000). While this is a dramatic increase from the current cap of one hundred dollars ($100), it is less than the aggregate cap under FEHA.

As well, the damages provided under AB 2509 for willful failure to maintain payroll records is increased from a flat five hundred dollars ($500) to one hundred dollars ($100) per employee for each payroll period

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during which the violation occurs, reaching back a maximum of three years. Under FEHA, willful failure to maintain employment records subjects the violator to a misdemeanor, punishable by up to six months in jail and a fine of up to one thousand dollars ($1000).

e) Authorizing Commissioner to assess penalties consistent with courts

Currently, a court may assess any penalty for violation available in statute in its decision. However, in the administrative realm, the Commissioner must conduct two different hearings, one to determine whether a violation occurred, and another to assess damages, fines and penalties. This bill would allow the Commissioner to award damages, fines and penalties consistent with the court's authority.

This authority is generally consistent with the authority granted to the Fair Employment and Housing Commission for violations of employment provisions of the Fair Employment and Housing Act. Under the FEHA, if "the commission finds that a respondent has engaged in any unlawful practice under this part, it shall state its findings of fact and determination and shall issue and cause to be served on the parties an order requiring the respondent to cease and desist from the unlawful practice and to take action, including, but not limited to, any of the following:

- The hiring, reinstatement, or upgrading of employees, with or without backpay.
- The admission or restoration to membership in any respondent labor organization.
- The payment of actual damages as may be available in civil actions, however actual damages shall not exceed, in combination with the amounts of any administrative fines one hundred fifty thousand dollars ($150,000) per aggrieved person per respondent.

In addition to the foregoing, in order to vindicate the purposes and policies of the FEHA, the Fair Employment and Housing Commission may also:

- Assess an administrative fine per aggrieved person per respondent.
- Assess a civil penalty of up to twenty-five thousand dollars ($25,000) to be awarded to a person denied any right provided for by Section 51.7 of the Civil Code, (Hate Crimes) as an unlawful practice under this part.

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4. Prior related legislation and veto message

AB 633 (Steinberg), Ch. 554, Stats of 1999, initially began as a broad ranging wage and hour bill, similar to AB 2509. It was narrowed to address only wage and hour issues within the garment industry.

AB 1652 (Steinberg) of last year contained many of the provisions being proposed in AB 2509. As presented to the Governor, AB 1652 would have:

- Required the Commissioner, when acting on behalf of a judgment creditor, to make reasonable collection efforts, unless the judgment creditor requests in writing that the Commissioner take no action.
- Provided that an employer seeking judicial review of an adverse order, decision, or award by the Commissioner shall post an undertaking in the amount of the order, decision, or award.
- Applied a provision of current law that imposes up to 30 days waiting time penalties where wages (or fringe benefits) are paid with a check for which payment is refused due to insufficient funds to all employers. This requirement currently applies only to the building and construction industry.
- Required an employer to provide information concerning the number of piecework units earned and the applicable piece rate if the employee is paid on a piecework basis.
- Prohibited employers from requiring any employee to work during any meal or rest period, and would have provided for penalties for violation of this section.
- Provided that an employer who knowingly and intentionally fails to maintain specified payroll records shall be subject to fines of $50 for the initial pay period violation and $100 per employee per each subsequent payroll period in which the records are not maintained, up to a maximum of $5,000.
- Required an employer to post a workplace notice describing the nature of a violation and related information.

The Governor vetoed that measure, stating in relevant part:

"This legislation, while laudable in its intent, duplicates many existing enforcement efforts and contains excessive penalties. Existing law already provides penalties against employers who issue bad checks for payment of

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wages. Additionally, requiring employers who engage in a pattern of violating wage and hour laws to post a declaration that there will be no further violations is unworkable and meaningless. This legislation, as drafted, is overly broad."

5. Additional provisions beyond Judiciary jurisdiction

Provide that in cases where wages are paid with a check for which payment is refused due to insufficient funds, the imposition of a penalty payment of up to 30 days' of wages applies to all employers. Currently this applies only in the building and construction industry.

Require that an employer's itemized wage statement shall include, among other information, the number of piecework units earned and any applicable piece rate if paid on a piecework basis, and for non-exempt employees, the applicable hourly rates in effect during the pay period and the hourly rate of pay and hours worked, where applicable.

Clarify that the employer shall keep specified payroll records for employees paid in cash and by check.

Provide that in a case where an employer fails to maintain records that identify each employee to whom wages are paid, penalties shall be computed by multiplying the number of employees employed on the date of the penalty for the preceding year, unless the employer affirmatively establishes evidence that supports a lesser penalty based upon proof of a lesser number of affected employees.

Provide that no employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission (IWC).

Provide that the Commissioner shall order the employer found in violation to post a workplace notice describing the nature of a violation and related information (described in detail below).

Provide that any amounts paid directly by a patron to a dancer employed by an employer subject to IWC Order No. 5 or 10 shall be deemed a gratuity.

Prohibit an employer from deducting from a gratuity indicated by a patron on a credit card slip any credit card payment processing fee or cost. The bill also would require payment of gratuities made by credit card to be made to the employees not later than the next regular payday following the date the patron authorized the credit card payment.

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Provide that an employer shall maintain payroll records showing the number of piece-rate units earned by and any applicable piece rate paid to employees.

Provide that the civil penalty for an employer who willfully fails to maintain specified payroll records includes, in addition to records required by statute, records required by any applicable wage orders of the IWC. Revises the penalty for a violation of this section from $500 to $100 per employee for each payroll period, up to a maximum period of three years.

California Manufacturers & Technology Association opposes creating, "a new paycheck information requirement to be added to an already confusing document and would allow damage awards of up to $10,000. It would also establish a new penalty for failure to keep certain payroll records and permit a penalty of $100 per employee for minor administrative errors where the employee suffered no harm."

Finally, the Engineering Contractors' Association, the Marin Builder's Exchange, the Sacramento Builders' Exchange, the Fence Contractors' Association, the Flasher/Barricade Association and the Seismic Gas Valve Manufacturers', sent a joint letter opposing AB 2509. While (we) strongly support any efforts to penalize employers who intentionally violate wage and hour laws, AB 2509 would go far beyond this by even penalizing the 'good' employers who make every effort to abide by the laws."

Support: California Professional Firefighters; Golden Gate University – School of Law, Women's Employment Rights Clinic; Equal Rights Advocates; Legal Aid Society of San Francisco, Employment Law Center; Transport Workers Union of America; California Rural Legal Assistance Foundation; California Conference Board of the Amalgamated Transit Union; Engineers and Scientists of California; Region 8 States Council of the United Food & Commercial Workers; Hotel Employees, Restaurant Employees International Union; California Conference of Machinists; Service Employees International Union; California Chapters of the National Electrical Contractors Association; California Legislative Conference of the Plumbing, Heating and Piping Industry; Western Wall & Ceiling Contractors Association; Air conditioning & Refrigeration Contractors Association; California Association of Sheet Metal and Air Conditioning Contractors, National Association; American Federation of State, County and Municipal Employees, AFL-CIO; California Teamsters, Public Affairs Council; California Labor Federation; La Raza Centro Legal, Inc.; Exotic Dancers Alliance; Asian Law Caucus; Mexican American Legal Defense and Education Fund

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Opposition: Western Growers Association; California Retailers Association; Civil Justice Association of California; California Grocers Association; California Chamber of Commerce; Roofing Contractors Association of California Associated General Contractors and Associated General Contractors San Diego; Orange County Business Council; Engineering Contractors' Association; Marin Builders' Exchange; Sacramento Builders' Exchange; Fence Contractors' Association; Flasher/Barricade Association; Seismic Gas Valve Manufacturers'; California Manufacturers & Technology Association; California Employment Law Council

HISTORY

Source: California Labor Federation, AFL-CIO

Related Pending Legislation: None Known

Prior Legislation: AB 1652 (Steinberg), of 1999, vetoed; AB 633 (Steinberg), Ch. 554, Stats. of 1999

Prior Vote: Assembly Labor and Employment Committee (6-3); Assembly Floor (41-32); Senate Committee on Industrial Relations (4-1)

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Exhibit C

INDUSTRIAL WELFARE COMMISSION ORDER No. 4-52,

EFFECTIVE AUGUST 1, 1952

WAGES, HOURS, AND WORKING CONDITIONS FOR WOMEN AND MINORS

IN PROFESSIONAL, TECHNICAL, CLERICAL, AND SIMILAR OCCUPATIONS

LEGISLATIVE INTENT SERVICE (800) 666-1917

To Whom It May Concern:

TAKE NOTICE: That pursuant to and by virtue of authority vested in it by Sections 1171 to 1204, inclusive, of the Labor Code of the State of California, and after public hearing duly had, notice of said hearing having been duly given in the manner provided by law, the Industrial Welfare Commission, upon its own motion, having found and concluded that the Professional, Technical, Clerical and Similar Occupations Order, Number 4R, enacted by the Industrial Welfare Commission on February 8, 1947, should be altered and amended:

NOW, THEREFORE, The Industrial Welfare Commission of the State of California does hereby alter and amend said Professional, Technical, Clerical and Similar Occupations Order, Number 4R, and does hereby enact its amended Order as follows:

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

1. APPLICABILITY OF ORDER

This Order shall apply to all women and minors employed in professional, technical, clerical, and similar occupations whether paid on a time, piece rate, commission, or other basis, unless such occupation is performed in an industry covered by another Order of this Commission, except that the provisions of this Order shall not apply to women employed where one of the following conditions prevails:

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

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

(c) The employee is the exchange operator of a telephone company having less than one hundred fifty (150) stations operating under the jurisdiction of the Public Utilities Commission of the State of California, and the employee's duties as operator are incidental to other duties.

2. DEFINITIONS

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

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

(c) "Professional, Technical, Clerical, and Similar Occupations" includes professional, semi-professional, managerial, supervisorial, laboratory, research, technical, clerical, and office work occupations. Said occupations shall include, but not be limited to, the following: Accountants; accounting clerks; appraisers; board markers; bookkeepers; canvassers; cashiers; checkroom attendants; checkers; clerks; collectors; compilers; computers; copyreaders; copywriters; demonstrators; instructors; interviewers; investigative shoppers; librarians and their assistants; messengers; office machine operators; physicians' and dentists' assistants and attendants; research, x-ray, medical, or dental laboratory technicians and their assistants; secretaries; social workers; statisticians; stenographers; teachers; telephone, teletype, and telegraph operators; tellers; ticket agents; tracers; typists; and other related occupations listed as professional, semi-professional, clerical, and kindred occupations.

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

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

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

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

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

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

3. HOURS

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

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

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

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

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

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

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

4. MINIMUM WAGES

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

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

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

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

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

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

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

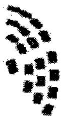
("Split Shift" means a work schedule which is interrupted by non-working periods other than bona fide rest or meal periods.)

5. REPORTING TIME PAY

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

6. PERMIT FOR HANDICAPPED WORKERS

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



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7. RECORDS

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

(1) Full name, home address, and occupation.
(2) Birth date, if under eighteen (18) years, and designation as a minor on the payroll record.
(3) Time records showing all in-and-out time which shall be recorded when it occurs, and also total hours worked each day. Meal periods during which operations cease and authorized rest periods need not be recorded.
(4) Total wages paid each payroll period, including value of board, lodging, or other compensation actually furnished to the employee. The total hours worked in the payroll period shall appear on the same record as wages paid for that period.

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

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

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

8. CASH SHORTAGE AND BREAKAGE

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

9. UNIFORMS AND EQUIPMENT

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

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

10. MEALS AND LODGING

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

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

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

Room Occupied Alone—$4 per week.
Room Shared—$3 per week.
Apartment—Two-thirds (⅔) of the ordinary rental value, and in no event more than $88 per month.

Meals:
- Breakfast, 85 cents
- Lunch, 45 cents
- Dinner, 70 cents

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

11. MEAL PERIODS

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

12. REST PERIODS

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

13. DRESSING AND REST ROOMS

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

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

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

14. DRINKING WATER AND WASHING FACILITIES

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

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

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

15. TOILET ROOMS

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

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

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

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

(b) GENERAL CONSTRUCTION

(1) Toilets shall be of the water pressure type, installed in accordance with approved and customary standards.
(2) The entrances to toilet rooms shall be effectively screened so that no toilet compartment is visible from any workroom. Each toilet shall be in a separate compartment of adequate size, so constructed as to provide privacy, and with a door of such dimensions as to permit easy entrance and exit. Each toilet compartment door shall be provided with a latch or bolt.
(3) The walls of toilet rooms shall extend to a ceiling and the room shall be thoroughly ventilated to the outside air and shall be adequately lighted.
(4) Floors shall be of cement, terrazzo, tile, glazed brick or other composition which is impervious to moisture and the angle formed by the floor and wall shall be sealed or coved.
(5) Surfaces of walls, partitions, doors, fixtures, toilet seats, bowls, and other equipment shall be smooth and non-absorbent, and all painted surfaces shall be a light color.

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

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

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

16. FIRST AID

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

17. LIFTING

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

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

18. SEATS

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

19. FLOORS

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

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

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

20. CLEANLINESS AND UPKEEP

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

21. LIGHTING

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

22. VENTILATION

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

23. TEMPERATURE

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

24. EXITS

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

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

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

25. ELEVATORS

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

26. EXEMPTIONS

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

27. FILING REPORTS

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

28. INSPECTION

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

29. PENALTIES

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

30. SEPARABILITY

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

31. POSTING OF ORDER

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

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

Order 4R, enacted February 8, 1947, is hereby rescinded as and of the date when this Order becomes effective.

INDUSTRIAL WELFARE COMMISSION
STATE OF CALIFORNIA

LeRoy E. Goodbody, *Chairman*
Mae Carvell
Eleanor O. Hewlett
Daniel E. Koshland
Mae Stoneman

C. Ulrich Chapman, *Acting Chief*
Division of Industrial Welfare

EXCERPTS FROM STATE LABOR CODE

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

Section 1199. Every employer or other person acting either individually or as an officer, agent, or employee of another person is guilty of a misdemeanor and is punishable by a fine of not less than fifty dollars ($50) or by imprisonment for not less than 10 days, or by both, who does any of the following:

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

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

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

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

Eight Hour Law:

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

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

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

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

(a) The employee is engaged in work which is predominantly intellectual, managerial, or creative; which requires exercise of dis-

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Exhibit D

MINUTES OF A MEETING
OF THE
INDUSTRIAL WELFARE COMMISSION
OF THE
STATE OF CALIFORNIA

MAY 16, 1952

10:20 A.M.

Pursuant to the adjournment of the meeting of April 19, 1952, the Industrial Welfare Commission met in Room 907 State Building, Los Angeles, California, on Friday, May 16, 1952 at 10:20 A.M.

PRESENT:

Chairman LeRoy E. Goodbody
Commissioner Mae Carvell
Commissioner Eleanor C. Hewlett
Commissioner Daniel E. Koshland
Commissioner Mae Stoneman
Secretary Florence R. Clark
C. Ulrich Chapman, Acting Chief
Jeanette Basile, Recording Secretary
Ariel E. Hilton, Deputy Attorney General
Glenn Mayfield, Industrial Welfare Agent

The meeting was called to order by Chairman Goodbody at 10:20 A.M.

In memory of Rena Brewster, Chief, all rose for a moment of silent prayer.

Commissioner Koshland suggested that we prepare a resolution that the Commission may adopt so that it can be embossed and delivered to Mr. Brewster. It was also requested that the press be advised of this action of the Commission.

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Following is the resolution:

"WHEREAS, Rena Brewster, Chief of the Division of Industrial Welfare, recently departed this life, and

WHEREAS, the State of California has thereby lost the services of a most distinguished woman who interested herself throughout her life in matters of public welfare, and

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Commissioner Koshland made a motion that the following resolution be adopted:

BE IT RESOLVED That the Industrial Welfare Commission hereby enacts the altered and amended Order as hereinbefore set forth. The motion was seconded by by Commissioner Hewlett, and it unanimously carried.

Commissioner Goodbody made a motion that the Commission rescind Order No. 10 R, dated February 8, 1947, as and of the date when Order No. 10-52 becomes effective August 1, 1952. Commissioner Stoneman seconded the motion, and it unanimously carried.

Commissioner Stoneman made a motion that the Secretary be instructed to order publication of the following Orders: 1-52, Manufacturing and Mercantile Industries; 2-52, Personal Service Industry; 3-52, Canning, Freezing, and Preserving Industries; 4-52, Professional, Technical, Clerical, and Similar Occupations; 5-52, Public Housekeeping Industry; 6-52, Laundry, Dry Cleaning and Dyeing Industry; 8-52, Handling Farm Products After Harvest; 9-52, Transportation Industries; and 10-52, Amusement and Recreation Industries, in accordance with Section 1182 of the California Labor Code, and mail copies thereof in accordance with the requirements of Section 1183 of the California Labor Code. Commissioner Carvell seconded the motion, and it unanimously carried.

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Commissioner Hewlett moved, seconded by Commissioner Carvell, and it was unanimously carried, that the Secretary be instructed to file the Orders with the Division of Administrative Procedure for inclusion in Title 8, California Administrative Code, as required by Labor Code Section 1185.

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Commissioner Stoneman moved, seconded by Commissioner Hewlett, and it was unanimously carried, that the following summary of findings as prepared by the Secretary be adopted.

"The Commission, having appointed Wage Boards to make recommendations for altering or amending Industrial Welfare Commission Orders 1R, 2R, 3R, 4R, 5R, 6R, 7R, 8R, 9R, and 10R, and the recommendations of said Wage Boards having been received, the Commission held public hearings in San Francisco on January 25 and 26, 1952, and in Los Angeles on February 1 and 2, 1952, in accordance with procedure set forth in Sections 1178 to 1181 of the State Labor Code. After study of the Wage Board recommendations and of evidence presented at the public hearings, the Commission held executive sessions during which the various provisions were discussed. Following is a summary of the principal amendments and the reasons therefor:

"The Commission considered the salary criteria for an executive, as contained in Section 1 (a) of all Minimum Wage Orders, and concluded that the present rate of $250 was not a suitable criteria in the face of increased prevailing wages for executives and, further concluded that considerable confusion had resulted from having a different rate in the Industrial Welfare Commission Orders than carried in the State Labor Code on the same subject. For these

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reasons, the Commission raised the $250 criteria to $350.

"Minor changes were made in the definitions for Orders 3R, 4R, 5R, 6R, and 9R. In no instance were the definitions changed substantially, but were intended to remove ambiguities and clarify jurisdiction. The Commission is aware that "night clubs" are listed in definitions under both Orders 5 and 10. It is intended that Order 5 cover such establishments when food is served but should a place of entertainment be called a "night club" and not serve food, then Order 10 would cover it.

"Upon recommendation of the enforcement staff, it was agreed to include the definitions of manufacturing and mercantile in one Order and to thereby eliminate Order 7. It is anticipated that this will achieve some simplification in enforcement because it will eliminate the previous problem of determining whether an establishment which both manufactures and sells is primarily engaged in manufacturing or selling. Inasmuch as the wording of Orders 1 and 7 were heretofore identical, except for the definitions, it is felt that no adverse circumstances can result from this combination.

"The provision regarding hours was altered to limit employment to 6 days in one week in lieu of 48 hours. This change was deemed necessary because the Labor Code provision on this subject has so many exceptions that enforcement had become confusing. It was considered advisable to include the Labor Code exception for the employment of short-hour workers for 7 days.

"After consideration of recommendations of the various Wage Boards, the Commission agreed that the present minimum wage of 65¢ was inadequate and concluded that 75¢ per hour would meet the requirements of the Labor Code and would also take into consideration economic factors. Other wage items were also raised for the sake of consistency, including a raise of the learner and minor rate to 60¢ and increases in the value of board and lodging.

"Because of difficulties encountered in enforcing the maintenance of proper time records, the record keeping section was changed to require the records to show in and out time and also require that the recording be done at the time it

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occurs. Other minor changes were made in the record keeping sections for the purpose of clarification.

"The Commission gave serious consideration to the definition of "Industries Handling Farm Products After Harvest" and despite the recommendations of the Wage Board on this subject, it was felt that the request of the many farmers attending the public hearings were justified and that no change should be made in this definition until there has been considerable further study on the subject.

"The request of the California State Nurses Association to include graduate nurses in the coverage of the Public Housekeeping Order was considered and it was concluded that the graduate nurses should still be exempted from this Order when they are employed in hospitals. The addition of the phrase "in hospitals" brings the Order in line with the language of the State Labor Code on this subject.

"The Commission considered the Transportation Wage Board's recommendation for defining "day" and concluded that the Attorney General's opinion on this subject amply takes care of the matter and that such a definition should not be included in only one Order and therefore it is considered best to omit it. However, in order to clarify the matter of "call backs" in the transportation industry, a special provision was included prohibiting anyone being called back when there has been an elapsed time of less than 8 hours.

"No special provisions for the airline industry have been included because insufficient data was available and it is expected that an Attorney General ruling on the matter of the jurisdiction of the Division will adequately solve the problem.

"Because of problems arising from failure to acquaint employees with incentive plan formulas, the Commission considered it advisable that this information be available to workers and included such a requirement under "Record Keeping".

"The meal period provision was amended to permit a 6-hour work period without a meal when such a work shift would complete the day's work, and the additional provision that a meal period shall be every 5 hours rather than providing only one meal period within the first 5 hours.

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"The rest period provision was clarified to indicate that an employee working less than 3½ hours for the entire day would not need to have a rest period. It was further clarified that the Commission did not intend a completely off-duty rest period to be applicable in the case of an employee who is alone on a shift and has ample time to rest because of the nature of the work. This would be true in the case of a night switchboard operator on a small board, a night hotel clerk, etc. If employees in such positions are able to rest on the job it is not intended that the employer provide a special relief employee.

"A provision for maintenance was added to the section on toilet rooms to simplify enforcement. Other changes in this section were merely for clarification.

"It had been recommended by at least one Wage Board that the "lifting" section be amended by the addition of the word "knowingly" before "permit". The Commission considered that this objective would just as well be served by eliminating the word "permit" and considering it a violation only when the employer requires lifting in excess of 25 pounds.

" Upon recommendation of the enforcement staff, an exemption to the two exit requirement was added to take care of existing establishments in which no hazard exists and in which a second exit cannot reasonably be constructed.

"The Orders pertaining to the Canning and After Harvest Industries were altered by deleting the overtime pay requirement from the minimum wage section and adding it to the section on hours, thus bringing these Orders in conformance with the other Orders of the Commission and making overtime payment a condition of overtime work rather than establishing it as a minimum wage requirement.

" The record keeping sections in the Canning and After Harvest Industries were simplified to more nearly coincide with present practices and to eliminate some of the requirements which prevailed when regular auditing of canneries was provided under the law."

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It was regularly moved, seconded, and carried, that the next meeting of the Industrial Welfare Commission be held in Los Angeles, on Friday, August 1, 1952, at 10 A.M.

Commissioner Hewlett moved, seconded by Commissioner Carvell, and it was unanimously carried, that the Commission extends appreciation to Jeanette Basile, Recording Secretary, for her faithful service, and wish her every success in her new assignment, and regret that the Commission is losing her services.

At 3:30 P.M., Commissioner Hewlett moved, seconded by Commissioner Carvell, and it was unanimously carried, that the meeting adjourn,

Chairman

Eleanor C. Hewlett
Mae Carvell
Daniel E. Koshland

ATTEST:

Florence R Clark
Secretary

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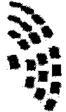

Exhibit E

STATEMENT AS TO THE BASIS

TAKE NOTICE Pursuant to the "Eight-Hour-Day Restoration and Workplace Flexibility Act," Stats. 1999, ch. 134 (commonly referred to as "AB 60"), the Legislature reaffirmed the State's commitment to the eight-hour workday standard and daily overtime, and authorized workers to adopt regularly scheduled alternative work days and weeks according to statutory and regulatory provisions. The Industrial Welfare Commission of the State of California ("IWC"), in accordance with the authority vested in it by the California Constitution, Article 14, Section 1, as well as Labor Code §§ 500-558, and 1171-1204, held public meetings and investigative hearings during which it received public comment regarding the implementation of AB 60 and, on March 1, 2000, the IWC's Interim Wage Order - 2000 became effective. The IWC subsequently has held additional public meetings and public hearings pursuant to Labor Code §517(a) to further review all of its Wage Orders for purposes of complying with AB 60. The IWC has considered all correspondence, verbal presentations, and other written materials submitted prior to the adoption of amended wage orders. The IWC submits the following statement as to the basis for the various amendments made to sections 1, 2, 3, 4, 7, 9,11, 12, 17, and 20[1] of Wage Orders 1 through 15, and to the Interim Wage Order - 2000. The Statements as to the Basis for the remaining parts of the IWC's wage orders are contained in prior printings of those orders. These remaining parts have not been changed, and there is no need for an explanation because the IWC is continuing in effect regulations that have previously become a part of the standard working conditions of employees in this State.

1. APPLICABILITY OF ORDER

Amendments to this section apply to Wage Orders 1 through 13, 15, and the Interim Wage Order. Generally, the section now provides, in part, that employees employed in administrative, executive, and professional capacities are exempt from Sections 3 through 12 of these wage orders. According to the provisions of Labor Code § 515, the criteria that must be satisfied in order to obtain an exemption from overtime pay requirements based on the fact that an individual is an administrative, executive, or professional employee, are that the particular employee must be primarily engaged in duties which meet the test for the exemption, and earn a monthly salary of no less than two times the state minimum wage for full time employment. Labor Code § 515(e) defines "primarily" as "more than one-half of an employee's work time," and § 515(c) defines "full-time employment" as 40 hours per week.

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[1]Please note that not all amendments apply to all of the wage orders, and that the sections of the Interim Wage Order are slightly different from the other wage orders. Please refer to the detailed Statement below.

Thus the Legislature has codified the longstanding IWC regulatory requirement that an employee must spend more than 50% of his or her work time engaged in exempt activity in order to be exempt from receiving overtime pay. The IWC notes that this California "quantitative test" continues to be different from and more protective of employees than, the federal "qualitative" or "primary duty" test. Unlike the California standard, federal law allows an employee that is found to have the "primary duty" of an administrator, executive, or professional to be exempt from overtime pay even though that employee spends most of his or her work time doing nonexempt work. Under California law, one must look to the actual tasks performed by an employee in order to determine whether that employee is exempt. In addition, the statutory threshold for monthly employee remuneration has substantially increased from the amounts set forth in prior IWC wage orders, and that remuneration must be received in the form of a salary.

In addition to the above requirements, Labor Code § 515(f) codified the IWC's existing treatment of registered nurses employed to engage in the practice of nursing. They are not to be considered exempt professional employees, and will not be considered exempt under Labor Code § 515(a) unless they individually meet the criteria established for executive or administrative employees. Similarly, Labor Code § 1186 (enacted by Senate Bill 651, Stats. 1999, ch. 190), provides that pharmacists employed to engage in the practice of pharmacy no longer qualify as exempt professional employees and must individually meet the criteria established for executive or administrative employees in order to be considered exempt under Labor Code § 515(a).

In accordance with the mandate of Labor Code § 515(a) and the expedited process for the promulgation of regulations authorized by § 517, the IWC conducted a review in order to determine the administrative, executive, and professional duties that meet the test of the exemption. The IWC held public meetings and hearings, and received verbal and written public comment in the form of testimony, correspondence, and legal argument regarding various proposals for exempt duties. The bulk of the information came from employers and employees involved in retail, restaurant, and fast food service businesses, as well as representatives of these groups. The IWC also received substantial comment from the legal community. The chief concern of all of these groups related to the distinction between executive managerial employees and nonexempt employees. Employees stated that it was common to have the title of a manager and not be paid overtime, yet perform many of the same tasks as other nonexempt employees during most of the workday. Many employers asked for specific action by the IWC, including the classification of work in settings, such as retail stores, where managers may spend a significant amount of time on the retail floor in the course of managing the operation and directing and supervising the staff. They argued that an employee should not lose his or her exempt manager status merely because he or she sometimes may have to chip in and perform nonexempt work. Attorneys representing employers argued that California should move toward the federal regulatory standards. Other attorneys representing employees reminded the IWC that use of federal regulations might conflict with California's more protective statutory requirement that, in order to be exempt, employees must be "primarily

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engaged" in exempt work. The IWC determined that the way to harmonize these various and competing concerns was to focus on identifying the federal regulations that could be used to describe managerial duties within the meaning of California law. The purpose of identifying and referring to such regulations is to more clearly delineate managerial duties that meet the test of the exemption and to promote consistent enforcement practices.

The IWC also received testimony and correspondence from registered nurses regarding the loss of their exempt status as professional employees. The IWC received similar testimony and correspondence from pharmacists and pharmacy representatives. Some testimony reflected the desire to reinstate the professional exemption, while other testimony based on safety and accuracy considerations did not. In addition, advocates seeking an exemption for pharmacists urged that, if the professional exemption could no longer be used, the definition for the administrative exemption should be expanded to include the coverage of pharmacists. Arguments included greater flexibility, professional degrees, and their managerial and advisory duties. Testimony submitted against the allowance of an exemption cited strenuous working conditions, potential jeopardy to the quality of patient care, and the interest of minimizing medical errors. The IWC does not have the power to repeal Labor Code § 515(f) or1186, which explicitly require that registered nurses and pharmacists individually meet the administrative or executive criteria in order to qualify for an exemption. Accordingly, the IWC chose not to address regulations relating to registered nurses and pharmacists.

Advanced practice nurses, which is an umbrella term that includes nurse practitioners, clinical nurse specialists, certified registered nurse anesthetists, and certified nurse-midwives, submitted testimony advocating the continuation of their exempt status as professional employees. They noted, among other things, that they are not employed to engage in the practice of nursing, and they have advanced degrees in specialized areas, and/or special certification by the State of California. They further noted their 24-hour responsibility for patients, independent management duties, and the need for continuity of patient care as justification for status as exempt professionals. Health care organizations and health care employees both submitted comments and correspondence urging an exemption for advanced practice nurses. On the other hand, labor organizations representing advanced practice nurses testified that they should be treated no differently than other nurses. The IWC also received information regarding pending legislation (Senate Bill 88) that would provide exempt professional status to three types of advanced practice nurses. This legislation was enacted and signed by Governor Davis in September 2000. Accordingly, Sections 3-12 the IWC Wage Orders 1-13 and 15, and Sections 4 and 5 of the Interim Wage Order do not apply to certified nurse midwives, certified nurse practitioners, and certified nurse anesthetists, within the meaning of Articles 2.5, 7, and 8, of Business and Professions Code, Division 2, Chapter 6, who otherwise satisfy the requirements for the professional, executive or administrative exemption. (See Stats. 2000, ch. 492, amending Labor Code § 515.)

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After digesting all the information received in its review, the IWC chose to adopt regulations for Wage Orders 1 - 13, and 15 that substantially conform to current guidelines in the enforcement of IWC orders, whereby certain Fair Labor Standards Act regulations (Title 29 C.F.R. Part 541) have been used, or where they have been adapted to eliminate provisions that are inconsistent with the more protective provisions of California law. The IWC intends the regulations in these wage orders to provide clarity regarding the federal regulations that can be used describe the duties that meet the test of the exemption under California law, as well as to promote uniformity of enforcement. The IWC deems only those federal regulations specifically cited in its wage orders, and in effect at the time of promulgation of these wage orders, to apply in defining exempt duties under California law.

Executive Exemption. The IWC derived the duties which meet the test for the executive exemption from language in the federal regulation 29 C.F.R. § 541.1(a)-(d), with one important exception. The reference in 29 C.F.R. § 541.1(a) to the phrase "primary duty" is omitted because, as discussed above, that phrase refers to a federal test that provides less protection to employees. Instead section A(1) generally refers to managerial duties and responsibilities, while section A(5) sets forth California's "primarily engaged" requirement. Section A(5) also refers to the federal regulations, 29 C.F.R. §§ 541.102, 541.104-541.111, 541.115-541.116, that may be used to describe exempt duties under California law. Included in these regulations are two which describe work and occasional tasks that are "directly and closely related" to exempt work. (29 C.F.R. §§ 541.108 and 541.110.) For example, time spent by a manager using a computer to prepare a management report should be classified as exempt time where use of the computer is a means for carrying out the exempt task. The IWC recognizes that 29 C.F.R. § 541.110 also refers to "occasional tasks" that are not "directly and closely related." The IWC does not intend for such tasks to be included in the calculation of exempt work. In addition, the last sentence of section A(5) comes from the California Supreme Court's decision in Ramirez v. Yosemite Water Co. (1999) 20 Cal.4th 785, 801-802. Although that case involved the exemption for outside salespersons, the determination of whether an employee is an outside salesperson is also quantitative: the employee must regularly spend more than half of his or her working time engaged in sales activities outside the workplace. In remanding the case back to the Court of Appeal, the California Supreme Court offered the following advice:

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> "Having recognized California's distinctive quantitative approach to determining which employees are outside salespersons, we must then address an issue implicitly raised by the parties that caused some confusion in the trial court and the Court of Appeal: Is the number of hours worked in sales-related activities to be determined by the number of hours that the employer, according to its job description or its estimate, claims the employee should be working in sales, or should it be determined by the actual average hours the employee spent on sales activity? The logic inherent in the IWC's quantitative definition of outside salesperson dictates that neither alternative would be wholly satisfactory. On the one hand, if hours worked on sales were determined through an employer's job

description, then the employer could make an employee exempt from overtime laws solely by fashioning an idealized job description that had little basis in reality. On the other hand, an employee who is supposed to be engaged in sales activities during most of his working hours and falls below the 50 percent mark due to his own substandard performance should not thereby be able to evade a valid exemption. A trial court, in determining whether the employee is an outside salesperson, must steer clear of these two pitfalls by inquiring into the realistic requirements of the job. In so doing, the court should consider, first and foremost, how the employee actually spends his or her time. But the trial court should also consider whether the employee's practice diverges from the employer's realistic expectations, whether there was any concrete expression of employer displeasure over an employee's substandard performance, and whether these expressions were themselves realistic given the actual overall requirements of the job."

The IWC, in summarizing the above language in its wage orders, intends to provide some guidance in the enforcement of its regulations. The IWC does not intend to modify or limit the California Supreme Court's statements or its decision.

Administrative Exemption. The IWC similarly derived the duties that meet the test for the administrative exemption from language in the federal regulation 29 C.F.R. § 541.2(a)-(c), with the exception of the "primary duty" phrase. Section B(1)(b), which restates 29 C.F.R. § 541.2(a)(2), refers to school administration, but is not intended to establish a different test with regard to school administration, or to affect the professional exemption as it relates to teachers, or to otherwise change existing law. Section B(4) sets forth the California "primarily engaged" requirement. That section also sets forth the federal regulations, 29 C.F.R. §§ 541.201-541.205, 541,207-541.208, 541.210, and 541.215, that may be used to describe exempt duties under State law. These regulations include types of administrative employees, categories of administrative work, and a description of what is meant by the phrase "discretion and independent judgment." The last sentence of section B(4) again summarizes the California Supreme Court's decision in Ramirez v. Yosemite Water Co. (1999) 20 Cal.4th at 801-802, quoted above. In summarizing that language, the IWC intends to provide some guidance in the enforcement of its regulations, and does not intend to modify or limit the California Supreme Court's statements or its decision.

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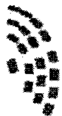

Professional Exemption. The IWC developed the duties that meet the test for the professional exemption from the list of recognized professions contained in prior wage orders as well as from language in the federal regulations 29 C.F.R. § 541.3(a)(1), (2), and (4), and 541.3(b). The recognized professions are law, medicine, dentistry, optometry, architecture, engineering, accounting, and teaching. Although registered nurses and pharmacists were previously included in the list of recognized professionals, as discussed above, they can no longer be considered to be exempt as professionals. (Labor Code §§ 515(f) and 1186.) Teaching continues to require a certificate from the Commission for Teacher Preparation and

Licensing, or teaching in an accredited college or university, to be eligible for the professional exemption.

Employees subject to Wage Orders 1, 4, 5, 9, and 10 have had the "learned or artistic" aspect of the professional exemption available to them since 1993. The IWC found no reason to limit this aspect of the exemption to those five wage orders. The IWC therefore decided to include the "learned and artistic" provisions uniformly throughout all the wage orders. Section C(4) sets forth the federal regulations, 29 C.F.R. §§ 541.207, 541.301(a)-(d), 541.302, 541.306, 541.307, 541.308, and 541.310, that may be used to describe exempt duties under State law.

The new regulations in this section of the IWC's wage orders regarding the administrative, executive, and professional exemption are consistent with existing law and enforcement practices.

Recent legislative enactments provide exemptions from some or all of the provisions of the IWC's wage orders. In addition to an exemption for certain advanced practice nurses, SB 88, Stats. 2000, ch. 492, creates an exemption for certain employees in computer software fields. Sections 3-12 of IWC Wage Orders 1-13 and 15, and Sections 4 and 5 of the Interim Wage Order will not apply to employees in computer software fields who 1) earn forty-one dollars ($41.00) or more per hour, 2) are primarily engaged in work that is intellectual or creative and requires the exercise of discretion and independent judgment, and 3) are highly skilled and proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, and software engineering within the meaning of added Labor Code § 515.5. In addition, effective January 1, 2001, the IWC's orders will not apply to any individual participating in a National Service Program, such as AmeriCorps, AmeriCorps NCCC, and Senior Corps, that carry out services with the assistance of grants from the Corporation for National and Community Service within the meaning of Title 42, United States Code, Section 12571. (See Stats. 2000, ch. 365, amending Labor Code § 1171.)

This section further provides that outside salespersons are exempt from the provisions of the IWC's wage orders. Pursuant to the requirements of Labor Code § 517(d), the IWC conducted a review of the wages, hours, and working conditions of outside salespersons and received testimony and correspondence on these matters. Some witnesses urged the IWC adopt a more expansive definition of an outside salesperson. Others asked the IWC to define more clearly those activities that are not "sales related." After considering proposals by both employers and employees, the IWC determined that it would not change its longstanding definition of "outside salesperson." (See Ramirez v. Yosemite Water Co., 20 Cal.4th 785.) However, the IWC notes that this exception is to be construed narrowly, as a determination that an employee is an outside salesperson deprives that employee of the protections of the wage orders and many other provisions of the Labor Code.

The provisions of Wage Order 10 now apply to all employees employed by an employer operating a business at a horse racing facility, including stable employees. Stable employees include, but are not limited to grooms, hotwalkers,

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exercise workers, and any other employees engaged in the raising, feeding, or management of racehorses, employed by a trainer at a racetrack or other non farm training facility. Employees in the commercial fishing industry are now covered by wage orders 10 and 14.

The IWC received no compelling evidence, and concluded there was no reason at this time, to warrant making any other changes in the provisions of this section.

2. DEFINITIONS

Amendments to this section apply to Wage Orders 1 through 13, and 15. The IWC received testimony from employee and employer groups requesting clarification regarding what a workday and a workweek included. There was also confusion regarding the definition of an alternative workweek. The IWC adopted the following language into the Interim Wage Order - 2000: 1) "Workday" and "day" mean any consecutive 24-hour period beginning at the same time each calendar day; 2) "Workweek" and "week" mean any seven (7) consecutive days, starting with the same calendar day each week. "Workweek" is a fixed and regularly recurring period of 168 hours, seven (7) consecutive 24-hour periods; 3) An "Alternative workweek schedule" means any regularly scheduled workweek requiring an employee to work more than eight (8) hours in a 24-hour period. This language will now replace the language in Wage Orders 1 through 13 and 15. The definitions provided in this section for "workday" and "day," "workweek" and "week," and "alternative workweek schedule" are identical to the definitions provided in Labor Code §500.

The IWC determined that an additional definition for a work "shift" should be added to its wage orders. "Shift " means designated hours of work by an employee, with a designated beginning and quitting time.

As discussed below in Section 3, Hours and Days of Work, the IWC also determined that the health care industry should retain the option to adopt alternative workweek schedules with work days of more than 10 but not exceeding 12 hours. The IWC has therefore included definitions in Wage Orders 4 and 5 for the terms "health care industry," "employees in the health care industry" and "health care emergency." These three terms are discussed more fully in Section 3.

The IWC received no compelling evidence, and concluded there was no authority at this time, to warrant making any other change in the provisions of this section other than those required by AB 60.

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3. HOURS AND DAYS OF WORK

DAILY OVERTIME - GENERAL PROVISIONS[2]

This portion of Section 3 states the daily overtime provisions mandated by AB 60 and applies to Wage Orders 1 through 13, unless otherwise indicated. This section clarifies that premium pay for the "seventh day of work in any one workweek" refers to the seventh consecutive day of work in a workweek. The IWC received testimony regarding the general provisions of overtime as mandated by AB 60. Both employers and employees testified that they were confused regarding the meaning of the "seventh day of work" in the calculation of premium pay. The time-and-a-half provision in Labor Code §510(a) refers to "seventh day of a workweek," but the double time provision refers to "seventh day of a workweek." This slight difference creates the confusion as to whether AB 60 requires double time pay for any work performed in excess of eight hours on the seventh day of the workweek, even if the employee has not worked on all seven days of that workweek. The IWC found that the purpose of the seventh day premium is to provide extra compensation to workers who are denied the opportunity to have a day off during the workweek. Following a literal interpretation of the double time provision would illogically reward someone who may only be scheduled to work one day, and that day fortuitously happens to be the seventh day of the employer's workweek. To clarify this matter, the IWC inserted the term "consecutive" to specify that an employee must work on all seven days in a designated workweek to receive overtime compensation for the seventh day of work in a workweek.

In determining overtime compensation for nonexempt full-time salaried employees, this section also restates Labor Code § 515 (d), which clarifies that the rate of 1/40th of the employee's weekly salary should be used in the computation.

ALTERNATIVE WORKWEEKS SCHEDULES[3]

This portion of section 3 provides the general guidelines for Wage Orders 1 through 13 for the adoption of employer proposed alternative workweek schedules provided by Labor Code § 511. Section 511 has specific provisions for adopting alternative workweek schedules and sets the standards for determining the overtime compensation for employees who adopt such schedules.

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Generally, Wage Orders 1 through 13 provide that an employer does not violate the daily overtime provisions by properly instituting an alternative workweek schedule of up to ten (10) hours per day within a forty (40) hour workweek. Instead, once employees have properly adopted an alternative workweek schedule, an employer must pay one and one-half (1½) times the employees' regular rate of pay for all work performed in any workday beyond that alternative workweek of up to twelve (12) hours a day or beyond forty (40) hours per week, and double the employees' regular

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[2] See Section 4 of the Interim Wage Order

[3] See Sections 5-8 of the Interim Wage Order.

rate of pay for all work performed in excess of twelve (12) hours per day and any work in excess of eight (8) hours on those days worked beyond the adopted alternative workweek schedule. Wage Orders 4 and 5 also provide for alternative workweek schedules of up to twelve (12) hours in a workday within a forty (40) hour workweek for employees in the health care industry. In addition, the IWC has provided for special exemptions from daily overtime for organized camp counselors and employees in the ski and commercial fishing industries. These matters are discussed in more detail below.

The IWC notes that Wage Order 1-89, which was reinstated by AB 60, provided for an alternative workweek "of not more than ten (10) hours per day within a workweek of not less than forty (40) hours," as opposed to the language adopted by the IWC that provides for an alternative workweek of not more than ten (10) hours per day within a "within a forty (40) hour workweek," as specified in AB 60. To resolve this conflict, and in the interest of uniformity and greater flexibility in crafting alternative workweek schedules, the IWC adopted the latter language to insert into Wage Orders 1 through 13. Thus, Wage Order 1 now contains language identical to the other wage orders.

The IWC further clarified that hours considered in the calculation of daily overtime pay are not counted in the determination of 40-hour workweek overtime compensation. Basically, there is no "pyramiding" of separate forms of overtime pay for the same hours worked. Once an hour worked is paid at the applicable daily overtime rate, that same hour cannot be used in the computation of forty hours for the purposes of weekly overtime pay.

After receiving testimony and correspondence from employees who sought predictability in work schedules, and employers who sought flexibility in work schedules, the IWC concluded that an employer proposal for an alternative workweek schedule must designate the number of days in the workweek and number of hours in the work shift. The employer does not need to specify the actual days to be worked within that workweek prior to the alternative workweek election. The phrase "regularly scheduled," as set forth in Labor Code § 511(a), means that the employer must schedule the actual work days and the starting and ending time of the shift in advance, providing the employees with reasonable notice of any changes, wherein said changes, if occasional, shall not result in a loss of the overtime exemption. However, in no event does Labor Code § 511(a) authorize an employer to create a system of "on-call" employment in which the days and hours of work are subject to continual changes, depriving employees of a predictable work schedule. Moreover, in Wage Orders 1, 2, 3, 6, 7, 8, 11, 12, and 13, the IWC retained the pre-AB-60 requirement that alternative workweek schedules provide for two (2) consecutive days off for employees.

The IWC received several inquiries concerning flexibility for employees switching alternative workweek options after an election is held. The IWC concluded that upon the approval of the employer, an employee may move from one menu option to another. Additionally, the "menu of options" provision provided in Labor Code § 511(a) provides that an employer may propose "a menu of work schedule options,

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from which each employee in the unit would be entitled to choose. "Such choice may be subject to reasonable nondiscriminatory conditions, such as a seniority-based system or a system based on random selection for selection of limited alternative schedules, provided that any limitation imposed upon an employee's ability to choose an alternative schedule is approved as part of the 2/3 vote of the work unit. If the employer's business needs preclude allowing its employees to freely choose among work schedule options, the employer should not propose a menu of work schedule options. Instead, the employer may be able to propose more than one alternative workweek schedule by dividing the workforce into separate work units, and proposing a different alternative workweek schedule for each unit. This method would inform each employee of exactly which schedule would be adopted by the election. In order to provide flexibility in accommodating the personal needs of employees, the IWC further clarified that employers may grant employee requests t switch same-length shifts on an occasional basis.

Based on some of the testimony the IWC received regarding alternative workweek schedules, a question arose as to whether an employer who adopted an alternative workweek arrangement of no greater than ten (10) hours per day could lawfully require employees to work beyond those scheduled hours on a recurring basis with the payment of appropriate overtime compensation. Labor Code §511(a) provides that employees may elect to establish a "regularly scheduled alternative workweek" that authorizes work by the affected employees for no longer than 10 hours within a 40-hour workweek. However, Labor Code § 511(b) provides that an employee working beyond the hours established by the alternative workweek agreement shall be entitled to overtime compensation. The IWC believes that, reading these two provisions of the Labor Code together, an employer who requires an employee to work beyond the number of hours established by the alternative workweek agreement, even if such overtime hours are worked on a recurring basis, does not violate the law if the appropriate overtime compensation is paid.

However, the IWC added a section to its wage orders out of its continued concern that employers could establish alternative workweek agreements and then consistently deviate from the regular schedule approved by the employees without paying overtime compensation for work performed beyond eight hours in a day. Such conduct effectively deprives employees of the right established by Labor Code §511(a) to a "regularly scheduled" alternative workweek and could lead to abuses. To prevent any such abuses, the IWC wage orders now provide that, if an employer sends workers home early on a work day that they are scheduled to work beyond eight hours without the payment of overtime pursuant to an alternative workweek agreement, the employer is required to pay overtime compensation in accordance with the provisions of the Labor Code §511(a) for all hours worked in excess of eight (8) hours on that workday.

The IWC has received questions regarding how part-time employees working in employee units that have adopted alternative workweeks should be paid overtime. It is the IWC's continued intention that a part-time employee be paid overtime in the same manner as other employees in the work unit. Thus if the employee work unit has adopted an alternative work week schedule of four ten-hour days, a part-time

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employee working two ten-hour days would not be paid overtime after eight hours; rather, overtime would be paid after working the ten-hour daily shift.

This section echoes Labor Code §511(c), which prohibits employers from reducing an employee's regular rate of hourly pay as the result of the adoption, repeal, or nullification of an alternative workweek schedule. Labor Code §511(c) only applies to reductions in the regular rate of pay that are instituted after January 1, 2000, the effective date of AB 60.

This section also reflects the requirements of Labor Code § 511(d) regarding the required reasonable accommodation of employees who are unable to work alternative workweek schedules that are established through election, the permissible accommodation of employees hired after the election who are unable to work the alternative workweek schedules established through election, and the required exploration of "any available reasonable alternative means" of accommodation of the religious belief of an affected employee that conflicts with the alternative workweek schedule established through election. In addition, this section states the requirements for the employer reporting of alternative workweek election results mandated by Labor Code §511(e), as well as the provisions in Labor Code §554 concerning the accumulation of days of rest. The requirement of one day's rest in seven is mandated by Labor Code §§ 551 and 552.

Notwithstanding the general provisions in its wage orders regarding alternative workweeks, Wage Orders 4 and 5 allow employees in the "health care industry" to adopt employer proposed alternative workweeks of up to twelve (12) hours in a workday within a forty (40) hour workweek. Labor Code § 511(g) and the Interim Wage Order 2000 previously authorized such alternative workweeks if they were adopted according to the election and other requirements contained in those measures. In addition, the Interim Wage Order provides that such alternative workweeks are valid only until the effective date of wage orders promulgated pursuant Labor Code §517. In the meantime, the IWC conducted a review of the health care industry, as required by Labor Code § 517(b), to determine inter alia whether the allowance of twelve hour workdays should continue to be an option for employees, and what employees should be considered a part of the health care industry.

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The IWC received testimony and correspondence from numerous employees, employers, and representatives of the health care industry regarding alternative workweeks. Citing personal preference, commuter traffic, mental and physical well-being, family care, and continuity of patient care issues, the vast majority of testimony from health care employees urged the retention of the 12-hour workday. Advocates of 12-hour workdays also noted that 8-hour shifts were impractical for hospital and home health care services, and that their industry should be afforded greater flexibility.

The IWC received additional testimony and correspondence from employees who work eight (8) hour shifts and prefer doing so. These employees also emphasized the need for flexibility in work scheduling, so that eight (8) shifts would not be

eliminated, and so that employees would not be forced to work longer or shorter hours than desired.

The IWC also received testimony concerning patient safety considerations in support of the elimination of 12-hour workdays. These witnesses advised that the last four hours of 12-hour shifts can be exhausting and that exhaustion can result in a greater inclination toward making mistakes.

Based on all the information it received, the IWC determined that the health care industry should retain the option to adopt alternative workweek schedules with work days of more than 10 but not exceeding 12 hours. The IWC further determined that it will retain through its wage orders the provisions of former Labor Code § 1182.9, that employers engaged in the operation of a licensed hospital, or in providing personnel for the operation of a licensed hospital, may propose regularly scheduled alternative workweeks that include no more than three (3) twelve (12)-hour workdays within a 40-hour workweek, and that, if such an alternative workweek is adopted, an employer must make a reasonable effort to find another work assignment for any employee who participated in the vote which authorized the schedule and is unable to work the 12-hour shift. However, an employer is not being required to offer a different work assignment to an employee if such a work assignment is not available or if the employee was hired after the adoption of the twelve (12) hour, three (3) day alternative workweek schedule.

The main question remaining was how the health care industry would be defined. Following several public meetings and hearings, employer and employee representatives decided to work together and attempt to resolve several issues regarding the health care industry and to draft proposed language for consideration by the IWC. Prior to the public hearing on June 30, 2000, these two groups were able to negotiate compromises agreeable to both sides and to propose such language to the IWC. The proposed language, which the IWC adopted, defines the "health care industry" as hospitals, skilled nursing facilities, intermediate care and residential care facilities, convalescent care institutions, home health agencies, clinics operating twenty-four (24) hours per day, and clinics performing surgery, urgent care, radiology, anesthesiology, pathology, neurology, or dialysis. The IWC received testimony and correspondence that in intermediate care and residential care facilities other regulatory agencies use the term "resident" to describe persons receiving medical care in those facilities. The IWC concluded that the term "patient" includes "residents" of those facilities as defined by Health & Safety Code §§ 1250(c), (d), (e), (g), and (h), and 1569.2(k).

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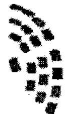

The proposal also included language defining the employees that are a part of the health care industry. The IWC adopted this proposal with one amendment regarding animal health care. Employees in the health care industry are now defined as those employees who provide patient care, or work in a clinical or medical department, including pharmacists dispensing prescriptions in any practice setting, or work primarily or regularly as members of a patient care delivery team, or are licensed veterinarians, registered veterinary technicians, and unregistered animal health

assistants and technicians providing patient care in animal hospital settings or facilities equivalent to those described above for people.
The regulations make clear that the phrase "employees in the healthcare industry" does not include those persons primarily engaged in providing meals, performing maintenance or cleaning services, doing business office or other clerical work, or undertakings involving any combination of such duties. Therefore, any alternative workweek schedule that is adopted by employees primarily engaged in these duties, and that provides for workdays in excess of 10 hours, is now null and void.

The IWC intends the definition of employees in the health care industry to encompass pharmacists who dispense prescriptions in all practice settings, including community retail pharmacists. The IWC also intends to include within the definition of the health care industry all employees who primarily or regularly provide hospice care as members of a patient care delivery team.

The IWC further notes that the requirement that an employee work primarily or regularly as a member of a patient care delivery team means that the employee must spend more than one-half of his or her work time engaged in such work. In Wage Orders 4-89 and 5-89, as amended in 1993, the IWC had a different definition of the term "primarily" for employees in the health care industry. According to those orders, "the term 'primarily' as used in section 1, Applicability, means (1) more than one-half the employee's work time as a rule of thumb or, (2) if the employee does not spend more than 50 percent of the employee's time performing exempt duties, where other pertinent factors support the conclusion that management, managerial, and/or administrative duties represent the employee's primary duty." This definition no longer exists. Again, the IWC emphasized that, consistent with Labor Code §515(e), "primarily" means one-half the employee's work time.

With regard to animal health care, the IWC received testimony from veterinarians and the California Veterinary Medical Association which represents approximately 4,500 licensed veterinarians and registered veterinary technicians who own and/or work in some 2,200 hospitals, clinics and independent practices throughout the State. The Association advised the IWC that approximately 50% of the animal care facilities are 24-hour hospitals that provide medical, dental, and surgical care, as well as emergency and critical care for patients. The IWC determined that licensed veterinarians, registered veterinary technicians and unregistered assistants had the same work-related issues and personal concerns regarding alternative workweek schedules as employees providing health care services to humans, and that such employees, who provide patient care within the meaning of Business and Professions Code §§ 4825-4857 in facilities similar to those described above for the treatment of humans, should be included in the health care industry.

The negotiated proposed language that the IWC adopted also includes a few protections for employees working 12-hour shifts. Employees cannot be required to work more than 12 hours in a 24-hour period unless there is a "health care emergency," as that phrase is defined in the regulation, and even though all reasonable steps have been taken to provide otherwise, the continued overtime is

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necessary to provide the required staffing. However, an employee may be required to work up to thirteen (13) hours within a 24-hour period if the employee that is supposed to relieve the first employee does not show up for his or her shift on time and does not notify the employer two hours in advance that he or she will not appear for duty as scheduled. Also, no employee can be required to work more than sixteen (16) hours in a 24-hour period unless by a voluntary mutual agreement of the employee and employer, and no employee can work more than 24 consecutive hours until that employee receives 8 consecutive off-duty hours. Finally, the adopted language provides that, if, during the last quarter of 1999, an employer implemented a reduced pay rate for employees choosing to work 12 hour shifts, and desires to reimplement a flexible work arrangement that includes twelve (12) hour shifts at straight time for the same work unit, the employer must pay a base rate to each affected employee in the work unit that is no less than that employee's base rate in 1999 immediately prior to the date of the rate reduction.

The IWC retained the provisions in Wage Order 5 relating to the following method of calculating overtime compensation. An employer engaged in the operation of a hospital or other institution primarily engaged in the care of the sick, aged, or mentally ill or defective in residence may, pursuant to an agreement or understanding arrived at before the performance of work, establish a work period of fourteen (14) consecutive days in lieu of a workweek of seven (7) consecutive days if, for any work in excess of eighty (80) hours in such fourteen (14) day period, the employee receives compensation at a rate of not less than one and one-half (1½) times the employee's regular rate of pay.

ELECTION PROCEDURES

Labor Code 517(a) directed the IWC to adopt regulations before July 1, 2000 regarding "the conduct of employee workweek elections, procedures for employees to petition for and obtain elections to repeal alternative workweek schedules, procedures for implementation of those schedules, conditions under which an adopted alternative workweek schedule can be repealed by the employer, employee disclosures, designations of work, and the processing of workweek election petitions." In accordance with this mandate, this section also lays out the election procedures for the adoption and repeal of alternative workweek schedules. Labor Code § 511(e) requires employers to report the results of any election to the Division of Labor Statistics and Research.

Based on testimony it received during public meetings and hearings, as well as its consideration of proposals of election procedures that were submitted, the IWC determined its wage orders should have more extensive procedures and safeguards than included in the Interim Wage Order - 2000. The language adopted reiterates the two-thirds (b) vote before the performance of work and secret ballot election requirements found in Labor Code § 511(a), and also provides a definition for "affected employees in the work unit." This definition is derived from preexisting language found in Wage Orders 4, 5, 9, and 10.

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However, the adopted language also sets up employee disclosure guidelines and mandates that an employer must provide disclosure in a non-English language if at least five (5) percent of the affected employees primarily speak that non-English language. Written disclosure and at least one meeting must be held at least fourteen (14) days prior to the secret ballot vote. This 14-day notice provision was previously applicable only to the health care industry. Failure to abide by these employee disclosure requirements will render the election null and void.

In addition, Wage Order election procedures now require employers to hold elections at the work site of the affected employees, specify that employers must bear any election costs, and authorizes the Labor Commissioner to investigate employee complaints. Following an investigation, an employer may be required to select a neutral third party to conduct the election. In order to provide additional protection for employees, the IWC added language that prohibits employers from intimidating or coercing employees to vote either in support of or in opposition to a proposed alternative workweek. Also, employees cannot be discharged or discriminated against for expressing opinions about elections or for voting to adopt or repeal an alternative workweek agreement.

The procedures further provide for the revocation of an alternative workweek schedule. The one-third (1/3) petition threshold and two-thirds (b) vote required to reverse an alternative workweek agreement reflects language adopted in the Interim Wage Order – 2000. While Wage Orders 1, 9, 10 and non-health care industry employees in Wage Orders 4 and 5 already followed these requirements, Wage Orders 2, 3, 6, 7, 8, 11, 12, 13, and Wage Orders 4 and 5 in the coverage of health care industry employees instead required a majority of employees to petition for an election. In the interest of establishing a universal provision applicable to all wage orders, the IWC decided to defer to the one-third (1/3) standard.

Following the repeal of an alternative workweek schedule, the employer faces a sixty (60) day compliance deadline, but the Division of Labor Standards Enforcement (DLSE) may grant an extension upon showing of undue hardship. This provision merely restates preexisting language from Wage Orders 1 through 13.

The requirements that an election to repeal an alternative workweek agreement must be held within thirty (30) days of an employee petition and on the affected employees' work site fall under the IWC's Labor Code § 517 authority. The prerequisite twelve (12) month lapse after the adoption of an alternative workweek schedule before an election to repeal can be held reflects preexisting language found in Wage Orders 1 through 13.

The adopted language clarifies that the report on election results is a public document, and further specifies the content required for each report. The language also provides for a thirty (30) day grace period before employees are required to work any new alternative workweek schedules adopted through election.

OTHER PROVISIONS[4]

[4] See Sections 6-8 of the Interim Wage Order.

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Minors: This section reflects the current penalties for violation of child labor laws. Violators are now subject to civil penalties from $500 to $10,000 as well as to criminal penalties. These increased penalties, initially set forth in the Interim Wage Order - 2000, will now be reflected in all the IWC's wage orders.

Make up Time: This section implements the make up time provisions mandated by Labor Code §513. The statute provides that an employer must approve the written request of an employee on each occasion the employee would like to perform make up time in the same workweek. In the interest of employer and employee convenience, the IWC decided to allow any employee who knows in advance that he or she will be requesting make up over a succession of weeks to request make up work time for up to four weeks in advance.

Collective Bargaining Agreements: This section updates the criteria for the collective bargaining agreement exemption in accordance with Labor Code § 514. Except as provided in subsections referring to overtime for minors 16 and 17 years of age, the availability of a place to eat for workers on night shift, and limits on work over 72 hours, employees working under valid collective bargaining agreements are exempt from the AB 60 overtime provisions if the agreement provides for the wages, hours of work, and working conditions of the employees, premium wage rates are designated for all overtime hours worked, and their regular hourly rate of pay is at least thirty (30) percent more than the state minimum wage.

This provision replaces the previous requirement that employees under collective bargaining agreements must earn at least one-dollar ($1) an hour more than the state minimum wage to qualify for the exemption. Premium wage rates are any rates higher than the regular hourly wage rate. The IWC also adopted language that requires the application of "one day's rest in seven" for employees working under a collective bargaining agreement unless the agreement explicitly states otherwise.

The California Labor Federation submitted testimony that Labor Code §514 was intended to permit the parties to a collective bargaining agreement to define what constitutes "overtime hours" and to determine the rate of premium pay to be paid for all overtime hours worked. The Commission agrees that § 514 permits the parties to a collective bargaining agreement to establish alternative workweek agreements through the collective bargaining process provided certain conditions are met. Thus, so long as the collective bargaining agreement establishes regular and overtime hours within the work week, establishes premium pay for all such hours worked, and the regular rate of pay is more than (30) percent above the minimum wage, then the exemption established by Labor Code § 514 is applicable.

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Personal Attendants: Wage Order 5 previously included an exemption from Section 3, Hours and Days of Work, for personal attendants, adult employees or minors who are permitted to work as adults who have direct responsibility for children under eighteen (18) years of age receiving twenty-four (24) hour care, organized camp counselors, and resident managers of homes for the aged having less than eight (8) beds as long as such employees were not employed more than 54 hours nor more than six (6) days in any workweek, except under certain emergency conditions. The

IWC learned, however, that, except for organized camp counselors, the provisions of this exemption violate the requirements of the federal Fair Labor Standards Act. In order to comply with federal law, the IWC reduced the weekly overtime provisions to 40 hours for personal attendants, adult employees or minors who are permitted to work as adults who have direct responsibility for children under eighteen (18) years of age receiving twenty-four (24) hour care, and resident managers of homes for the aged having less than eight (8) beds. It is the IWC's intention is that these employees may work more than eight (8) hours in a day as long as their weekly hours do not exceed 40 and, consistent with prior enforcement practices, any such employees who work more than 40 hours in a workweek must receive overtime pay for any day during that workweek in which they worked more than eight (8) hours. The IWC notes, however, that personal attendants who are also "employees in the health care industry," who also work in facilities within the meaning of the term "health care industry," may elect to work pursuant to an alternative workweek schedule adopted pursuant to the provisions applicable to such employees.

Ski Industry Employees (See Wage Order 10): Pursuant to Labor Code § 517(b), The IWC conducted a review of the wages, hours, and working conditions of employees working at establishments that offer Alpine and Nordic skiing and related recreational activities to the public. The IWC received testimony and written submissions from employees who overwhelmingly disapproved the special exemption from overtime set forth in former Labor Code § 1182.2 whereby employees could be required to work up to 56 hours in a workweek without the payment of overtime. Employees stated that their income is just above the minimum wage, that they have often worked ten (10) to fourteen (14) hours at straight time without breaks or meal periods, and at their income it is difficult to pay rent or otherwise make ends meet. They asked that they receive the same protections as other employees under AB 60. In addition, labor representatives testified that ski facilities in neighboring Nevada are required to pay overtime to employees after eight (8) hours without any apparent financial hardship.

Employers testified that they are a very small industry of 38 facilities, with a low profit margin that is very dependent upon the vagaries of the weather and a primarily seasonal workforce. Employers further stated that, unlike other industries that are dependent on the weather, ski facilities must be cleared for safe public use every day they are open. They also noted that, the under the federal Fair Labor Standards Act, the ski industry is exempt from having to pay weekly overtime after forty (40) hours, and that, if they are required to comply with all the requirements of AB 60, their profit margin will be eliminated. As a compromise, they requested that the IWC issue regulations requiring overtime to be paid after forty-eight (48) hours in a workweek year-round.
The IWC concluded that it would be inconsistent with the health, safety, and welfare of employees to continue the former statutory exemption from daily overtime in a regulation. Instead, Wage Order 10 will now provide that an employer engaged in the operation of a ski establishment as defined in that order will not be in violation of overtime provisions by instituting a regularly scheduled alternative workweek of 48 hours or less during any month of the year when Alpine or Nordic skiing activities are actually being conducted. However, overtime must be paid at the rate of 1 ½

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times the regular rate of pay for all hours worked in excess of ten (10) hours in a day or 48 hours in a workweek.

Commercial Fishing Employees (See Wage Orders 10 and 14): The IWC received testimony from persons employed in the commercial passenger fishing industry that, due to the uncertain length of the work day as well as long established customs in the industry, which is highly dependent on the availability of fish, it would be inappropriate to impose a requirement that employees receive overtime pay. In addition, commercial passenger fishing boats are subject to minimum manning requirements regulated by the United States Coast Guard, Title 46, Code of Federal Regulation, Part 15, which limit the number of hours that crew members may work while at sea. There is also an exemption from overtime requirements for commercial fishing vessels under the Fair Labor Standards Act. Therefore, the IWC concluded that it would continue the exemption from Section 3, Hours and Days of Work, formerly set forth in the Labor Code § 1182.3, for employees of commercial passenger fishing boats when they perform duties as licensed crew members. Such an exemption would not apply to other employees in the industry, such as clerical or maintenance personnel, who do not perform duties as licensed crew members on fishing boats.

The IWC received no compelling evidence to warrant making any other changes in the provisions of Section 3, Hours and Days of Work.

4. MINIMUM WAGES

While there are no changes to present minimum wage levels, the IWC currently is conducting its minimum wage review. A new minimum wage may become effective January 1, 2001. If there is a new minimum wage, it will, in turn, affect the level of meal and lodging credits.

Commercial Fishing: Under former Labor Code § 1182.3 employees in this industry were exempt from the minimum wage. The IWC conducted a review of this industry pursuant to Labor Code § 517(b), and received testimony from representatives of the commercial passenger fishing industry that the custom in the industry was to pay crew members on the basis of "one-half day," "three-quarter day," "full day," or "overnight" trips. These employers wished to continue this custom consistent with their present obligation to pay the minimum wage for all hours worked. The provisions of Section 4 (E) would allow employers to record pay of crew members in accordance with a formula based on the length of the trip. However, if the trip exceeds the defined hours of the formula, the additional hours would have to be recorded as additional hours worked and compensated accordingly. In practice, this alternative record keeping system may result in employees being paid more than the actual hours worked, but can never result in them being paid less than the actual hours worked. It is, therefore, primarily established as a convenience for employers. It is noted that regulations of the United States Coast Guard establish minimum crew standards which are intended to insure that, when boats are at sea for protracted periods, they receive adequate rest periods.

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9. UNIFORMS AND EQUIPMENT

The IWC retained its longstanding policy of requiring employers to provide uniforms, tools and equipment necessary for the performance of a job. Subsection (B) permits an exception to the general rule by allowing an employee who earns more than twice the State minimum wage to be required to provide hand tools and equipment where such tools and equipment are customarily required in a trade or craft. This exception is quite narrow and is limited to hand (as opposed to power) tools and personal equipment, such as tool belts or tool boxes, that are needed by the employee to secure those hand tools. Moreover, such hand tools and equipment must be customarily required in a recognized trade or craft.

11. MEAL PERIODS[5]

Wage Orders 1, 2, 3, 6, 7, 8, 9, 10, 11, 13 and 15 continue the preexisting requirement of a meal period for an employee working for a period of more than five (5) hours, and provide for a second meal period in accordance with Labor Code §512(a).

Senate Bill 88, Stats. 2000, chapter 492, added subsection (b) to Labor Code § 512, which provides that, notwithstanding subsection (a), the IWC may adopt a working condition order that allows a meal period to begin after six hours of work if it determines that the order is consistent with the health and welfare of the affected employees. The IWC made such a determination with regard to Wage Order 12 and continued the existing language providing for a first meal for an employee working for a period of more than six (6) hours, and for a second meal period in accordance with Labor Code §512.

Consistent with the health, safety, and welfare of employees in the health care industry, the IWC determined that Wage Orders 4 and 5 should have somewhat different language regarding meal periods. The IWC received correspondence from members of the health care industry requesting the right to waive a meal period if an employee
works more than a 12-hour shift. The IWC notes that Labor Code § 512 explicitly states that, whenever an employee works for more than twelve hours in a day, the second meal period cannot be waived. However, Labor Code § 516 authorizes the IWC to adopt or amend the orders with respect to break periods, meal periods, and days of rest for all California workers consistent with the health and welfare of those workers.

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[5] See Section 9 of the Interim Wage Order.

The IWC received several comments concerning the potential prohibition of on-duty meal periods. Under the current IWC wage orders, an "on-duty meal period" is permitted only when (1) the nature of the work prevents the employee from being relieved of all duty, and (2) the employee and employer have entered into a written agreement permitting an on-duty meal period. An employee must be paid for the entire on-duty meal period since it is considered time worked.

Any employee who works more than six hours in a workday must receive a 30-minute meal period. If an employee works more than five hours but less than six hours in a day, the meal period may be waived by the mutual consent of the employer and employee.

Notwithstanding other provisions regarding meal periods, the IWC adopted proposed language prepared for its consideration by employee and employer representatives of the health care industry. This language provides that employees in the health care industry covered by Wage Orders 4 and 5 who work shifts in excess of eight (8) hours in a workday may voluntarily waive their right to one of their two meal periods, provided that the waiver is in writing and voluntarily signed by the employer and employee. The employee may revoke the waiver at any time by providing the employer with at least one (1) day's written notice of the revocation. However, while the waiver is in effect, the employee must be paid for all working time, including an on-the-job meal period.

During its review of its wage orders and of various industries pursuant to the provisions of AB 60, the IWC heard testimony and received correspondence regarding the lack of employer compliance with the meal and rest period requirements of its wage orders. The IWC therefore added a provision to this section that requires an employer to pay an employee one additional hour of pay at the employee's regular rate of pay for each work day that a meal period is not provided. An employer shall not count the additional hour of pay as "hours worked" for purposes of calculating overtime pay.

The IWC received no compelling evidence, and concluded there was no authority at this time, to warrant making any other change in the provisions of this section other than those required by AB 60.

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12. REST PERIODS

As discussed above in Section 11, Meal Periods, the IWC heard testimony and received correspondence regarding the lack of employer compliance with the meal and rest period requirements of its wage orders. The IWC therefore added a provision to this section that requires an employer to pay an employee one additional hour of pay at the employee's regular rate of pay for each work day that a rest period is not provided. An employer shall not count the additional hour of pay as "hours worked" for purposes of calculating overtime pay.

Commercial Fishing Employees: The IWC added the last paragraph of Section 12 to insure that crew members on commercial passenger fishing boats are at sea for periods of twenty-four (24) hours or longer receive no less than eight (8) hours off-duty within each twenty-four (24) hour period to permit the employee to sleep. This rest period is in addition to the meal and rest periods otherwise required under Section 12.

17. EXEMPTIONS

This section previously allowed the Division of Labor Standards Enforcement, after an investigation and finding that enforcement would not materially affect the welfare or comfort of employees and would work an undue hardship on the employer, to exempt the employer and employees from the requirements of certain sections of the IWC's wage orders. After considering the testimony and correspondence it received with regard to meal periods, and in light of the mandatory provisions of Labor Code § 512, the IWC decided to remove Section 11, Meal Periods, from the list of sections that can be exempt from enforcement.

20. PENALTIES [6]

This section sets forth the provisions of Labor Code § 558, which specifies penalties for initial and subsequent violations. In accordance with that section, the IWC voted to extend the penalties provisions to Wage Order 14. The IWC received inquiries as to whether "willfulness" is a required element for the issuance of a civil penalty. There were also concerns over the assessment of penalties against an employer's payroll clerk, payroll supervisor, or a payroll processing service for failure to issue checks reflecting the required overtime compensation. AB 60 fails to address these issues, but the IWC noted that there is no intent to penalize individuals that are merely carrying out policies formulated by an employer.

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[6]See Section 10 of the Interim Wage Order.

Exhibit F

History of Basic Provisions in a Representative Order of the Industrial Welfare Commission, the Order Covering the Manufacturing Industry

REST PERIODS

Year of Order	
1919-20	SANITARY REGULATIONS applicable to manufacturing: Rest periods are not specified as such. Provisions at that time were limited to time out for meals and availability of seats. "Women and minors shall be permitted to use the seats when not engaged in the active duties of their occupation. Such shall apply in any room where manufacturing, altering, repairing, finishing, cleaning or laundering is carried on." (Section 23, Order #13)
1932	Previous order amended to add "As far as and to whatever extent, in the judgment of the Commission, when women and minors are required by the nature of their work to stand, a relief period shall be given every two (2) hours of not less than ten (10) minutes." (Order #18) Sanitary provisions were incorporated in industry orders.
1947	Rest Period clearly designated. It reads: "Every employer shall authorize all employees to take rest periods which, insofar as practicable, shall be in the middle of each work period. Rest periods shall be computed on the basis of ten minutes for four hours working time, or majority fraction thereof. No wage deduction shall be made for such periods." (Section 11, Order #1R)
1952	Previous order amended to add: "A rest period need not be authorized for employees whose total daily work time is less than three and one-half ($3\frac{1}{2}$) hours." (Section 12, Order 1-52).
1957	No change from 1952 (Order 1-57).
1963	No change from 1957 (Order 1-63).
1968	No change from 1963 (Order 1-68).
1976	No change from 1968, except it covers men as well as women and minors, and "net" 10 minutes is specified. (Order 1-76)
1980	No change from 1976. It reads: "Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half ($3\frac{1}{2}$) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages."

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their occupation. Such shall apply in any room where manufacturing, altering, repairing, finishing, cleaning or laundering is carried on." (Section 23, Order #13)

1932 Previous order amended to add "As far as and to whatever extent, in the judgment of the Commission, when women and minors are required by the nature of their work to stand, a relief period shall be given every two (2) hours of not less than ten (10) minutes." (Order #18) Sanitary provisions were incorporated in industry orders.

1947 Rest Period clearly designated. It reads: "Every employer shall authorize all employees to take rest periods which, insofar as practicable, shall be in the middle of each work period. Rest periods shall be computed on the basis of ten minutes for four hours working time, or majority fraction thereof. No wage deduction shall be made for such periods." (Section 11, Order #1R)

1952 Previous order amended to add: "A rest period need not be authorized for employees whose total daily work time is less than three and one-half ($3\frac{1}{2}$) hours." (Section 12, Order 1-52).

1957 No change from 1952 (Order 1-57).

1963 No change from 1957 (Order 1-63).

1968 No change from 1963 (Order 1-68).

1976 No change from 1968, except it covers men as well as women and minors, and "net" 10 minutes is specified. (Order 1-76)

1980 No change from 1976. It reads: "Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half ($3\frac{1}{2}$) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages."

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CERTIFICATE OF SERVICE
PROOF OF SERVICE

I, Carol J. Aranda, declare as follows:

I am employed in the County of San Francisco, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 555 Mission Street, Suite 3000, San Francisco, California 94105, in said County and State. On August 31, 2015, I served the within:

MOTION FOR JUDICIAL NOTICE

to each of the persons named below at the address(es) shown, in the manner described.

SEE ATTACHED SERVICE LIST

☑ **BY MAIL**: I placed a true copy in a sealed envelope addressed as indicated on the attached service list for collection and mailing at my business location, on the date mentioned above, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing with the United States Postal Service. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service in a sealed envelope with postage fully prepaid. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date on the envelope is more than one day after the date of deposit for mailing contained in the proof of service.

I certify under penalty of perjury that the foregoing is true and correct, that the foregoing document(s), and all copies made from same, were printed on recycled paper, and that this certificate was executed on August 31, 2015 at San Francisco, California.

Carol Aranda

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Court of Appeal Second Appellate District, Division One Office of the Clerk 300 S. Spring Street 2nd Floor, North Tower Los Angeles, CA 90013	
Appellate Coordinator Office of the Attorney General Consumer Law Section 300 S. Spring Street Los Angeles, CA 90013-1230	Electronic copy submitted to the Office of the Attorney General at https://oag.ca.gov/services- info/17209-brief/add