Case Number S185827

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Anthony Kirby, et al.,
Plaintiffs and Appellants

vs.

Immoos Fire Protection, Inc.,
Defendant and Respondent

Appeal from a Decision of the Third Appellate District,
Case Number C062306

APPELLANTS' OPENING BRIEF ON THE MERITS

LAW OFFICES OF ELLYN MOSCOWITZ, P.C.
Ellyn Moscowitz (SBN 129287)
Jennifer Lai (SBN 228117)
1629 Telegraph Avenue,
Fourth Floor
Oakland, California 94612
Telephone: (510) 899-6240
Facsimile: (510) 899-6245

LAW OFFICES OF
SCOT D. BERNSTEIN,
A Professional Corporation
Scot Bernstein (SBN 94915)
101 Parkshore Drive, Suite 100
Folsom, California 95630
Telephone: (916) 447-0100
Facsimile: (916) 933-5533

Attorneys for Plaintiffs and Appellants
ANTHONY KIRBY AND RICK LEECH, JR.

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Facsimile: (916) 933-5533

Attorneys for Plaintiffs and Appellants
ANTHONY KIRBY AND RICK LEECH, JR.

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ISSUES PRESENTED

Under the Court's Order dated November 17, 2010 and California Rule of Court 8.516(a)(1), the issues to be briefed and argued are limited to the following:

(1) Does Labor Code section 1194 apply to a cause of action alleging meal and rest period violations (Cal. Labor Code § 226.7) or may attorney's fees be awarded under Labor Code section 218.5?

(2) Is our analysis affected by whether the claims for meal and rest periods are brought alone or are accompanied by claims for minimum wage and overtime?

INTRODUCTION

The first issue asks the Court to determine whether the one-way fee shifting provision in Labor Code section 1194 or the two-way shifting provision in section 218.5 applies to a cause of action alleging violations of meal and rest period requirements under section 226.7.[1] Law and public policy point in the same direction: section 1194 applies, and section 218.5 does not. The "additional hour of pay" owed under section 226.7 for a missed meal or rest break is mandated "premium pay," a self-executing payment, similar to the overtime premium or the payment of wages. A worker's right to this premium pay arises under statute, not private contract, and carries out California's important public policy of protecting the health and safety of workers and the public. Allowing employers to use section 218.5 to threaten workers seeking to enforce this premium pay with enormous liability and even financial ruin would render such enforcement

[1] Unless otherwise specified, all further statutory references are to the California Labor Code.

efforts untenable for numerous workers. In many circumstances, it would amount to a *de facto* repeal of meal and rest period premium requirements that the Legislature made clear that it wanted enforced. It would also frustrate the Legislature's intent to shield minimum labor standards from the risks inherent in section 218.5's two-way fee shifting provision.

Thus, as the appellate courts have concluded with analogous statutory rights, such as the right to overtime in *Earley v. Superior Court* (2000) 79 Cal.App.4th 1420, and the right to the prevailing wage in *Road Sprinkler Fitters Local Union No. 699 v. G&G Fire Sprinklers, Inc.* (2002) 102 Cal.App.4th 765, the one-way fee shifting provision of section 1194 must govern claims to enforce the rights to meal and rest breaks and to premium pay when those breaks are not provided. The reasoning in *Earley*, a Second Appellate District decision which the Legislature later codified, supports this result. So does this Court's decision in *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094.

In holding to the contrary, the opinion in *Kirby, et al. v. Immoos Fire Protection, Inc.* (filed June 25, 2009, Court of Appeal No. C062306) [nonpub. Opn.] (the "Opinion" or "*Immoos*") sets new precedent that ignores *Earley,* misinterprets *Murphy*, and severely diminishes the ability of California's workers to enforce their statutory rights to minimum labor standards. In a few short paragraphs and without justifying its holding with a single published case, *Immoos* imposes a highly restrictive interpretation on section 1194. Properly interpreted, section 1194 alone applies to causes of action seeking recovery of statutorily-required unpaid meal and rest period premium pay. Thus, this Court should reverse *Immoos*, a serious misinterpretation of the Labor Code that will harm millions of workers in California.

Turning to the second question, a correct construction of the term "action" contained in section 218.5 would preclude imposition of section 218.5's two-way fee shifting provision when an employee alleges claims under section 1194 in his or her complaint, even if meal and rest period premium pay is determined *not* to be included within the coverage of section 1194. The danger of potentially ruinous personal liability for an employer's attorney's fees never should deter a worker who is seeking to enforce basic statutory protections. The plain language of section 218.5 and its legislative history compel this result. Contrary to *Immoos*, *Earley* does not support a construction of "action" as meaning "cause of action." And a plain language construction neither eviscerates section 218.5 nor leads to absurdity. Indeed, a plain language construction is fully consistent with the legislative design of fee shifting in the Labor Code: to protect and advance the minimum statutory rights of California's workers by allowing two-way fee shifting under section 218.5 only when private contractual rights are the sole matters at issue.

FACTS AND PROCEDURAL HISTORY

Plaintiffs and Appellants Anthony Kirby and Rick Leech, Jr. ("Appellants" or "Plaintiffs" or "Kirby") were sprinkler fitter construction workers and former employees of Defendant and Respondent Immoos Fire Protection, Inc. ("Immoos" or the "Company"), a fire protection subcontractor to general commercial and residential building contractors throughout California. (1 Joint Appendix ("JA") 0002:5-0002:9, 1 JA 0003:2-0003:7.) On January 3, 2007, Appellants filed suit against Immoos on behalf of themselves and approximately 150 current and former sprinkler fitters, alleging multiple unlawful labor and unfair business practices, including the Company's banking of overtime hours to avoid

paying the overtime premium, its failure to pay for "off-the-clock" work, and its failure to provide afternoon rest periods. (1 JA 0005:8-0016:2.) In total, Appellants alleged six causes of action against Imooos.[2] Appellants alleged a seventh cause of action under section 2810 against 750 Doe defendants who knew or should have known that the agreements entered into with Immoos did not contain sufficient funds to meet minimum labor standards in California. (1 JA 0014:1-0016:2.) On June 20, 2007, Immoos answered the Complaint. (2 JA 0097-0101.) On August 30, 2007, Appellants filed a First Amended Complaint ("FAC"), alleging the same six causes of action against Immoos and the same seventh cause of action against the Doe defendants. (1 JA 0017-0032.)

On August 11, 2008, Appellants amended the FAC to identify four Doe defendants: Hilbers, Inc. ("Hilbers"), D.R. Horton, Inc., Sacramento ("D.R. Horton"), Meritage Homes of California, Inc. ("Meritage"), and Shea Homes, Inc. ("Shea") (collectively, the "General Contractor Defendants"). (1 JA 0035-0042.) On October 1, 2008, Appellants and Hilbers entered into a conditional settlement agreement. (1 JA 0043-0044;

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[2] Appellants alleged Immoos violated the following statutory provisions: (1) Bus. & Prof. Code § 17200 ("First Cause of Action"); (2) Cal. Labor Code §§ 201, 203, 204 for failure to pay all wages owed, including the overtime premium and "off-the-clock" work ("Second Cause of Action"); (3) Cal. Labor Code §§ 204.3 and 510 and Industrial Wage Commission ("IWC") Order 16-2001 for failure to pay the overtime premium ("Third Cause of Action"); (4) Cal. Labor Code § 223 for secret payment of lower wages, including failure to pay wages for all hours worked and failure to pay the overtime premium ("Fourth Cause of Action"); (5) Cal. Labor Code § 226 for failure to provide itemized wage statements ("Fifth Cause of Action"); (6) IWC Order 16-2001 for failure to provide afternoon rest periods ("Sixth Cause of Action"). (1 JA 0007:24-0013:25.) The Complaint also alleged violations of section 226.7, which were incorporated by reference into the Sixth Cause of Action. (Cal. Labor Code § 226.7; 1 JA 0002:18-26; 1 JA 0013:17-18.)

see Motion for Judicial Notice ("MJN") filed concurrently with this Opening Brief Ex. J (specifically, see Ex. B of Ex. J).) On October 14, 2008, November 21, 2008, and December 2, 2008, Appellants entered into similar conditional settlements with the remaining three General Contractor Defendants, D.R Horton, Shea, and Meritage. (1 JA 0046-0047, 0049-0050; see also MJN Ex. J (specifically, see Exs. A, C, D, E of Ex. J).)

Meanwhile, Appellants continued to litigate the class case against Immoos. On November 19, 2008, Appellants noticed their motion for class certification. (1 JA 0053.) On January 12, 2009, the trial court denied Appellants' motion for class certification. (2 JA 0214.)

Appellants then executed their conditional settlements with the General Contractor Defendants and dismissed the FAC against each of these defendants. (1 JA 0056-0063; MJN Ex. J.) After receiving all settlement monies due, totaling $6,000.00, Appellants filed a request for dismissal against all parties on all remaining causes of action on February 27, 2009. (1 JA 0062; MJN Ex. J.)

Initially, Immoos sought only to recover its costs. (2 JA 0071:27-0072:2.) But on April 24, 2009, Immoos filed a motion for attorney's fees against Kirby. (2 JA 0071-0080.) In its motion, Immoos conceded it could not be awarded section 218.5 fees for the Second, Third, Fourth, and Fifth Causes of Action, which overlapped with Appellants' overtime allegations and were protected from two-way fee shifting by section 1194. (2 JA 0073:28-0074:26.) Immoos argued, however, that section 218.5 fees could be awarded for the following three causes of action, which it claimed were "unconnected:" (1) the Sixth Cause of Action; (2) the Seventh Cause of Action; and (3) the First Cause of Action for unfair business practices

which incorporated the Sixth and Seventh Causes of Action. (2 JA 0074-0077.)

In calculating the amount claimed in attorney's fees, Immoos argued it was "impossible" to "provide an accurate itemization of all hours performed on each of the Causes of Action, or parts thereof, for which Defendant is entitled, as the billing does not include that type of specificity;" hence, Immoos used the following formula: "2 Causes of Action divided by 8 Causes of Action equals 25%. 2.5 Causes of Action divided by 8 Causes of Action equals 31.25%." (2 JA 0077-0078.)

Using this formula, Immoos claimed that Appellants owed 30 percent of $143,598.50 in pre-petition fees plus another $6,766.50 in petition-related fees, for an incorrectly computed total of $46,846.05. (2 JA 0071-0080.) The corrected figure ultimately calculated by the trial court was $49,846.05 – *more than eight times the amount Appellants had recovered in their settlements with the General Contractor Defendants.* (3 JA 0425-0426; 1 JA 0064, 2 JA 0071-0080, 3 JA 347; see MJN Ex. J.)

On July 9, 2009, the trial court awarded Immoos the entire $49,846.05 of fees under section 218.5, together with interest beginning on the May 26, 2009 hearing date. (3 JA 0425-0426.)

Kirby appealed the trial court's decision. (3 JA 0415-0416.) Then, on July 27, 2010, the Third District Court of Appeal reversed the trial court's order awarding attorney's fees on the First and Seventh Causes of Action. (Op., pp. 10, 21-26.) But the Court of Appeal affirmed the trial court's order granting attorney's fees under section 218.5 to Immoos for its defense of the Sixth Cause of Action, which sought premium pay for missed rest periods. (Op., pp. 10, 18-21, 27.)

On August 27, 2010, Appellants filed a Petition for Review (the "Petition"). Due to the important public policy considerations raised by the Opinion, including its impact on workers' ability to enforce their rights under the Labor Code, a number of *amici curiae* filed letters in support of the Petition.[3] On November 17, 2010, this Court granted review.

ARGUMENT

I. SECTION 1194 CONTROLS THE AWARD OF ATTORNEY'S FEES IN ACTIONS TO RECOVER UNPAID MEAL AND REST PERIOD PREMIUM PAY

The Legislature intended section 1194 to control the award of attorney's fees in causes of action alleging section 226.7 violations. It so demonstrated through: (1) the language of section 1194; (2) the Legislature's clear statements of intent when it amended section 218.5 and codified *Earley* to restrict the application of section 218.5; and (3) the statutory and regulatory context of fee shifting and meal and rest period enforcement in the Labor Code.

A. General Principles of Statutory Interpretation

Several established rules of interpretation apply to both issues presented. The cardinal rule is to ascertain the Legislature's intent so as to effectuate the statute's intended purpose. (*Van Horn v. Watson* (2008) 45

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[3] Four organizations and five individuals submitted letters. Appellants identify these *amicus curiae* letters by name and date: (1) Consumer Attorneys of California (dated Sept. 3, 2010); (2) State Building and Construction Trades Council of California, American Federation of Labor-Congress of Industrial Organizations ("AFL-CIO") (dated Sept. 9, 2010); (3) California Labor Federation, AFL-CIO (dated Sept. 10, 2010); (4) Lieff Cabraser Heiman & Bernstein, LLP (dated Sept. 27, 2010); and (5) Albert H. Cicairos, Richard Wheeler, Frank Daniel, George Thompson, and Kenneth Bluford (dated Sept. 27, 2010).

Cal.4th 322, 326 (citing *Lennane v. Franchise Tax Board* (1994) 9 Cal.4th 263, 268).) Construction begins with the statutory language. (*Smith v. Superior Court* (2006) 39 Cal.4th 77, 83.) If the language is unambiguous, "the plain meaning controls and resort to extrinsic sources to determine the Legislature's intent is unnecessary." (*Bonnell v. Medical Board of California* (2003) 31 Cal.4th 1255, 1261 (citation omitted).) The Court should attempt to harmonize the language within the larger context of the statutory scheme:

> The words of the statute must be construed in context, keeping in mind the statutory purpose, and the statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible.

(*Dyna-Med, Inc. v. Fair Employment & Housing Comm'n* (1987) 43 Cal.3d 1379, 1387 (citations omitted).)

If the statutory language is unclear and the terms used are not "specifically defined," the Court may turn to "expressions of legislative intent to construe [the terms] in the statute's relative context." (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572.) The Court then should "choose the construction that comports most closely with the Legislature's apparent intent, endeavoring to promote rather than defeat the statute's general purpose, and avoiding a construction that would lead to absurd consequences." (*Smith,* 39 Cal.4th at 83 (citation omitted).) "'A literal construction . . . will not control when such a construction would frustrate the manifest purpose of the enactment as a whole.'" (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 991 (citation omitted).) "'The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.'" (*Arias,* 46 Cal.4th at 979 (citation omitted).) Language should be interpreted as "workable and reasonable, practical, in

accord with common sense and justice." (*Halbert's Lumber, Inc. v. Lucky Stores, Inc.* (1992) 6 Cal.App.4th 1233, 1239-1240 (citations omitted).)

Significantly, "statutes governing conditions of employment are to be construed broadly in favor of protecting employees." (*Murphy,* 40 Cal.4th at 1103 (citing *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 340; *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794; *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 985.) Indeed, "'past decisions . . . teach that in light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection." (*Ramirez,* 20 Cal.4th at 794 (citing *Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 702).) This "liberal construction rule" should be applied by the Court when construing the Labor Code.

Finally, "when a general and particular provision are inconsistent, the latter is paramount to the former." (Cal. Civ. Proc. Code § 1859.) And "[w]here uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation." (*Dyna-Med,* 43 Cal.3d at 1386-87 (citations omitted).)

The Opinion does not apply these principles of construction in determining whether section 1194 or section 218.5 applies to the Sixth Cause of Action. Instead, it contains an overly restrictive reading of section 1194. It does not consider the Legislature's express intent to shield statutory minimum labor standards from section 218.5's reach, nor does it harmonize any of the provisions at issue within their statutory and

regulatory context. Finally, and most importantly, it does not apply the "liberal construction" rule to these important worker protection provisions.

B. Fee Shifting in the Labor Code: The Statutes

Section 1194 bars prevailing employers from seeking attorney's fees in civil actions brought by workers to recover "the legal minimum wage or the legal overtime compensation." (Cal. Labor Code § 1194.) Enacted in 1913, and amended in 1991 to include the recovery of attorney's fees, section 1194 provides, in relevant part:

> (a) Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, *reasonable attorney's fees*, and costs of suit.

(Cal. Labor Code § 1194(a) (emphasis added).) Prevailing employers may seek attorney's fees in actions covered under section 218.5. (Cal. Labor Code § 218.5.) Enacted in 1986, and amended in 2000 to include a second paragraph, section 218.5 provides:

> In any action brought for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions, the court shall award reasonable attorney's fees and costs to the prevailing party if any party to the action requests attorney's fees and costs upon the initiation of the action. This section shall not apply to an action brought by the Labor Commissioner. This section shall not apply to a surety issuing a bond pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code or to an action to enforce a mechanics lien brought under Chapter 2 (commencing with Section 3109) of Title 15 of Part 4 of Division 3 of the Civil Code.
>
> *This section does not apply to any action for which attorney's fees are recoverable under Section 1194.*

(Cal. Labor Code § 218.5 (emphasis added).) The second paragraph, specifically referencing section 1194, was added as part of Assembly Bill 2509 ("AB 2509"). (A.B. 2509, Stats. 2000, ch. 876, § 4; see Cal. Labor Code § 218.5.)

Section 218.5 is one of nine Labor Code provisions that provides for two-way fee shifting.[4] The other 46 fee shifting provisions in the Labor Code are all one-way provisions. Forty-four of these provisions provide for one-way fee shifting in favor of employees; two provisions allow for one-way fee shifting in favor of employers that prevail against public entities.[5] No provision in the Labor Code allows a one-way fee shift in favor of

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[4] Four of the other eight two-way fee shifting provisions require a finding of bad faith or contempt (Cal. Labor Code §§ 98.7, 2673.1, 4062.3, 5813), three are related to collective bargaining agreements, arbitrations, and public works projects (Cal. Labor Code §§ 1128, 1730, 2692), and one provision applies to Berman appeals (Cal. Labor Code § 98.2).

[5] Appellants have located 55 attorney's fees provisions in the Labor Code. Of these provisions, 44 are one-way for the employee: Cal. Labor Code §§ 1193.6, 1194, 1774 (wages); Cal. Labor Code §§ 226, 233 (sick leave); Cal. Labor Code §§ 1062, 1073, 1695.7, 1697, 1697.1, 2673.1, 2677, 2810 (employment with contractors and successor contractors in the janitorial, public transit, farm labor and garment industries); Cal. Labor Code §§ 1700.25, 1704.2 (talent agencies); Cal. Labor Code § 2802 (employees' expenditures); Cal. Labor Code § 432.7 (employment records); Cal. Labor Code § 2699 (Private Attorney General Act claims); Cal. Labor Code § 1404 (Worker Adjustment Retraining and Notification Act); Cal. Labor Code § 1197.5 (wage discrimination); and 24 one-way provisions relating to workers' compensation litigation.

Only two provisions of the Labor Code expressly permit an employer to recover attorney's fees. One is for employers who prevail in an Occupational Health and Safety Administration appeal (Cal. Labor Code § 149.5), and the other is for contractors/employers who seek to recover differences paid in public work projects from the awarding body (Cal. Labor Code § 1726). An employee is never an opposing party in these proceedings.

employers and against employees. Thus, generally speaking, the American Rule applies when an employer prevails in an employer-employee dispute unless the prevailing employer is entitled to attorney's fees under section 218.5. (See Cal. Civ. Proc. § 1021 (codifying the American Rule).)[6]

Section 218.5 does not expressly provide for an award of attorney's fees in causes of actions alleging violations of section 226.7. (See Cal. Labor Code § 218.5) Nor does section 1194. (See Cal. Labor Code § 1194.) Enacted in 2000, section 226.7 provides:

> (a) No employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission.
>
> (b) If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall *pay* the employee one additional hour of *pay* at the employee's regular rate of compensation for each work day that the meal or rest period is not provided.

(Cal. Labor Code § 226.7 (emphasis added).)

In *Murphy*, this Court held that this "pay" under section 226.7(b) "constitutes a wage or premium pay," a self-executing payment required by law, similar to an "employee's immediate entitlement to payment of wages

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[6] Code of Civil Procedure section 1021 provides:

> Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to their costs, as hereinafter provided.

(Cal. Civ. Proc. Code § 1021.)

or for overtime." (*Murphy*, 40 Cal.4th at 1099-1100, 1108 (citing *Kerr's Catering Service v. Department of Industrial Relations* (1962) 57 Cal.2d 319, 326).) As such, it is the "legal minimum wage" owed to a worker who works through a meal or rest period or "the legal overtime compensation" for a worker who works in excess of a prescribed time period.

C. The Language of Section 1194 Supports the Inclusion of Meal and Rest Period Premium Pay

Section 1194 governs "the legal minimum wage." (Cal. Labor Code § 1194(a).) But section 1194 does not define this term, nor does any other Labor Code provision. Section 1194 also does not state that "the legal minimum wage" is set forth or defined in another provision of the Labor Code. (Cal. Labor Code § 1194.) The Opinion wrongly equates "the legal minimum wage" with the "minimum wage" *rates* set forth in sections 1182.11 and 1182.12 (the "rate provisions" or the "minimum wage rate provisions").[7] (Op., 18-21; Cal. Labor Code §§ 1182.11; 1182.12.)

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[7] Section 1182.11 provides:

> Notwithstanding any other provision of this part, on and after March 1, 1997, the minimum wage for all industries shall not be less than five dollars ($5.00) per hour; on and after March 1, 1998, the minimum wage for all industries shall not be less than five dollars and seventy-five cents ($5.75) per hour. The Industrial Welfare Commission shall, at a public meeting, adopt minimum wage orders consistent with this section without convening wage boards, which wage orders shall be final and conclusive for all purposes.

(Cal. Labor Code § 1182.11.)

Section 1182.12 provides:

> Notwithstanding any other provision of this part, on and after January 1, 2007, the minimum wage for all industries shall be not less than seven dollars and fifty cents ($7.50) per hour, and on and

The Labor Code does not define "minimum" or "legal." "Minimum" means "the least possible" or the "lowest." (American Heritage Dict. (2006), available at: http://dictionary.reference.com/browse/minimum.) "Legal" means "[o]f or relating to law" or "falling within the province of law" or "established, required, or permitted by law." (Black's Law Dict. (9th ed. 2009).) The Labor Code does not define "wage," but it does define "wages" to include "all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation." (Cal. Labor Code § 200.)

There are a number of "lowest" or "least possible" wages established by law in California. It is well settled that the prevailing wage is considered "the legal minimum wage" under section 1194. (*Road Sprinkler Fitters,* 102 Cal.App.4th at 778-779 (citations omitted); see also *Reyes v. Van Elk, Ltd.* (2007) 148 Cal.App.4th 604, 612.) The prevailing wage "guarantees a *minimum cash wage* for employees" on a public works project. (*Road Sprinkler Fitters,* 102 Cal.App.4th at 778-779 (emphasis added).) It is the "least possible" wage owed on a public works project. Overtime also guarantees "the least possible" compensation owed for time worked in excess of maximum hour requirements. (See *Murphy*, 40 Cal.4th at 1105-1106.)

Similarly, meal and rest period premium pay is the "least possible" wage owed when a meal or rest period is not provided as required by law.

> after January 1, 2008, the minimum wage for all industries shall be not less than eight dollars ($8.00) per hour.

(Cal. Labor Code § 1182.12.)

As discussed above, meal and rest pay is statutory pay. (*Murphy*, 40 Cal.4th at 1099-1100, 1108.) The employer is affirmatively obligated to pay a worker for missing a meal or rest period. (*Id.* at 1108.) As this Court explained in *Murphy*, a worker is immediately entitled to this pay because the worker who has worked through two rest periods in a regular eight-hour work day:

> essentially performs 20 minutes of 'free' work, i.e., the employee receives the same amount of compensation for working through the rest periods that the employee would have received had he or she been permitted to take the rest periods. An employee forced to forgo his or her meal period similarly loses a benefit to which the law entitles him or her. While the employee is paid for the 30 minutes of work, the employee has been deprived of the right to be free of the employer's control during the meal period. *Section 226.7 provides the only compensation for these injuries.*

(*Id.* at 1104 (citations omitted) (emphasis added).) Meal and rest pay is the "lowest" wage owed by law under these circumstances. It is "the legal minimum wage" for a worker who works through a meal and rest period.

The Opinion wrongly equates the minimum wage rate provisions with "the legal minimum wage." (Op., 18-21.) These rate provisions do not define "the legal minimum wage" and cannot be understood as its equivalent. Rather, the rate provisions are but a subset of "the legal minimum wage," providing a quantitative limitation applicable to section 1194 and all other provisions of Part Four (Employees), Division Two (Employment Regulation and Supervision) of the Labor Code. (See Cal. Labor Code § 1182.12 ("*Notwithstanding any other provision of this part*, the minimum wage for all industries *shall not be less than* . . . .") (emphasis added).) In other words, quantitatively speaking, the rate provisions prevent "the legal minimum wage" from dropping below a certain monetary sum per hour. Qualitatively, however, the rate provisions do not

provide a complete definition for "the legal minimum wage." Indeed, the term "minimum wage" as used in these rate provisions does not even contain the word "legal." (See *Snukal v. Flightways Mfg., Inc.* (2000) 23 Cal.4th 754, 778 ("In analyzing statutory language, [courts] seek to give meaning to *every word* and phrase in the statute to accomplish a result consistent with the legislative purpose.") (citation omitted) (emphasis added); *Moyer v. Workmen's Comp. Appeals Board* (1973) 10 Cal.3d 222, 230 ("[A] construction making some words surplusage is to be avoided.'") (citation omitted).)

Had the Legislature intended to equate "the legal minimum wage" with the rate provisions, it would have cited to them. The Legislature knows how to reference provisions within and outside of the Labor Code and has done so in many instances. (See, e.g., Cal. Labor Code § 98.2 (a) (a filing fee "shall be distributed *as provided in* Section 68085.3 of the Government Code"); Cal. Labor Code § 1197.5 ("complaints shall be investigated *as provided in* subdivision (b) of Section 98.7"); Cal. Labor Code § 300 (a) ("As used in this section, the phrase 'assignment of wages' . . . does not include an order or assignment *made pursuant to* Chapter 8 (commencing with Section 5200) of Part 5 of Division 9 of the Family Code or Section 3088 of the Probate Code.") (all emphasis added).) The Legislature did *not* provide a reference or a citation for "the legal minimum wage." Thus, contrary to the Opinion, it cannot be equated to any other term in California law. "The Legislature has in mind existing laws when it passes a statute." (*Estate of McDill* (1975) 14 Cal.3d 831, 837.)

Section 1194 also governs "the legal overtime compensation." (Cal. Labor Code § 1194(a).) Like its treatment of "the legal minimum wage," section 1194 does not define "the legal overtime compensation," nor does it

cite to, reference or limit it to any other provisions of the Labor Code. The Labor Code also does not specifically define "overtime" or "compensation," although it provides the formula for overtime rate calculations in sections 510 and 511 (the "overtime rate provisions"), which are similar to the minimum wage rate provisions except that they are formulaic rather than numerical. (See Cal. Labor Code §§ 510 (a); 511(a)-(b); see also, *supra*, p. 13.)[8] While the overtime rate provisions provide a

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[8] Section 510(a) provides, in relevant part:

> Eight hours of labor constitutes a day's work. Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee. Any work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay for an employee. In addition, any work in excess of eight hours on any seventh day of a workweek shall be compensated at the rate of no less than twice the regular rate of pay of an employee. Nothing in this section requires an employer to combine more than one rate of overtime compensation in order to calculate the amount to be paid to an employee for any hour of overtime work.

(Cal. Labor Code § 510(a).)

Section 511(a) and (b) provide, in relevant part:

> (a) Upon the proposal of an employer, the employees of an employer may adopt a regularly scheduled alternative workweek that authorizes work by the affected employees for no longer than 10 hours per day within a 40-hour workweek without the payment to the affected employees of an overtime rate of compensation pursuant to this section . . . .
>
> (b) An affected employee working longer than eight hours but not more than 12 hours in a day pursuant to an alternative workweek schedule adopted pursuant to this section shall be paid an overtime rate of compensation of no less than one and one-half times the regular rate of pay of the employee for any work in excess of the

quantitative measure of pay, they do not purport to provide meaning or a definition for "the legal overtime compensation." Moreover, they do not purport to limit the obligation to pay overtime compensation to the circumstances described within their four corners or to provide an exhaustive collection of circumstances in which overtime compensation may be owed. (See Cal. Labor Code § 1194(a).)

"Overtime" means "time in excess of a prescribed period." (American Heritage Dict. (2006), available at: http://dictionary.reference.com/browse/overtime.) "Compensation" means "remuneration and other benefits received in return for services rendered" and "payment of damages, or any other act that a court orders to be done by a person who has caused injury to another." (Black's Law Dict. (2009).)

As discussed above, meal and rest period premium pay clearly is compensation. (*Murphy,* 40 Cal.4th at 1104; see, *supra,* pp. 14-15.) Indeed, as this Court emphatically stated: "[T]he Legislature intended section 226.7 first and foremost to compensate employees for their injuries." (*Id.* at 1110-1111.) Further, the compensation is owed for time worked in excess of a "prescribed period," which in an eight-hour work day includes an unpaid 30-minute meal period and two paid ten-minute rest period (the "section 226.7 prescribed period"). (See *Murphy*, 40 Cal.4th at 1104.) Any work performed during the 30-minute meal period or the two ten-minute rest periods constitutes "overtime" or time worked "in excess" of the 226.7 prescribed period and therefore is a form of "overtime." Thus,

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> regularly scheduled hours established by the alternative workweek agreement and for any work in excess of 40 hours per week . . . .

(Cal Labor Code § 511(a)-(b).)

the premium pay required by section 226.7 is "the legal overtime compensation" for that overtime work within the meaning of section 1194. It is the functional equivalent of work performed in excess of the prescribed periods under the overtime rate provisions. (See, *e.g.*, § 510 ("any work in excess of eight hours in one workday" and "any work in excess of 40 hours in any one workweek").) The only difference is that it takes place during the workday rather than at its end.

Here again, had the Legislature intended to confine "the legal overtime compensation" to specific provisions, including the overtime rate provisions, it could and would have simply cited to these provisions as it has done in a number of instances. (See, *e.g.*, Cal. Labor Code § 515(a) ("The Industrial Welfare Commission may establish exemptions from the requirement that an overtime rate of compensation be paid *pursuant to Sections 510 and 511* . . . ."); Cal. Labor Code § 513 ("If an employer approves a written request of an employee to make up work time . . . the hours of that makeup work time . . . may not be counted towards computing the total number of hours worked in a day for purposes of the overtime requirements *specified in Section 510 or 511*") (all emphasis added).) The Legislature did not do so in section 1194.

Hence, the terms "the legal minimum wage" and "the legal overtime compensation are not ambiguous. The phrase "the legal minimum wage or the legal overtime compensation" appears only once in the Labor Code, and also is not ambiguous. Instead, the phrase is deliberately broad and general. The phrase, and, separately, its subparts, clearly reference meanings and concepts of "overtime compensation" and "minimum wage" *generally*, as opposed to any one particular specific "overtime" or "minimum wage" provision. Indeed, as discussed above, if the Legislature

wanted section 1194 to be limited to particular "overtime" or "minimum wage" provisions, it would have said so expressly.[9] The Legislature thus intended "the legal minimum wage or the legal overtime compensation" to encompass a wide variety of minimum wages and forms of overtime compensation.

Nevertheless, "the legal minimum wage," "the legal overtime compensation," and "the legal minimum wage or the legal overtime compensation" have not been "specifically defined" by the Legislature and may be reasonably susceptible to different interpretations. (See *White*, 21 Cal.4th at 572; see also *Murphy*, 40 Cal.4th at 1104-1105.) The Court therefore may look beyond the statutory language and "choose the construction that comports most closely with the Legislature's apparent intent, endeavoring to promote rather than defeat the statute's general purpose, and avoiding a construction that would lead to absurd

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[9] Instead, the only reference the Legislature made to "the legal minimum wage or the legal overtime compensation" in the Labor Code is the broad reference in the text of section 1194(a) itself:

> . . . [A]ny employee receiving less than the legal minimum wage or the legal overtime compensation . . . is entitled to recover in a civil action the unpaid balance of the full amount of *this* minimum wage or overtime compensation . . . .

(Cal. Labor Code § 1194(a) (emphasis added).) The Legislature's "grammatical choices" cannot be ignored. (*Pineda v. Bank of America* (2010) 50 Cal.4th 1389, 1396.) Here, the Legislature's use of "this" signifies that the "unpaid balance" that can be recovered is that same broad and general group of categories of wages and compensation that it referred to at the outset: "the legal minimum wage or the legal overtime compensation." (See Garner, A Dictionary of Modern Legal Usage (2d ed. 1995), pp. 259-260 (defining "this" as a deictic term, a "pointing word" [] that points directly to an antecedent).)

consequences." (*Smith,* 39 Cal.4th at 83 (citation omitted).) The Legislature's codification of *Earley* clearly evinces an intent to bring meal and rest premium pay under section 1194.

D. By Codifying *Earley*, the Legislature Acted Consistently With Its Intent To Limit Section 218.5 To Contractual Disputes and To Protect Minimum Labor Standards Under Section 1194

As described above, the Legislature amended section 218.5 in 2000 by adding the following sentence: "This section does not apply to any action for which attorney's fees are recoverable under Section 1194." (Stats. 2000, ch. 876 [A.B. 2509], § 4; see, *supra,* pp. 10-11.) The Legislature then declared its purpose for adding this sentence as follows:

> The amendments to Section 218.5 of the Labor Code made by Section 4 of this act do not constitute a change in, but are declaratory of, the existing law, and these amendments are intended to reflect the holding of the Court of Appeal in *Early v. Superior Court* (2000) 79 Cal.App.4th 1420.

(Stats. 2000, ch. 876 [A.B. 2509], § 11 (the "*Earley* codification provision").) The Legislature thus codified the *Earley* decision.

The *Earley* court first recognized the Legislature's overall fee shifting design in the Labor Code: section 218.5 would serve as the more "general" attorney's fees provision applicable to a variety of "contractually agreed-upon or bargained-for" wages and benefits, but the "very specific and focused" provisions of section 1194 would apply to minimum labor standards which were created by statute and based on important public policy. (*Earley*, 79 Cal.App.4th at 1426-31.)

As it expressly stated in the *Earley* codification provision, the Legislature did not intend to change the existing law with the 2000 amendment, but rather to clarify the law in accordance with *Earley*. (See *Martin v. California Mutual Building & Loan Assn.* (1941) 18 Cal.2d 478,

484 (changes to a statute are purposeful, but the purpose can be a "legislative attempt to clarify the true meaning of the statute").) The Legislature thus indicated that *Earley* had correctly identified the Legislature's intent to shield workers enforcing statutory rights from the risks that would imposed on them by section 218.5.

In *Earley*, an employer unsuccessfully attempted to expand two-way fee shifting under section 218.5 by arguing that both section 218.5 *and* section 1194 could be applied in a class action to recover unpaid overtime pay. (*Earley*, 79 Cal.App.4th at 1427.) The dispute in *Earley* centered on language in a class notice advising employees of their "likely" exposure to section 218.5 attorney's fees if the employer were to prevail. (*Id.* at 1424.) Opposing the inclusion of this language, the employees argued that the application of section 218.5 to an overtime action conflicted with and defeated the legislative purpose behind section 1194 to provide "special treatment" to claims brought under section 1194. (*Id.* at 1426-27.) The employer responded that the plain language of sections 1194 and the pre-2000 version of section 218.5 controlled. The employer urged that no conflict existed as section 1194 was "simply an overlapping statute," and that harmonization between the statutes was "best accomplished by the recognition that both sections should apply." (*Id.* at 1427.)

The *Earley* court rejected the employer's construction. Focusing instead on the legislative histories of the statutes and subsequent case law, it found that the Legislature could not have intended section 218.5 to apply to actions covered under section 1194. (*Id.* at 1427-28.) Thus, the court concluded, to maintain the integrity of both statutes, section 1194 must be read as the "sole statutory authority" for the award of attorneys' fees in overtime actions. (*Id.* at 1428-29.)

Several specific legislative findings compelled this conclusion. The *Earley* court agreed with the employees that the Legislature had, in fact, long provided "special treatment" to claims brought under section 1194. (*Id.* at 1427, 1427, fn. 7, 1428 (tracing section 1194's history from its enactment in 1913).) The court then found that this "special treatment" extended into the realm of attorney's fees. (*Id.* at 1428-29.) Specifically, *Earley* found that although section 218.5 had been in effect since 1986, five years *prior* to the 1991 amendment adding one-way fee shifting to section 1194 (the "1991 amendment"), the Legislature described the existing law in 1991 as providing only "costs of suit" and not attorney's fees. (See *id.* at 1428.) This indicated that the Legislature of 1991 did not consider section 218.5 to be a source for an award of attorney's fees in actions covered by section 1194. (*Ibid.* ("The Legislature must be deemed to have been aware of section 218.5 when it acted to amend section 1194.") (citation omitted).)

Earley's review of legislative history also revealed that the Legislature considered the 1991 amendment as providing "*additional* remedies" and a "needed disincentive to violation of the *minimum* wage laws," indicating that the Legislature did not consider section 218.5 as a sufficient disincentive or remedy. (*Id.* at 1428 (emphasis in original).) Significantly, the *Earley* court also observed that in the five years between 1986 and 1991, no California court had extended section 218.5 to an overtime claim. (*Id.* at 1427-28.) Thus, the *Earley* court concluded: "Obviously, the Legislature did not regard the general provisions of section 218.5 as applicable to overtime claims. If we were to hold otherwise, we would, by conclusion, create the very type of statutory conflict which we are enjoined to avoid." (*Id.* at 1428-29 (citation omitted).)

The *Earley* court further justified its holding by examining the *source* of a worker's right to overtime and the public policy importance of overtime:

> Such a harmonization of these two sections is fully justified. An employee's right to wages and overtime compensation clearly have different sources. Straight-time wages (above the minimum wage) are a matter of private contract between the employer and employee. Entitlement to overtime compensation, on the other hand, is mandated by statute and is based on an important public policy. In *Gould v. Maryland Sound Industries, Inc., supra*, 31 Cal.App.4th 1137 the court stated: 'The duty to pay overtime wages is a duty imposed by the state; it is not a matter left to the private discretion of the employer. (Lab. Code, § 1173; *Monzon v. Schaefer Ambulance Service, Inc. (1990) 224 Cal.App.3d 16, 29 [273 Cal.Rptr. 615 5].)*. . . . [We have] observed one purpose of requiring payment of overtime wages is 'to spread employment throughout the work force by putting financial pressure on the employer ....' (224 Cal.App.3d at p. 39.) Thus, overtime wages are another example of a public policy fostering society's interest in a stable job market. [Citation.]

(*Id.* at 1430.) Significantly, in its discussion of source, the *Earley* court cited section 1173 and the broad power of the Industrial Welfare Commission ("IWC") to create statutory rights. (*Ibid;* see Cal. Labor Code § 1173.)[10] Because "the duty to pay overtime" was mandated under this power and based on important public policy, section 1194 alone applied to the statutory right to overtime. (*Id.* at 1430-31.) The *Earley* court,

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[10] Section 1173 provides, in part:

> It is the continuing duty of the Industrial Welfare Commission, hereinafter referred to in this chapter as the commission, to ascertain the wages paid to all employees in this state, to ascertain the hours and conditions of labor and employment in the various occupations, trades, and industries in which employees are employed in this state, and to investigate the health, safety, and welfare of those employees.

(Cal. Labor Code § 1173.)

however, preserved section 218.5 for actions seeking contractual wages and benefits:

> Section 218.5 would still be available for an action brought to recover nonpayment of contractually agreed-upon or bargained-for 'wages, fringe benefits, or health and welfare or pension fund contributions.'

(*Id.* at 1430.) Indeed, this distinction between contractual and statutory rights advanced the core legislative purpose behind the one-way fee shifting permitted by section 1194:

> There can be no doubt that [section 1194 as amended in 1991] was meant to 'encourage injured parties to seek redress—and thus simultaneously enforce [the minimum wage and overtime laws] in situations where they otherwise would not find it economical to sue. To allow employers to invoke section 218.5 in an overtime case would defeat the legislative intent and create a chilling effect on workers who have had their *statutory* rights violated. Such a result would undermine statutorily-established public policy. That policy can only be properly enforced by the recognition that section 1194 alone applies to overtime compensation claims.

(*Id.* at 1430-31(emphasis in original).)

Thus, as the *Earley* court concluded, and as the Legislature then codified, the one-way fee shifting provision under section 1194 would broadly protect statutory rights based on important public policy, while two-way fee shifting under section 218.5 would apply only to private contractual rights. (See *id.* at 1426-31.)

E. The Opinion Is Inconsistent with *Earley* and the Legislature's Intent

1. The Opinion Effectively *Reverses* the Conclusion in *Earley*

Despite the Legislature's codification of *Earley*, the Opinion does not apply *Earley* to meal and rest period premium pay. (Op., pp. 18-21.)

The Court of Appeal was aware of *Earley*. It discussed *Earley* extensively in the section of the Opinion construing the term "action" in section 218.5. (See Op., pp. 11-18; see also, *infra*, pp. 35-45.) But the Opinion fails to address *Earley* directly in considering whether section 1194 or section 218.5 applies to meal and rest premium period pay. That failure is improper. (See *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 244-245 ("[T]he Legislature's expressed views . . . are entitled to due consideration, and [the Court] cannot disregard them.").) Nevertheless, the treatment of *Earley* in the "action" section affects the Opinion's overall construction of section 1194 and section 218.5, and Appellants will address it here.

In construing "action" in section 218.5, the Opinion turned the *Earley* decision on its head. Contrary to *Earley*, its codification, and the Legislature's clear and longstanding intent, the Opinion finds that two-way fee shifting under section 218.5 is the broad and general rule, and that one-way fee shifting under section 1194 should be narrowly and specifically limited *only* to *causes of action* alleging violations involving the minimum wage *rate* provisions and the overtime *rate* provisions. (Op., pp. 12-18.)

As *Earley* provides, and as the Legislature codified, section 218.5 may be a more "general" provision in that it covers a bargained-for and therefore necessarily wider range of wages and benefits, but as it functions in the Labor Code, *two-way fee shifting* is the narrow rule. Thus, section 218.5 should be specifically limited *only* to "contractually-agreed upon and bargained-for" rights. (*Earley*, 79 Cal.App.4th at 1430.)

Subsequent case law confirms *Earley*'s restrictive interpretation of section 218.5. In the 25 years since section 218.5's enactment, no California appellate court, until now, has issued a published decision

explicitly affirming a trial court's award of attorney's fees to an *employer* under section 218.5 in *any* wage action for *any* cause of action, much less an action involving the Labor Code's minimum labor standards.[11] In contrast, the Courts of Appeal have steadily followed *Earley's* reasoning and affirmed section 218.5 fees *only* when they have been awarded to employees and *only* in actions involving contractually agreed-upon wages, such as unpaid executive salaries and bonus installments. (See *On-Line Power v. Mazur* (2007) 149 Cal.App.4th 1079, 1085-1086 (reversing trial court's denial of section 218.5 fees to prevailing corporate executive plaintiffs in action to recover unpaid executive salaries); *Kelly v. Stamps.com* (2004) 135 Cal.App.4th 1088, 1090, 1102-05 (affirming trial court's denial of section 218.5 fees to employer in an action brought by plaintiff former vice president of marketing alleging wrongful termination and two causes of action under the Labor Code for failure to pay retention bonus installments).)

This restrictive construction also is confirmed by the overall design of fee shifting in the Labor Code, where one-way provisions dominate as discussed previously. (See, *supra*, pp. 10-12.) The Court should correct the Opinion's fundamental misinterpretation of *Earley*.

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[11] One Court of Appeal may have affirmed an award of section 218.5 fees to an employer in an action brought by a plaintiff-employee and his wife alleging, *inter alia*, wrongful termination, loss of consortium, negligence, and wage claims. (*Chin v. Namvar* (2008) 166 Cal.App.4th 994, 997-98.) In *Chin,* the Second Appellate District affirmed a trial court's determination that plaintiff was an independent contractor and estopped from denying that status under section 2750.5. (*Id.* at 997-98, 1003-10.) Although the trial court's judgment included an award of attorney's fees to the employer under section 218.5, the appellate court's order affirming the judgment does not specifically include the fee award in its analysis or holding, nor does it discuss the plaintiff's wage claims. (*Id.* at 1003, 1010.)

2. *Earley* Supports the Application of Section 1194 to Meal and Rest Period Premium Pay

The reasoning in *Earley* dictates that the right to meal and rest period premium pay must fall under section 1194. Like overtime under section 510, which guarantees premium pay for work in excess of prescribed maximum hours, and like the prevailing wage, which guarantees "a minimum cash wage" to workers on public works projects, the right to meal and rest period premium pay guarantees minimum compensation for workers who work through meal and rest periods. (See *Murphy*, 40 Cal.4th at 1099, 1105-1112, 1114; *Road Sprinkler Fitters*, 102 Cal.App.4th at 778-779.) All three of these minimum labor standards are imposed by the state and are based on important public policy. (See *Earley*, 79 Cal.App.4th at 1430-1431.) Accordingly, workers who bring cases that include claims under section 226.7 should be allowed to proceed under section 1194 exclusively as well.

Murphy established that meal and rest period premium pay is compensation required by law. (*Murphy*, 40 Cal.4th at 1099-1100, 1108.) As this Court explained, prior to the enactment of section 226.7, employers that failed to provide their employees with meal and rest periods required by the IWC wage orders faced only the risk of injunctive actions. (*Id.* at 1105-1106.) Due to the lack of employer compliance, the Legislature codified the IWC pay remedy for meal and rest period violations. (*Id.* at 1105-06, 1109-10; see also Cal. Labor Code § 226.7(b).) Thus, the duty to pay meal and rest period premium pay, like the duty to pay overtime, is a "duty imposed by the state and not a matter left to the private discretion of the employer." (*Earley*, 79 Cal.App.4th at 1430.)

Additionally, the right to overtime under section 510 and the right to meal and rest period premium pay under section 226.7 are virtually

identical as regulatory devices. Like the legislative design of overtime enforcement, meal and rest period premium pay is primarily compensatory but also has "a corollary disincentive aspect in addition to its central compensatory purpose." (*Murphy*, 40 Cal.4th at 1110.) Indeed, this Court in *Murphy* found that these "dual function" enforcement devices resulted in better enforcement of "proper scheduling consistent with maximum hours and minimum pay requirements." (*Id.* at 1111-12.) Thus, both overtime premium pay and meal and rest period premium pay have been mandated by statute to serve the same regulatory purpose and function. (*Ibid.*) The Opinion fails to consider these aspects of the *Murphy* decision.

According to the Opinion, the "premium pay" in *Murphy* means "a sum over and above regular pay." (Op., pp. 20-21.) It concludes that as "an addition to regular pay, the remedy is not one for failure to pay the minimum wage." (Op., p. 21.) Here again, the defect in the analysis is that the Opinion assumes "the minimum wage" is coextensive with the minimum wage *rate* provisions. The "minimum wage" is far broader. (See, *supra*, pp. 13-15; see also, *infra*, pp. 31-35.) The prevailing wage is a "minimum wage," even though it is different from and higher than the minimum wage contained in the minimum wage rate provisions. (*Road Sprinkler Fitters*, 102 Cal.App.4th at 778-79.) Overtime is "a sum over and above" the minimum wage set forth in the minimum wage rate provisions as well, yet it still is the smallest amount payable by law and is in that sense a "minimum." (Cal. Labor Code § 1194.)

From a section 1194 standpoint, meal and rest period premium pay is similar to the prevailing wage in several important ways. The right to the prevailing wage and the right to meal and rest period premium pay both arise under statute and are anchored in the Labor Code. (See *Road*

Sprinkler Fitters, 102 Cal.App.4th at 778-779 (citing Cal. Labor Code §§ 1771, 1774-1775 as statutory authority for the prevailing wage); see Cal. Labor Code § 226.7.) Both also are "enforceable independent of an express contractual agreement." (See *Road Sprinkler Fitters*, 102 Cal.App.4th at 779.)

Moreover, it is well-established that mandatory meal and rest periods are based on important public policy for workers. "Meal and rest periods have long been viewed as part of the remedial worker protection framework." (*Murphy*, 40 Cal.4th at 1105-06 (citations omitted).) As this Court in *Murphy* explained:

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

(*Id.* at 1113 (citation omitted).)

Like the right to overtime and the right to the prevailing wage, the right to meal and rest breaks and to premium pay for missed breaks also is based on public policy and the broader public interest. The health and safety of workers advances the public interest. (See *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 456 ("California courts have long recognized [that] wage and hours laws 'concern not only the health and welfare of the workers themselves, but also the public health and general welfare.'" (citation omitted).) The enforcement of the overtime requirement creates jobs and builds "a stable job market." (*Earley*, 79 Cal.App.4th at 1430.) The enforcement of the prevailing wage protects "workers, union

contractors, and the public." (*Road Sprinkler Fitters*, 102 Cal.App.4th at 778; see also *Reyes,* 148 Cal.App.4th at 612 (expanding on *Road Sprinkler Fitters'* analysis of the public policy importance of the prevailing wage to include "benefit[ting] the public through the superior efficiency of well-paid employees" and "prevent[ing] government contractors from using 'itinerant, cheap, bootleg labor'").)

Here, instead of applying *Earley*, the Court of Appeal focused on the way in which the "additional hour of pay" is calculated under section 226.7. (Op., pp. 18-21.) Because this measure of pay is a formula pegged to a contractual rate of pay and not the minimum wage *rate* provisions, the Opinion holds that a claim seeking meal and rest period premium pay is not a claim covered under section 1194. (See Op., pp. 18-21; see, *supra*, pp. 13-16.) But in doing so, it has focused on the wrong distinction. What makes a wage "minimum" is not the method of calculating the amount of pay, but rather whether the amount paid is the lowest allowable under the law. The fact that, instead of being a constant, it is a formula that includes a variable does not make it any less a legal "minimum." (See, *supra*, pp. 13-16.)

In addition to wrongfully equating the rate provisions with "the legal minimum wage," the Opinion's analysis leads to untenable outcomes. If the Opinion is allowed to stand, any wage (other than overtime) that references a contractual rate of compensation, would fall outside of section 1194. Moreover, only those workers who are paid precisely at or below the rate specified by the rate provisions could claim to be seeking payment of a "minimum wage" and thereby shield themselves from section 218.5 fees. (Op., pp. 18-21.) The Legislature did not, and could not, have intended section 226.7 to apply to only one subset of hourly workers, nor could the

Legislature have intended to expand section 218.5 fee shifting in this manner.

F. A Broad and Reasonable Construction of Section 1194 Serves the Legislative Scheme for Worker Protection in California

There are strong textual and contextual indicators that the phrase "the legal minimum wage or the legal overtime compensation" in section 1194, and, separately, its subparts, "the legal minimum wage" or "the legal overtime compensation" includes a broad range of minimum labor standards. The subparts themselves are interchangeable. For example, overtime is considered among the "*minimum* wage laws." (*Earley*, 79 Cal.App.4th at 1428 (quoting from Senate Rules Committee, Analysis of Senate Bill No. 955 (1991-1992 Reg. Sess.) as amended Sept. 10, 1991, emphasis added); see also Enrolled Bill Report (Sept. 19, 1991) on Sen. Bill No. 955 (1991-1992 Reg. Sess.) (summarizing SB 955 as a bill that "would permit . . . private parties to recover liquidated damages, interest and attorneys [sic] fees in civil actions for failure to pay *minimum wages*" (emphasis added), MJN Ex. K, p. 1.) Once earned, overtime constitutes "unpaid wages" and "property to which the employees [are] entitled" under the unfair competition law. (*Cortez v. Purolator Air Filtration Prod. Co.* (2000) 23 Cal.4th 163, 168.)

Viewed in a greater statutory and regulatory context, a broad and non-literal construction of "the legal minimum wage or the legal overtime compensation" is consistent with the history of section 1194 as well as section 1194's placement in the worker protection regulatory framework intended by the Legislature. "Section 1194 was originally enacted in 1913 to mandate minimum wages, maximum hours and overtime pay for women and children." (*Earley*, 79 Cal.App.4th at 1427, fn. 7.) Section 1194's scope is at least coextensive with the IWC's delegated authority to set

minimum labor standards for California. (See *Martinez v. Combs* (2010) 49 Cal.4th 35, 56, 61-62; see also Cal. Labor Code §§ 1173, 1185, 1197, 1198; Cal. Const., art. XIV, § 1.) The IWC's authority is vast; "[t]he power to fix [the minimum] wage does not confine the [IWC] to that single act. It may adopt rules to make it effective." (*Martinez*, 49 Cal.4th at 61 (citing *Cal. Drive-in Restaurant Assn. v. Clark* (1943) 22 Cal.2d 287, 303.) As this Court provided in *Martinez v. Combs*:

> Such provisions constitute valid exercises of the IWC's authority because, and to the extent, they have 'a direct relation to minimum wages' and are reasonably necessary to effectuate the purposes of the statute, *[c]ourts must enforce such provisions in wage actions* because, as we have explained, an employee who sues to recover unpaid minimum wages under section 1194 actually sues to enforce the applicable wage order. *Only by deferring to wage orders' definitional provisions do we truly apply section 1194 according to its terms by enforcing the 'legal minimum wage.'*

(*Id.* at 62 (citations omitted) (emphasis added).) Thus, while anchored to the "minimum wage," the IWC and section 1194 are not narrowly confined. (See *Kerr's Catering Service,* 57 Cal.2d at 324-25 (IWC-promulgated provisions "'affect the wage,' but apply regardless of whether or not the employee is making the minimum wage, and are for the purpose of prohibiting or discouraging working conditions prejudicial to the welfare of women and minor employees").)

Meal and rest periods have been regulated by the IWC since 1916 and 1932, respectively. (See *Murphy*, 40 Cal.4th at 1105 (citations omitted).) They arise from statute and are enforceable to the same extent as the minimum wage rates and overtime compensation rates. (See Cal. Labor Code § 226.7; see, *supra*, pp. 13-20.) As *Murphy* shows, they are the functional equivalent of overtime. (*Murphy*, 40 Cal.4th at 1099-1100, 1108, 1110.) As such, given the broad scope of section 1194, construing meal and rest period premium pay to fall within "the legal minimum wage

or the legal overtime compensation" or as a form of either "the legal overtime compensation," or "the legal minimum wage" would be consistent with the overall worker protection regulatory framework that the Legislature intended. This broad construction also is consistent with this Court's directives that the Labor Code be construed liberally in favor of workers. (See *Murphy,* 40 Cal.4th at 1103; see *supra*, p. 9.)

A narrow and literal construction of "the legal minimum wage or the legal overtime compensation" would frustrate the "manifest purpose" of section 1194: to encourage injured workers to seek redress while simultaneously enforcing minimum labor standards. (See *Earley*, 79 Cal.App.4th at 1431-32; see also *Sav-on Drug Stores,* 34 Cal.4th at 340 (citing *Earley* and stating that "Labor Code section 1194 confirms 'a clear public policy ... that is specifically directed at the enforcement of California's minimum wage and overtime laws for the benefit of workers.'"); see also *Arias*, 46 Cal.4th at 991 (citation omitted).)

Additional legislative history supports this purpose. For example, an Assembly committee noted the Department of Industrial Relations' ("DIR") reason for supporting the 1991 amendment to section 1194: "[DIR officials] say they believe [the amendment] would, indeed, act as a deterrent, and aid in the state's minimum wage and overtime enforcement program." (Assembly Ways and Means Committee, Republican Analysis (May 22, 1991) on Sen. Bill No. 2139 (1991-1992 Reg. Sess.), MJN Ex. L at 1.) Because of the two-way nature of section 218.5, the Senate Rules Committees repeatedly described the restricted types of contractual matters to which section 218.5 would apply:

> This bill would require courts to award attorney fees to a prevailing party in any action involving *employment benefits (salary, pension*

> *fund, health benefits, etc.*), or enforcement of an arbitrator's award as specified.

(Senate Rules Committee, Office of Senate Floor Analyses (May 14, 1986) on Sen. Bill No. 2570 (1985-1986 Reg. Sess.), Aug 12, 1986, MJN Ex. M, p. 1 (emphasis added); see also Senate Rules Committee, Office of Senate Floor Analyses (August 14, 1986) on Sen. Bill No. 2570 (1985-1986 Reg. Sess.), Aug 12, 1986, MJN Ex. N, p. 1.)

A narrow and literal construction of section 1194 also would frustrate the purpose of section 226.7. This Court summarized the purpose of section 226.7 as follows:

> We conclude that the administrative and legislative history of the statute indicates that, whatever incidental behavior-shaping purpose section 226.7 serves, *the Legislature intended section 226.7 first and foremost to compensate employees for their injuries.*

(*Murphy*, 40 Cal. 4th at 1110-11 (emphasis added).)

Subjecting enforcement of this right to compensation to the threat of potentially far greater liability for an employer's attorney's fees would contravene this purpose. (See *Arias*, 46 Cal.4th at 991 (citation omitted).) Thus, the one-way fee shifting provision under section 1194 must apply to causes of action alleging violations of section 226.7.

II. SECTION 218.5 IS NOT APPLICABLE TO AN ACTION THAT INCLUDES A CLAIM UNDER SECTION 1194

Section 218.5 makes it clear that the danger of liability for an employer's attorney's fees never should deter an employee who is seeking "the legal minimum wage or the legal overtime compensation" from seeking other unpaid wages in the same action. The second paragraph of section 218.5 states as follows: "This section does not apply to any *action*

for which attorney's fees are recoverable under Section 1194." (Cal. Labor Code § 218.5 (emphasis added).)

The Opinion interpreted the term "action" in that paragraph to mean "cause of action." (Op., pp. 10-18, 17.) The decision therefore imposes on wage earners seeking to recover "the legal minimum wage or the legal overtime compensation" a harsh choice: (a) seek *only* "the legal minimum wage or the legal overtime compensation" and allow the employer to retain as ill-gotten gains all other straight-time pay that the employee is owed; or (b) include a claim for the unpaid straight-time wages and risk potentially ruinous liability to the employer for its attorney's fees. Wage earners making a claim for "the legal minimum wage or the legal overtime compensation" never should face that choice, and the Legislature made that clear.

A. "Action" in Section 218.5 Means Civil Action, Not a "Cause of Action"

To reach its result, the Opinion finds that the Legislature, when it said "action," actually meant "cause of action." (Op., pp. 10-18.) Where statutory language is unambiguous, "the plain meaning controls and resort to extrinsic sources to determine the Legislature's intent is unnecessary." (*Bonnell,* 31 Cal.4th at 1261 (citation omitted).) The second paragraph of section 218.5 is so short and clear that there should be no need to resort to those extrinsic sources. The Legislature must be presumed to be fully conversant with the terms "action" and "cause of action," as it uses both on multiple occasions in both the Labor Code and the Code of Civil

Procedure.[12] In fact, it defined "action" in section 22 of the Code of Civil Procedure as follows:

> *An action is an ordinary proceeding in a court of justice* by which one party prosecutes another for the declaration, enforcement, or protection of a right, a redress or prevention of a wrong, or the punishment of a public offense.

(Cal. Civ. Proc. Code § 22 (emphasis added).)

It is hard to imagine that a Legislature that so clearly defined "action" could be taken to have allowed for the possibility that the terms "action" and "cause of action" could be interchangeable. The casual vernacular of lawyers is one thing; the precise wording of statutes is quite another.

Case law has defined the use of "action" in section 1194 as "a court action." (*Sampson v. Parking Service 2000 Com., Inc.* (2004) 117 Cal.App.4th 212, 223 (holding that "civil action" for purposes of section 1194 means "a court action" and not "an administrative proceeding").) If *Immoos* is allowed to stand, "action" in section 1194 would mean "a court action," but an "action for which attorney's fees are recoverable under Section 1194" in section 218.5 would mean a "cause of action." (Cal.

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[12] Uses of "cause of action" in the Labor Code include sections 98.6(b) and 100. (Cal. Labor Code § 98.6 (b) ("There shall be no civil liability on the part of and no *cause of action* shall arise against any person, acting pursuant to this section and within the scope of his authority, for false arrest or false imprisonment arising out of any arrest which is lawful or which the arresting officer, at the time of such arrest, had reasonable cause to believe was lawful.") (emphasis added).); Cal. Labor Code § 100 ("The division may join various claimants in one preferred claim or lien as well as list them with the data regarding their claims in an exhibit and join them, in case of suit, in one *cause of action* in cases where no valid reason exists for making separate causes of action for each individual employee.") (emphasis added).)

Labor Code §§ 1194, 218.5.) This would be error. Inconsistent definitions between different sections of the Labor Code referencing the same term should be avoided. (See *Pitte v. Shipley* (1873) 46 Cal. 154, 160-61 ("[A] word in a statute is presumed to have the same meaning throughout.").)

Moreover, the Legislature uses "action" five times in the first paragraph of section 218.5:

> In any *action* brought for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions, the court shall award reasonable attorney's fees and costs to the prevailing party if any party to the *action* requests attorney's fees and costs upon the initiation of the *action.* This section shall not apply to an *action* brought by the Labor Commissioner. This section shall not apply to a surety issuing a bond pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code or to an *action* to enforce a mechanics lien brought under Chapter 2 (commencing with Section 3109) of Title 15 of Part 4 of Division 3 of the Civil Code.

(Cal. Labor Code § 218.5 (emphasis added).) There is no textual indicator that "action" in these five instances means anything other than "civil action" or "suit." If inconsistent definitions should be avoided *between* sections of the Labor Code, then inconsistent definitions *within a single section* of the Labor Code should be avoided as well.

The Opinion also does little to diminish the persuasive authority of the two cases cited by Appellants, *Nassif v. Municipal Court* (1989) 214 Cal.App.3d 1294 (1989) and *Palmer v. Agee* (1978) 87 Cal.App.3d 377, both of which support a plain language construction of "action." (Op., p. 15.) The Opinion states in a parenthetical that *Palmer* "note[s] that 'an action' is *sometimes* used to denote the suit in which the action is enforced." (*Ibid.* (citing *Palmer,* 87 Cal.App.3d at 387) (emphasis added by the Court of Appeal).) Although not stated in the Opinion, *Palmer* then goes on to distinguish between "cause of action" and "action," as follows:

> [A]n action is nothing else than the right or power of prosecuting in a judicial proceeding what is owed to one-which is to say, an obligation. ... The action therefore springs from the obligation, and hence, the 'cause of action' is simply the obligation.

(*Palmer*, 87 Cal.App.3d at 387 (citing *Frost v. Witter* (1901) 132 Cal. 421, 426).) The Opinion's treatment of *Nassif* is similarly incomplete. After the sentence quoted by the Opinion in a parenthetical, the *Nassif* court then declares:

> *Action is not the same as cause of action.* While 'action' refers to the judicial remedy to enforce an obligation, 'cause of action' refers to the obligation itself. [citing *Palmer*] . . . Accordingly, as the Legislature did not provide a special definition of the word 'action' in the [provisions at issue], we must presume it intended action to mean a suit . . . .

(*Nassif*, 214 Cal.App.3d at 1298 (emphasis added).) These cases unequivocally support a plain language construction of "action" in section 218.5 as a "civil action." This interpretation is consistent with this Court's recent analysis of these terms in *Lu v. Hawaiian Gardens Casino, Inc.* (2010) 50 Cal.4th 592, 597, fn. 3:

> Strictly speaking, the term 'action' is not interchangeable with 'cause of action.' 'While 'action' refers to the judicial remedy to enforce an obligation, 'cause of action' refers to the obligation itself.' (*Nassif v. Municipal Court* (1989) 214 Cal.App.3d 1294, 1298.)

B. The Opinion's Analysis of *Earley* and the Legislative History Are Flawed

Although *Earley* is absent from the Opinion's analysis of the Sixth Cause of Action, the Court of Appeal relies on *Earley* to argue for a narrow reading of section 218.5's second paragraph. (Op., pp. 10-18.) As discussed above, the Opinion's construction turns *Earley* on its head and should be rejected. (See, *supra*, pp. 25-27.) Its dismissal of the legislative history cited by Appellants should be rejected as well. (See Op., pp. 15-17

(stating Kirby "advances a plausible reading of the legislative history," but ultimately rejecting this reading).)

The legislative history overwhelmingly reveals an intention to equate "action" with "court action" or a "case" or a "lawsuit" or a "suit." The Department of Industrial Relations, for example, stated as follows in its 1986 analysis of section 218.5:

> [T]he purpose of the bill is to award attorney's fees only in *private suits* . . . . The Division wins 85% of its *suits*. If the average attorney fee was $500, approximately $150,000 would be generated.

(Bill Analysis, DIR on Sen. Bill No. 2570 (1985-1986 Reg. Sess.) Aug 12, 1986 (emphasis added), MJN Ex. O, p. 1-2.) Similarly, according to the Assembly's Third Reading,

> Attorney's fees and costs would be specifically excluded for unpaid wage *actions* involving a contractor's license bond or action to enforce a mechanics lien.

(Assembly Third Reading on Sen. Bill No. 2570 (1985-1986 Reg. Sess.) Aug 12, 1986 (emphasis added), MJN Ex. P, p. 1.) The use of the term "action" throughout section 218.5 simply means "action."

Rejecting both the plain meaning and legislative history, the Opinion concludes that construing "action" to mean "action" would result in this purported absurdity: workers seeking to enforce their minimum statutory rights would be able to "insulate" themselves from section 218.5 by "simply adding a cause of action for unpaid minimum or overtime wages." (Op., pp. 17-18.)

To arrive at that purported absurdity, however, the Opinion must create several of its own. The added "cause of action for unpaid minimum or overtime wages" either will have merit or it will not. So the first

absurdity is concluding that, facing the ample disincentives to filing frivolous claims, workers and their counsel nonetheless will deliberately suffer though all of those disincentives in the hope of insulating themselves from fee exposure for as long as their frivolous claims remain alive.[13]

The second absurdity is that a wage earner with a legitimate claim for "the legal minimum wage or the legal overtime compensation" should be limited to claiming those sums and be precluded from seeking the rest of his or her straight-time wages because of the threat of greater liability for the employer's attorney's fees. If it is not absurd that employers now have an incentive to withhold non-section-1194 wages and benefits because they have a legally sanctioned way to intimidate employees out of seeking them, it is hard to imagine what is.

The third absurdity is that all of this has occurred in the face of the second paragraph of section 218.5, which says as plainly as one can imagine that this cannot happen.

Further, the Court of Appeal's equating of "action" with "cause of action" leads to linguistic absurdities that demonstrate that its proposed equality must not be real. An action is "an ordinary proceeding in a court of justice," yet one never would say that a complaint with twelve causes of action contained "twelve proceedings" and the party filing such a case

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[13] California law contains a number of provisions that preclude the filing of frivolous suits, including three provisions in the Labor Code under which an employer could seek fees upon a showing of bad faith and contempt. (See, *supra*, pp. 10-12; see also Cal. Civ. Proc. Code § 128.7.) Section 1194 is not prone to abuse by truly exempt employees who, in addition to losing credibility with the court, may lose their section 1194 claims early enough in the litigation to face fee exposure during the remainder of the case.

would receive one case number and one judge assignment, not twelve. " (See Cal. Civ. Proc. Code § 22.) The terms simply are not interchangeable.

Finally, one might ask which is more absurd: that a wage earner with a claim for both straight-time wages and "the legal minimum wage or the legal overtime compensation" might avoid liability for an employer's attorney's fees by asserting "the legal minimum wage or the legal overtime compensation" claim in his or her action as the statute plainly allows? Or that an employer can keep all legitimately owed but deliberately unpaid straight-time wages above and beyond "the legal minimum wage or the legal overtime compensation" by the simple expedient of threatening a wage earner with ruinous liability for the employer's attorney's fees?

The Supreme Court thus should protect both workers' rights to seek their pay without the threat of financial ruin and the Legislature's ability to secure those rights by making it clear that the second paragraph of section 218.5 means what it plainly says.

III. THIS CASE RAISES IMPORTANT PUBLIC POLICY CONSIDERATIONS

Most significantly, the Opinion fails to liberally construe the Labor Code in favor of workers and fails to consider the public policy impact of this case. (See *Murphy*, 40 Cal.4th at 1103 (citations omitted).) The chilling effect on the ability of workers to enforce their right to meal and rest breaks and to premium pay for missed breaks is formidable and real. (See, *supra*, pp.6-7, 7, fn. 3; MJN Exs. A-I.)

Franco v. Athens Disposal Company, Inc. (2009) 171 Cal.App.4th 1277 is instructive here. In considering whether a claim to recover meal and rest period premium pay was covered by a class arbitration agreement,

the court in *Franco* expressed its concern about fees in the event of a loss in the *one-way* fee shifting scenario, as follows:

> [Plaintiff's] total damages for the meal and rest period violations, as alleged, come to approximately $7,750, plus $2,500 in civil penalties – an amount too high for a small claims action (citation omitted) and too low, as a practical matter, to be pursued as an individual claim, either in court or through arbitration. And the possibility of an award of attorney fees would not provide a sufficient incentive for an attorney to take a case like [plaintiffs's] as an individual matter. 'Even assuming that such attorney fees were equally available in arbitration, employees and their attorneys must weigh the typically modest recovery, and the typically modest means of the employees bringing ... lawsuits, with the risk of not prevailing and being saddled with *the substantial costs of paying their own attorneys.* Moreover, the award of 'reasonable' fees and costs is at the discretion of the trial court. Assuming that the arbitrator had similar discretion, there is still a risk that even a prevailing plaintiff/employee may be undercompensated for such expenses.' (citation omitted).

(Franco, 171 Cal.App.4th at 1295 (emphasis added).) Fees in the two-way fee shifting context would be simply unfathomable.

If the Opinion is allowed to stand, California's workers, particularly the state's low-wage workers with limited financial resources, will be unable to bring meal and rest period claims for fear of being pummeled by their employer's fee awards in the event of a litigation loss. That will lead to renewed employer non-compliance with meal and rest period requirements and other minimum labor standards. This Court should prevent this potential deterioration of California's century-old worker protection regulatory framework and reverse.

CONCLUSION

For the foregoing reasons, the Court should reverse the Third District Court of Appeal and hold that the one-way fee shifting provision of section 1194 alone governs claims to enforce the right to the meal and rest period premium pay. Additionally, this Court should confirm that the second paragraph of section 218.5 means what it plainly says and confirm that that section is inapplicable to any lawsuit that contains a claim under section 1194.

Dated: January 17, 2011

Respectfully submitted,

LAW OFFICES OF
ELLYN MOSCOWITZ, P.C.
Ellyn Moscowitz
Jennifer Lai

LAW OFFICES OF
SCOT D. BERNSTEIN, P.C.
Scot Bernstein

By _____
Ellyn Moscowitz

Attorneys for Plaintiffs and Appellants
Anthony Kirby and Rick Leech, Jr.

CERTIFICATE OF WORD COUNT

I hereby certify pursuant to California Rule of Court 8.204(c)(1) that Appellants' Opening Brief On The Merits contains 12,952 words, excluding the table of contents, table of authorities, and this certificate. Counsel relies on the word count feature of the computer program used to prepare this brief.

Dated: January 17, 2011

Respectfully submitted,

LAW OFFICES OF
ELLYN MOSCOWITZ, P.C.
Ellyn Moscowitz
Jennifer Lai

LAW OFFICES OF
SCOT D. BERNSTEIN, P.C.
Scot Bernstein

By _____
Ellyn Moscowitz

Attorneys for Plaintiffs and Appellants
Anthony Kirby and Rick Leech, Jr.

CERTIFICATE OF SERVICE

I am a citizen of the United States of America and am employed in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action. My business address is 1629 Telegraph Avenue, Fourth Floor, Oakland, California 95612. I am employed by the Law Offices of Ellyn Moscowitz, P.C.

On January 18, 2011, I served the within Appellants' Opening Brief on the Merits in *Anthony Kirby et al. v. Immoos Fire Protection, Inc.*; California Supreme Court Case Number S185827 [Third Appellate District Court of Appeal Case Number C062306] upon the following:

Robert Rediger, Esq. Laura C. McHugh, Esq. Jimmie E. Johnson, Esq. Rediger, McHugh & Owensby, LLP 555 Capitol Mall, Suite 1240 Sacramento, CA 95814	Honorable Loren E. McMaster Sacramento Superior Court 720 Ninth Street Sacramento, CA 95814
Appellate Coordinator Office of the Attorney General 300 S. Spring Street Los Angeles, CA 90013	California Court of Appeal Third Appellate District Court of Appeal 621 Capitol Mall, Tenth Floor Sacramento, CA 95814

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Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

XXXX: BY MESSENGER SERVICE. I served the documents by placing them in an envelope or package addressed to the persons at the addresses I listed above and providing them to a professional messenger service.

I certify under penalty of perjury that the above is true and correct. Executed at Oakland, California on January 18, 2011.

Maria Anderson