Case No. S 212704 2ND COPY

IN THE SUPREME COURT OF CALIFORNIA

CONSTRUCTION PROTECTIVE SERVICES, INC., *ET AL.*
Defendants/Cross-Complainants/Appellants

v.

TIM MENDIOLA, *ET AL.*
Plaintiffs/Cross-Defendants/Respondents

SUPREME COURT
FILED

AUG 15 2013

Frank A. McGuire Clerk

Deputy

After a Decision of the Court of Appeal
Second Appellate District, Division Four
Consolidated on Appeal with Case No.: B240519
Los Angeles County Superior Court Case Nos. BC388956, BC391669, JCCP 4605
Honorable Jane L. Johnson, Judge

PETITION FOR REVIEW

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PETITION FOR REVIEW

ISSUES PRESENTED

1. Does California law permit employers and employees who reside on the employer's premises for extended periods of time, but who do not work 24-hour shifts, to agree to deduct eight hours of sleep time from compensable hours worked?

2. Is on-call time compensable hours worked when an employee, who resides on the employer's premises for extended periods of time, voluntarily remains on-site even though the employee is subject to certain employer imposed restrictions?

WHY REVIEW SHOULD BE GRANTED

This case presents important questions of wage and hour law for thousands of California employees who reside on their employer's premises for extended periods of time, including housekeepers, nannies, personal attendants and companions, mortuary workers, oil rig and clean-up workers, park rangers, certain agricultural workers and security guards. The court of appeal, in a published opinion, held that employers and employees who reside on the employer's premises can agree to exclude from compensable hours worked up to eight hours a day of sleep time, but **only** when the employees are required to remain on the premises for periods of 24 hours or more. As the court of appeal correctly recognized, "the IWC's historical rule had been to permit the exclusion of sleep and meal periods" from compensable hours worked for 24-hour employees. Slip Op. at 30. (Exhibit A) Following the decisions in *Monzon v. SchaeferAmbulance*

Service, Inc. (1990) 224 Cal.App 3d 16 and *Seymore v. Metson Marine, Inc.* (2011) 194 Cal.App.4th 361, the court of appeal held that in accordance with settled principles of California law, specifically the implied sleep time exclusion based on 29 C.F.R. Section 785.22,[1] an employer can deduct eight hours of sleep time from compensable hours worked for employees who are required to be on duty for 24 hours or more. Yet, the court declined to find a similar implied sleep time exclusion based on the companion regulation, 29 C.F.R. Section 785.23,[2] which was enacted by the U.S. Department of Labor ("DOL") together with 785.22 as part of a comprehensive set of federal regulations addressing when sleep time is compensable[3] and which authorizes reasonable agreements to exclude

[1] 29 C.F.R. Section 785.22 provides, in relevant part, that "Where an employee is required to be on duty for 24 hours or more, the employer and the employee may agree to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period of no more than eight hours from hours worked, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep."

[2] 29 C.F.R. Section 785.23 provides: "An employee who resides on his employer's premises on a permanent basis or for extended periods of time is not considered as working all the time he is on the premises. Ordinarily, he may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining and other periods of complete freedom from all duties when he may leave the premises for purposes of his own. It is, of course, difficult to determine the exact hours worked under these circumstances and any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted. This rule would apply, for example, to the pumper of a stripper well who resides on the premises of his employer and also to a telephone operator who has the switchboard in her own home."

[3] The first of these "sleep time" regulations is 29 C.F.R. Section 785.20 which provides: "Under certain conditions an employee is considered to be working even though some of his time is spent in sleeping or in certain other activities." The subsequent provision, Section 785.21, addresses sleep time during duty periods of less than 24 hours: "An employee who is required to be on duty for less than 24 hours is working even though he is permitted to sleep or engage in other personal activities when not busy. A telephone operator, for example, who is required to be on duty for specified hours is working even though she is permitted to sleep when not busy answering calls. It makes no difference that she is furnished facilities for sleeping. Her time is given to her employer. She is required to be on duty and the time is worktime."

sleep time for employees who reside on the employer's premises.[4] The court of appeal held that, under California law, such agreements are not lawful except on days when the workers are scheduled for 24 hour duty periods.

Based upon *Monzon* and *Seymore*, the court of appeal recognized that federal sleep time regulations were instructive in interpreting California wage and hour laws because the definition of "hours worked" in the wage orders and federal law were "comparable." Slip Op. 30. But the court of appeal illogically declined to import the integral section of the federal regulations, Section 785.23, which permits the exclusion of sleep time for employees who agree to reside on the employer's premises as a condition of their employment even if they are scheduled to work less than 24 hours. As discussed below, it is evident from the text of the DOL regulations that they are all parts of a single regulatory subject (sleep time) so the distinction parsed by the court of appeal makes no sense. This Court should rectify that error and rule that California law – like "comparable" federal law– permits reasonable agreements to exclude up to eight hours of sleep time from compensable hours worked whether employees remain at work for 24 hour periods OR whether they agree to reside on their employer's premises for extended periods of time.

There are a number of important reasons why this Court should grant this Petition for Review. First, and foremost, because the court of appeal held that its decision applies "to all wage orders,"[5] its holding that "an employee required to

[4] A formal Opinion Letter issued by the Acting Administrator of the DOL in 2004 clarifies that (1) up to eight hours of sleep time may be excluded from compensable hours worked and (2) the employee need not be free to leave the premises during sleep time in order for that time to be unpaid. WHD Opinion Ltr. FLSA2004-7 (July 27, 2004) (copy attached as Exhibit B, pursuant to CRC 8.504(e)(1)(C)).

[5] The court of appeal held that its decision applies "to all wage orders" that include the definition of hours worked contained in Wage Order No. 9 (Slip Op. at 31). Sixteen of the 17 wage orders contain that same definition, although two of

sleep at the worksite is subject to the employer's control during sleep hours" is likely to have significant financial and operational consequences for a wide range of businesses and employees across California. As to the parties involved in this dispute, if the decision below is not reversed, the result of the court of appeal's holding will not be that Trailer Guards get paid more – inevitably, the result will be *no more Trailer Guards*. Instead, the work will be performed by technology and by lower-paid hourly guards.[6] Similar negative consequences can be expected in other industries.

Second, this Court should grant review in order to address the question of when an employee who resides on the employer's premises can agree with his or her employer to exclude sleep time from compensable hours worked. This is a very significant issue not only with respect to the security guards involved in this case, but to virtually all other employees who reside permanently or for extended periods of time on the employer's premises, including housekeepers, nannies, personal attendants and companions, mortuary workers, oil rig and clean-up workers, park rangers and certain agricultural workers.

For example, while the job of "telephone operator" explicitly referenced and contrasted in Sections 785.21 and 785.23 of the DOL regulations may be a relic of the past, the number of persons employed as personal attendants and companions will continue to grow as the baby boom generation enters retirement. The court of appeal's ruling in this case dictates that for purposes of determining

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them (Wage Order No. 4 and Wage Order No. 5) also contain additional language. The court of appeal explicitly held that Wage Order No. 4 includes "essentially the same definition of 'hours worked' found in Wage Order No. 9" (Slip Op. at 31) necessarily concluding that the additional language included in Wage Order No. 4 is not material to this dispute.

[6] Hourly Guards receive the same or higher hourly wage, but are scheduled for fewer overtime hours and therefore earn a considerably lower annual wage. The Trailer Guards who filed this lawsuit earned from $26,825 to $48,301 per year. (Stip. Fact No. 70, Jt. App. Vol. 1, 0087).

those worker's wages it makes no difference whether or not a personal attendant resides in his or her employer's home. The only way for an employer to avoid paying for sleep time is to schedule such workers for 24-hour shifts – a scheduling outcome that may not be necessary or desirable for the employee, the employer, or the insurance companies and public agencies who may be called on to share in the funding of such employment. Moreover, because those employers will have less incentive to provide housing to such workers, there could be an adverse impact on the employees who have to find and pay for other places to live. Some other examples of the unintended results that may follow from the court of appeal's decision are described below, but it is fair to say that the decision, if not overturned, will have numerous unintended consequences. All of these peculiar outcomes flow from the court of appeal's decision to import into California law some but not all of a balanced and time-tested set of federal regulations which have been in effect since 1961.

Third, this case presents the opportunity for the Court to give the public much-needed guidance as to how its 2000 decision in *Morillion v. Royal Packing Co.* (2000) 22 Cal 4th 575 applies to determining what constitutes hours worked for on-call employees, particularly on-call employees who reside on the employer's premises. In *Morillion*, the Court held that an employer that required its employees to travel to a work site on the employer's bus must compensate the employees for their time spent traveling on the bus because the employees were subject to the employer's. The court of appeal here, although acknowledging that *Morillion* held that the level of the employer's control is the most significant factor in determining whether an employee's activity constitutes hours worked, based its analysis of the control issue not on *Morillion,* but on the court of appeal's decision in *Gomez v. Lincare, Inc.* (2009) 173 Cal.App. 4th, 508. Significantly, although *Gomez* was decided nine years after *Morillion*, the court did not even

refer to *Morillion* in its opinion. Rather, the *Gomez* court, in determining whether on-call employees were subject to the employer's control, adopted the **federal standard** set forth in a line of federal cases, most notably the Ninth Circuit's decision in *Owens v. Local No.* 169 (9th Cir. 1992) 971 F.2d 347. Thus, even though the court of appeal here purported to base its ruling on the California policy against relying upon "federal authorities and regulations to construe state regulations where the language or intent of state and federal law substantially differs, and the federal law would provide less protection to California employees" (Slip Op. 26), the predicate "substantial difference" is entirely lacking; federal regulations and federal case law form the entire bedrock of California law with respect to when on-call time is compensable. Given the large and growing number of on-call employees in the twenty-first century workforce, it is imperative that this Court give further guidance to employers as to when on-call time will be considered hours worked and when it will not.

Finally, this Court should grant review in order to address the proper role of federal law in interpreting California's Labor Code and Wage Orders. In *Morillion*, this Court stated that it did not need to "resolve the foregoing conflict" between federal and state law on the issue of compulsory travel time. Here, however, federal law informed the court of appeal's decision on both the issue of what constitutes hours worked for on-call employees as well as the issue of whether and when an employer and employee can agree to exclude sleep time from compensable hours worked. In the first instance, the Court applied the *Owens* test, following the court of appeal decision in *Gomez v. Lincare, Inc., supra.* The court of appeal then looked to federal regulations and determined that although 29 C.F.R. Section 785.22 created an implied sleep time exclusion for 24-hour employees, it refused to find a similar exclusion under 29 C.F.R. Section

785.23 for employees who reside on their employer's premises for extended periods of time.

It has been 13 years since this Court addressed what constitutes hours worked under the California Labor Code and Wage Orders and the proper role that federal law plays in interpreting California's Labor Code and Wage Orders. This Petition presents the opportunity for the Court to again address the issue, this time with respect to on-call employees, in order to give the public the certainty needed for employers to schedule their workers, and for workers to schedule their family obligations. Accordingly, as more fully explained below, Petitioners respectfully request that this Court grant review of the Second Appellate District's decision in this case.

FACTUAL AND PROCEDURAL BACKGROUND

This case stems from a trial court order granting a preliminary injunction against Petitioners CPS Security Solutions, Inc., CPS Construction Protection Security Plus, Inc., and Construction Protective Services (collectively, "CPS") in a wage and hour class action lawsuit brought by current and former Trailer Guards. The factual and procedural background of the case is accurately summarized on pages 3-11 of the court of appeal's decision and recounted in more detail below.

A. Factual Background

CPS provides security guard services for construction companies at construction sites throughout California and in several other states. Some of the security guards employed by CPS work as Trailer Guards and others work as Hourly Guards. The hallmark of employment as a Trailer Guard is that, unlike Hourly Guards, the employee resides on the work site in a trailer home provided by CPS. Generally, Trailer Guards are scheduled to be on site 24 hours a day on

weekends and up to 16 hours a day on weekdays. (On weekdays from 7:00 a.m. until 3:00 p.m. when workmen are typically on site, the Trailer Guards are permitted to leave the premises or to remain in the trailer home). Both the obligation to reside on the premises and the work hours are set forth in a written agreement between the Trailer Guards and CPS. (Jt. App. Vol. 1,0079-80.)

The trailer homes used by the Trailer Guards provide a home-like environment. The trailers range in size from 150 to 200 square feet. Each trailer home has a living area, a bed, bathroom facilities (a toilet and shower), a kitchen area (including a sink, refrigerator, microwave or oven and stovetop), a table and a seat. Each trailer has electricity, heat and air-conditioning. Fresh water and pumping of sewage is provided. Trailer Guards may keep personal clothing, books, magazines, televisions, radios, personal computers and other belongings in the trailer. (Jt. App. Vol. 1, 0080-81.)

The trailers are private quarters. They are equipped with locks, and only the Trailer Guards and CPS maintenance staff are provided with keys. Maintenance employees only enter the trailers with the permission of the Trailer Guard. Other CPS employees, including other guards and field supervisors, do not have access to the trailer. (Jt. App. Vol. 1, 0083.) There are some necessary restrictions that flow from residing and working at an active construction site. Because construction sites are often hazardous, minors are not permitted to visit the sites, consumption of alcohol is restricted, and Trailer Guards are generally not permitted to keep pets or entertain visitors.[7] Exceptions to these restrictions are permitted on a case-by-case basis at the customer's sole discretion. (Jt. App. Vol. 1, 0081.)

[7] The same restrictions apply to Trailer Guards who choose to remain at the trailer during the 40 hours per week of completely unrestricted free time (generally weekdays from 7:00 a.m. to 3:00 p.m.). Despite the restrictions, the Trailer Guards do not claim they are entitled to be paid during those hours.

Trailer Guards are generally required to patrol the premises from 5:00 a.m. to 7:00 a.m. and 3:00 p.m. to 9:00 p.m. on weekdays, and 5:00 a.m. to 9:00 p.m. on Saturdays and Sundays. The frequency of the patrol rounds and the amount of time spent patrolling during scheduled work hours varies from site to site. (Jt. App. Vol. 1, 0080.) During active construction hours, typically Monday through Friday from 7:00 a.m. to 3:00 p.m., Trailer Guards are completely off-duty and free to leave the premises or to remain in their trailer homes. (Jt. App. Vol. 1, 0085.)

The hours from 9:00 p.m. to 5:00 a.m. each night are designated as "on-call" or "personal time." Each Trailer Guard signs an agreement that designates his or her personal time. These written agreements, titled "Designation of Personal Time for In-Residence Guard" (Jt. App. Vol. 1, 119-145), together with the specific agreements for each work site (Jt. App. Vol. 1, 0146-0169), reflect the contractual agreements between CPS and each Trailer Guard. (Jt. App. Vol. 4, 0558-0580.) While there are minor variations in the wording of different versions of these agreements, all contain the same material terms. (Jt. App. Vol. 1, 0080.) During on-call hours, Trailer Guards are permitted to, and in fact do, engage in personal activities such as sleeping, taking showers, cooking, eating, reading, watching television, listening to the radio and surfing the internet. (Jt. App. Vol. 1, 0081.)

Before 9:00 p.m. each night, electronic alarm sensors are placed by the Trailer Guards at various locations around the construction site. If an alarm sounds, the Trailer Guard must investigate the disturbance and then inform CPS's Command Center ("Dispatch") so that Dispatch can report the hours worked during the interruption to the payroll department. (Jt. App. Vol. 1, 0082-85). The parties stipulated that Trailer Guards are paid for actual interruptions and, if a

Trailer Guard is interrupted for three hours or more, the entire eight hour on-call period is counted as hours worked and is paid. (Jt. App. Vol. 1, 0084-85.)

CPS permits Trailer Guards to leave the construction site during their on-call time, subject to the conditions specified in the on-call agreements. Trailer Guards who wish to leave the site during on-call hours must notify Dispatch in order to permit CPS to secure a reliever and advise Dispatch how long they intend to be away and where they will be.[8] Dispatch must then identify a reliever to cover the site during the Trailer Guard's absence. (Jt. App. Vol. 1, 0082.) Although requests to leave the site during on-call hours are relatively infrequent, and staffing levels are generally adequate to meet coverage needs, CPS can order a Trailer Guard to stay on site, but this is an unusual occurrence. (Jt. App. Vol. 1. 0082-0083.) **Significantly, Trailer Guards who request to be relieved during on-call hours are paid from the moment they request to leave the construction site until a reliever arrives or, if a reliever is not available, for the remainder of the on-call hours.** (Jt. App. Vol. 1. 0082-0084.)

While away from the site during on-call hours, the Trailer Guard must carry a pager or radio telephone (which is provided by CPS) and is expected to stay within a 30 minute radius of the construction site, unless other arrangements are made. (Jt. App. Vol. 1, 0082.)

B. Procedural History

In 2008, the *Mendiola* plaintiffs and the *Acosta* plaintiffs filed two separate wage and hour class action lawsuits against CPS seeking to represent the same class of California Trailer Guards. The competing class actions were consolidated

[8] This procedure applies to requests to leave during on-call hours. On weekdays, between the hours of 7:00 a.m. and 3:00 p.m., Trailer Guards are permitted to stay in the trailer home or leave the job site without restriction and without notice to CPS.

by Judge Rosenfeld of the Los Angeles County Superior Court. Additional wage and hour class action lawsuits were filed against CPS in other counties, and CPS successfully petitioned the Judicial Council for coordination before a single trial judge.

The parties recognized early in the litigation that it was critical to obtain a judicial determination of the lawfulness of CPS's on-call policy. Initially, the parties sought a determination pursuant to Rule 3.541 of the California Rules of Court. However, when the court learned that all parties desired appellate review of any legal determination, and that such review might be constrained under *Magana Cathcart McCarthy v. CB Richard Ellis* (2009) 174 Cal.App.4th 106, the parties stipulated to permit the Trailer Guards to amend their complaint to allege a new cause of action for declaratory relief, and to permit CPS to file a cross-complaint for declaratory relief, concerning CPS's on-call policy.

Once the complaint was amended, and CPS filed its cross-complaint, the Trailer Guards moved for summary adjudication of their cause of action for declaratory relief and CPS moved for summary judgment on the single claim in its cross-complaint. While the cross-motions were pending, the court of appeal decided *Seymore v. Metson, supra*, which addressed the enforceability of agreements to exclude sleep time from hours worked under California law. The trial court ordered supplemental briefing and heard oral argument on March 28, 2011.

On April 25, 2011, the court granted the Trailer Guards' motion for summary adjudication of their cause of action for declaratory relief and denied CPS's motion for summary judgment on its cross-complaint. The court held that CPS's on-call policy violates Wage Order 4 and Labor Code Section 1194, finding that agreements to exclude sleep time from compensable hours worked are

unenforceable under Wage Order 4 "except, possibly, as it applies to the health care industry." (Jt. App. Vol. 4, 0576.)

CPS timely appealed the trial court's order granting the Trailer Guards' motion for summary adjudication but the appellate court determined that order of the trial court was an interlocutory order on the issue of declaratory relief, did not constitute a final judgment, and was not made immediately appealable by statute or case law. Accordingly, the appeal was dismissed as premature.

On January 17, 2012, the Trailer Guards filed a motion for a preliminary injunction in the trial court. The motion sought to enjoin CPS from continuing to violate Wage Order 4 and Labor Code Section 1194 through application of its on-call policy and to require CPS to begin paying all California Trailer Guards for hours spent on the construction site during their on-call time. (Jt. App. Vol. 4, 0594-619.) The trial court granted the injunctive relief sought and CPS timely appealed.

On July 3, 2013, the Court of Appeal for the Second Appellate District, Division Four issued its decision affirming in part and reversing in part the trial court's order. The court of appeal properly reversed that portion of the trial court's order holding that CPS and the Trailer Guards could not agree to exclude up to eight hours of sleep time from compensable hours worked on weekends, when the Trailer Guards worked 24-hour shifts.[2] However, the court of appeal affirmed the portion of the trial court's order requiring CPS to cease and desist from deducting eight hours of sleep time from compensable hours worked on weekdays, when the Trailer Guards did not work 24-hour shifts. In so holding, the court of appeal rejected CPS's argument that because they voluntarily remained on the work site and did not request to leave, the Trailer Guards were not under its

[2] CPS is not requesting review of this portion of the court of appeal's decision.

control during on-call or sleep time hours. CPS argued that the Trailer Guards were analogous to the employees in *Overton v. Walt Disney Co.*, (2006) 136 Cap.App.4th 263, 271, who voluntarily took an employer-provided shuttle from the employer's parking lot to and from the work site and were held not to be under the employer's control because they were "free to choose not to ride the shuttle" if they wished. The court of appeal also rejected CPS's argument that even if the employees were under CPS's control, CPS could exclude eight hours of sleep time from compensable hours worked under 29 C.F.R. Section 785.23. Erroneously holding that "[t]he only wage order with language limiting the compensation to which a worker may be entitled while residing on the employer's premises is Wage Order No. 5," the court of appeal declined CPS's request to engraft Section 785.23 into California law in the same manner as 29 C.F.R. Section 785.22. (Slip Op. at 26).

LEGAL DISCUSSION

A. Because the Court of Appeal's Decision Applies to Virtually "All Wage Orders," Its Decision has Broad Financial and Operational Consequences Across the State of California.

The court of appeal held that its decision applies "to all wage orders that include essentially the same definition of 'hours worked' found in Wage Order No. 9, including Wage Order No. 4." (Slip Op. at 31). All of the wage orders except Wage Order No. 17[10] define the term "hours worked." Each provides, as

[10] Wage Order No. 17 was enacted by the IWC in 2001 and applies to "Miscellaneous Employees" in "any industry or occupation not previously covered by, and all employees not specifically exempted in, the Commission's wage orders in effect in 1997, or otherwise exempted by law. . . ." The IWC's stated purpose was to implement "changes in the law as a result of the Legislature's enactment of the 'Eight-Hour-Day Restoration and Workplace Flexibility Act,' Stats. 1999, ch. 134 (commonly referred to as AB 60)."

does Wage Order No. 9, that: "'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."

Two of the wage orders also contain additional language. (Slip Op. at 15-16, n. 20). In Wage Order No. 4 and Wage Order No. 5, the IWC added the sentence: "Within the health care industry, the term 'hours worked' means the time during which an employee is suffered or permitted to work for the employer, whether or not required to do so, as interpreted in accordance with the provisions of the Fair Labor Standards Act." (*Id.*) Wage Order No. 5 (Public Housekeeping Industry[11]) also adds the following phrase at the end of the sentence defining 'hours worked': "and in the case of an employee who is required to reside on the employment premises, that time spent carrying out assigned duties shall be counted as hours worked."

The court of appeal explicitly held that Wage Order No. 4 includes "essentially the same definition of 'hours worked' found in Wage Order No. 9" (Slip Op. at 31), necessarily finding that the additional language regarding the health care industry included in Wage Order No. 4 is not material to this dispute. In contrast, the court of appeal deemed the additional language contained in Wage Order No. 5 to be determinative:

> The only wage order with language limiting the compensation to which a worker may be entitled while residing on the employer's premises is Wage Order No. 5, which states that in the case of an employee required to reside on the employment premises, only the time spent carrying out assigned duties should be counted as hours worked. But Wage Order No. 5 applies only to those in the public housekeeping industry and that language does not appear in any other wage order. Applying 29 C.F.R. part 785.23

[11] "Public Housekeeping Industry" is defined in Wage Order No. 5 as "any industry, business, or establishment which provides meals, housing, or maintenance services, whether operated as a primary business or when incidental to other operations in an establishment not covered by an industry order of the Commission."

> or the language of Wage Order No. 5 to employees falling under other wage orders would deprive employees such as those in *Seymore*, who resided for extended periods of time on the employer's ships, of the additional compensation awarded by the court. Accordingly, we conclude that applying part 785.23 to California employees in the manner CPS urges would substantially impair the protections provided by California law." (Slip Op. at 27).

The court of appeal's decision therefore stands for the proposition that, unless employed in the public housekeeping industry or scheduled for 24-hour duty shifts, ALL California employees who live on their employer's premises are working and must be paid whenever they are required to sleep at home because "an employee required to sleep at the worksite is subject to the employer's control during sleep hours." (Slip Op. at 19). That ruling has significant adverse operational and financial consequences for employers and workers throughout California.

The following example serves to illustrate just one way in which the court of appeal's decision is likely to have unintended adverse consequences. Wage Order 15 governs the employment of household employees such as nannies and prescribes different work hour and overtime rules for employees who live in the home, but contains the same definition of "hours worked" as Wage Order No. 9 and Wage Order No. 4. Live in nannies can be scheduled for 12 hour shifts up to five days per week, provided they have 3 hours free of duty during the 12 hour span of work. Any work performed during the worker's free time must be paid at overtime rates.

A single mother could employ a live-in nanny to work from 8:00 a.m. to 8:00 p.m. Monday-Friday without incurring any overtime expense provided the nanny receives at least three hours of free time during each 12 hour work period (for example, while the child attends school). Although the nanny resides in the home, it would not be necessary to pay him or her for the night time hours between 8:00 p.m. and 8:00 a.m. if they are not required to stay on the premises at

night because (although sleeping there) they are not required to work. But what if the mother has to go out of town for business? Under the court of appeal's decision here, the mother would be required to pay for an additional 12 hours, at overtime rates for each night she is gone, even if the child never woke up during the night and the nanny was able to sleep and watch television as usual, simply because he or she was required to sleep on the premises during these nights and is therefore "subject to the employer's control during sleeping hours." (Slip. Op. p. 19, n. 21). Because the nanny is not required to work during the day time hours while the child is at school, the nanny is not scheduled for 24 hour shifts and the sleep time cannot be excluded from hours worked. That makes no sense.

Another unintended consequence could be the effect upon the employment of personal attendants. While the non-residential and residential telephone operators contrasted in Sections 785.21 and 785.23 of the DOL regulations may be a relic of the past, the number of personal attendants and companions is growing as the baby boom generation enters retirement. Consider the following example: Wage Order 5 applies to personal attendants who work in nursing homes. Because of the unique definition of "hours worked" contained in Wage Order No. 5, a personal attendant who is "required to reside" in the nursing home is not entitled to be paid for sleep time (unless actually interrupted), but the sleep time for a non-residential attendant is compensable, even if the employer provides sleeping quarters, unless the attendant works 24-hour shifts.

Wage Order 15 applies to personal attendants employed in a private home. Under the logic of the court of appeal's ruling, an attendant required to reside in a private home who is provided with room and board in the home is still entitled to be paid for sleep time provided that he or she is required to remain at the home to respond to an emergency. Without importing the sleep time exception embodied in Section 785.23, the only way to avoid this result would be to schedule the

attendant for 24 hour duty. This would, in turn, require the scheduling of at least two individuals to comply with Wage Order 15's scheduling limit of 5 days per week for live-in employees. The court of appeal's interpretation of California law would advantage wealthy people with homes large enough to house two attendants and disadvantage less fortunate people with fewer spare rooms. Although common sense tells us that can hardly have been the IWC's intent, the normal procedure for seeking clarification of legislative intent is not available; the Legislature de-funded the IWC effective July 1, 2004. http://www.dir.ca.gov/IWC/IWC_Defunded.html.

This Court can avoid these absurd results simply by recognizing that the federal sleep time regulations in their entirety are consistent with California law and reversing the court of appeal's holding that Section 785.23 is not applicable. As discussed below, (1) the concerns voiced by the court of appeals are based upon mistaken assumptions and (2) the construction of the law proposed by CPS would not require a different outcome in *Seymore, Aguilar v. Association for Retarded Citizens* (1991) 234 Cal.App.3d 21, or any of the prior appellate decisions. On the other hand, if the decision below is not reversed, the result will not be that Trailer Guards get paid more – inevitably, the result will be *no more Trailer Guards*. Instead, these middle class jobs will go away and the void will be filled by technology and lower paid work. Similar consequences, no doubt unintended by the court of appeal, can be expected to ripple across the California economy.

B. This Court Should Grant Review in Order to Address the Question of When, if at all, an Employee Who Resides On the Employer's Premises Can Agree to Exclude Sleep Time from Compensable Hours Worked.

The court of appeal held that CPS can deduct eight hours of sleep time from compensable hours worked on weekends, when the Trailer Guards work 24-hour shifts. However, the Court rejected CPS's argument that it can deduct eight hours

of sleep time on weekdays, when the guards do not work 24-hour shifts. In urging this claim, CPS asked the court of appeal to import 29 C.F.R. Section 785.23 into California law for employees who reside on the employee's premises, just as a companion regulation, 29 C.F.R. Section 785.22, was imported into California law for employees who work 24-hours shifts.

Two court of appeal cases have upheld agreements between an employer and employee to exclude eight hours of sleep time from compensable hours worked when an employee is required to be on duty for 24-hours or more, *Monzon v. Schaefer Ambulance Services, Inc., supra,* and *Seymore v. Metson, supra.* In *Monzon,* the issue before the court of appeal was whether oral or implied agreements to exclude sleep time and meal periods from hours worked are enforceable under Wage Order 9. The plaintiffs there were ambulance drivers who were scheduled to remain on premises for 24-hour shifts. The employer paid the ambulance drivers for 16 of those hours, but not for eight hours of sleep time unless the drivers were called to respond to an emergency. The employer did not have a written agreement with the plaintiffs.

Wage Order 9, which applies to employees in the Transportation Industry, like the other wage orders, defines the term "hours worked" as "the time during which an employer 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." In addition, Wage Order 9 contains a separate provision (current Section 3(K)), unique to Wage Order 9, that expressly permits employers to exclude sleep time and meal periods from the daily time worked of "ambulance drivers and attendants scheduled for 24-hour shifts of duty" who have signed written agreements. Because the ambulance drivers in *Monzon* had not signed written agreements, the plaintiffs argued that the entire 24-hour shift was compensable hours worked. The court of appeal disagreed.

The court of appeal found that although the definition of "hours worked" in the wage order is different from the Fair Labor Standards Act, California's wage orders "are closely modeled after" the FLSA. *Monzon, supra*, 224 Cal.App.3d at 38-39. "Given the similar purpose behind FLSA and the wage orders, we conclude that although the definitions of 'hours worked' are not the same, they are parallel, and therefore federal precedent is entitled to some deference." *Id.* at 46. The court then recognized an implied sleep time exclusion in California law based 29 C.F.R. §785.22, which permits agreements to exclude up to eight hours of sleep time from compensable hours worked for employees working shifts of 24 hours or longer.

Monzon was followed last year in *Seymore v. Metson, supra*. The plaintiffs there worked 14 day "hitches" on ships used to clean oil spills off the California coast. Unlike the plaintiffs in *Monzon*, the *Seymore* plaintiffs were not scheduled to work 24-hour shifts. Rather, while on a hitch, employees were scheduled to work for 12-hours and to be "off-duty" for 12 hours each day. The off-duty time included eight hours of sleep time, three hours of meal time, and one hour of free time, all during which the employees were on "stand by." If the ship was docked at port, the employees were permitted to leave the ship, but they were required to carry a cell phone and respond to emergency calls within 30-45 minutes. The employees **did not reside** on the ship between hitches, but they were required to sleep aboard the ship each night during the hitch.

The employees in *Seymore*, who were covered by Wage Order 9, alleged that they were subject to the control of the employer during their "off duty" time and were entitled to an additional 12 hours of pay each day at double time. The employer argued that the stand-by hours were not hours worked. Although the employees were scheduled to work 12 hours (plus an additional eight hours of sleep time) and not 24 hours a day, the *Seymore* court, relying on *Monzon* and 29

C.F.R. Section 785.22, found that the eight hours of sleep time was not compensable hours worked. The court explained that the express exemption in Wage Order 9 for a sleep time exclusion for ambulance drivers and attendants based on Section 3(k) of the wage order, which requires a written agreement, is *different* from the exclusion of sleep time from compensable hours worked by 24-hour employees. Following *Monzon*, it held that the exclusion of sleep time for 24-hour employees is "implied from the terms" of 29 C.F.R. Section 785.22.

The court of appeal here, while recognizing that 29 C.F.R. Section 785.23 is a companion regulation to Section 785.22, refused to "engraft" that regulation onto Wage Order No. 4.[12] The court reasoned that there was no convincing evidence that the Industrial Welfare Commission intended to adopt the federal standard, and moreover, that "we may not use federal authorities and regulations to construe state regulations where the language or intent of state and federal law substantially differs, and the federal law would provide less protection to California employees." Slip Op. at 26, citing *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 798. But that observation concerned clear differences in the method of determining the outside salesperson exemption. In *Morillion*, this Court similarly cautioned against reliance on federal standards when the IWC intended differences. There, the Court expressly found that "Congress's extensive

[12] The federal regulations, which have been in effect since 1961, address sleep time in different employment contexts. Section 785.20 sets forth the general rule that time spent sleeping can be compensable – a principle agreed with by this Court in *Morillion*. Section 785.21 sets forth the more specific principle that an employee "who is required to be on duty for less than 24 hours is working even though he is permitted to sleep or engage in other personal activities when not busy. . . ." Section 785.22 creates an exception to these general rules by permitting employees and employers to agree to exclude up to eight hours of sleep time from compensable hours worked when the employees work 24-hour shifts, while Section 785.23 allows the same exclusion when employees reside on the employer's premises. The final principle is clearly consistent with California law, insofar as it has been adopted in Wage Order 5 and cases decided thereunder. There is simply nothing to suggest that the IWC (nor any court prior to this case) found the principle *antithetical* to California law.

findings underlying the Portal-to-Portal Act, and the absence of such findings in the state's scheme, compel the conclusion that federal and state law regarding travel time are dissimilar." *Morillion, supra,* 22 Cal.4th at 593.

However, state and federal law with respect to when on-call time constitutes hours worked is **not** dissimilar. Rather, as stated above, the court of appeal here, following *Gomez*, adopted the federal *Owens* test in determining whether on-call time constitutes hours worked. State and federal law are also similar with respect to sleep time. Thus, the court of appeal following *Monzon* and *Seymore*, relied on Section 785.22 of the DOL sleep time regulations to hold that California law permits the deduction of eight hours of sleep time from compensable hours worked when the Trailer Guards work 24-hour shifts (on weekends).

Although the court of appeal followed federal law to determine whether on-call time constitutes hours worked and whether CPS can deduct eight hours of sleep time from compensable hours worked for 24-hour employees, it refused to follow 29 C.F.R. Section 785.23 with respect to employees who did not work 24-hour shifts but who reside on the job site. First, the court found that 29 C.F.R. Section 785.23 does not appear to apply where an employee is required to be present at the employer's premises during specified hours. Rather, the court stated that Section 785.23 "anticipates an agreement encompassing those periods when the employee has 'enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he [or she] may leave the premises for purposes of his [or her] own.'" *Id.* at 25. The court noted that "[t]his may accurately describe the midday hours when the trailer guards are free to leave the premises, but it does not describe the hours from 9:00 p.m. to 5:00 a.m., when they remain on call." *Id.*

The court of appeal's interpretation of 29 C.F.R. Section 785.23 is directly contrary to the interpretation of the Department of Labor in a July 27, 2004 opinion letter (FLSA 2004-7) (Exhibit B). The DOL there specifically addressed the question of whether "under 29 C.F.R. §785.23, must an employee be free to leave the premises during sleep time in order for that time to be unpaid?" Contrary to the court of appeal here, the DOL found that it was sufficient if employees "[a]re completely free to leave the premises for their own purposes and engage in normal private pursuits during all non-duty time other than the sleep time." The DOL's interpretation of the Fair Labor Standards Act is entitled to deference unless clearly unreasonable. *See, Chevron U.S.A,. Inc.*v. *Natural Resources Defense Council, Inc.* (1984) 457 U.S. 837, 842-843.

Second, the court of appeal refused to apply 29 C.F.R. Section 785.23 because, it found, there is no evidence that the IWC intended to adopt the federal standard under Wage Order No. 4. Instead, the court found that the only wage order with language limiting the compensation to which a worker may be entitled while residing on the employer's premises is Wage Order No. 5, which applies to employees in the "Public Housekeeping Industry." Wage Order No. 5 provides that in the case of an employee required to reside on the employment premises, only the time spent carrying out assigned duties are counted as hours worked.

It has become apparent that the primary purpose of this provision in Wage Order No. 5 is not to exclude *sleep time* from hours worked, but to make clear that employees covered by the wage order who reside on the employer's premises, such as motel clerks and apartment building resident managers, are not entitled to be paid for all of the hours they are required to remain on the premises but only when they actually perform work (whether during daytime or sleep time hours). *See, e.g., Brewer v. Patel* (1993) 20 Cal.App.4th 1017 (motel clerks); *Isner v.*

Falkenberg/Gilliam & Associates (2008) 160 Cal.App.4th 1393 (apartment building resident managers).[13]

Moreover, by distinguishing Wage Order 5 from the other Wage Orders, the court of appeals appears to have assumed that the IWC **intended** to treat residential employees who work in the public housekeeping industry differently from all other residential employees in California. Other than the additional language contained in Section 2(K) of Wage Order No. 5, there is nothing to suggest this to be true, and other provisions of various wage orders overlooked by the court of appeal (particularly the split shift provisions and the housing credit provisions) suggest the contrary.

Although the canons of statutory construction instruct that these differences in the definition of "hours worked" are entitled to some weight, such canons are tools to be used in ascertaining legislative intent, not rigid formulas. *Medical Bd. Of Califonia v. Superior Court* (2001) 88 Cal.App.4th 1001. Here, there is contrary evidence contained in other provisions of the wage orders themselves, such as in the provisions regarding "split shift" premiums.[14] Moreover, it would be folly to so rigidly apply the canons of statutory construction to the IWC Wage Orders – a hodgepodge of work rules cobbled together over decades by a quasi-

[13] The court of appeal also wrongly found that "Applying 29 C.F.R. Part 785.23 or the language of Wage Order No. 5 to employees falling under other wage orders would deprive the employees such as those in *Seymore*, who resided for extended periods of time on the employer's ships, of the additional compensation awarded by the court." Slip Op. at 26. Although that would be true if the language of Wage Order No. 5 were imported to Wage Order 9, the importation of 29 C.F.R. Section 785.23 would not lead to a different result in *Seymore* because, as under Section 785.22, a maximum of eight hours of sleep time can be excluded under Section 785.23.

[14] Wage Order No. 4, Section 4(C) provides as follows: "When an employee works a split shift, one (1) hour's pay at the minimum wage shall be paid in addition to the minimum wage for that workday, **except when the employee resides at the place of employment** [emphasis supplied]." Each Wage Order, except Wage Order No. 16 and Wage Order No. 17, contains a similar provision in the section prescribing minimum wages.

legislative body that has been defunct for nearly a decade. It is just as likely true that the IWC (like the DOL in enacting Section 785.23) wished to distinguish between employees who reside on the premises from those who do not in all occupations, but that the IWC had no cause to believe there was any need to adopt the language of "hours worked" used in Wage Order No. 5 in the other wage orders.

Finally, the court of appeal's entire decision is founded upon a fundamental legal assumption which is simply incorrect. The court of appeal declined to import Section 785.23 because it concluded that "[t]he only wage order with language limiting the compensation to which a worker may be entitled while residing on the employer's premises is Wage Order No. 5. . . ." (Slip. Op. at 26). That is simply not true.

Other than Wage Order No. 17, each of the IWC wage orders, including Wage Order No. 4, contains language limiting the compensation to which a worker may be entitled while residing on the employer's premises because each wage order requires the payment of a split shift premium, "except when the employee resides at the place of employment." *See, e.g.,* Cal. Code Regs., tit. 8 11040 subd. 4(C). Thus, all of the wage orders contain language "limiting the compensation to which a worker may be entitled while residing on the employer's premesis," not just Wage Order No. 5.

C. This Court Should Grant Review In Order To Give the Public Guidance Regarding How The Decision In *Morillion* Applies To On-Call Employees, Including Employees Who Reside On Their Employer's Premises.

The Court in *Morillion* addressed the question of "whether an employer that requires its employees to travel to a work site on its buses must compensate the employee for their time spent traveling on those buses." 22 Cal.App.4th at 578. In analyzing this issue, the Court held that the two prongs of the definition of

"hours worked" in the Wage Orders—whether an employee is "suffered or permitted to work" and whether an employee is "subject to the control of an employer"—are independent factors so that "an employee who is subject to an employer's control does not have to be working during that time to be compensated...." *Id.* at 582. The Court based its decision on two court of appeal cases, *Bono Enterprises, Inc. v. Bradshaw* (1995) 32 Cal.App.4th 968 and *Aguilar, supra*, 234 Cal.App.3d 21. The court of appeal in *Bono* held that employees who are required to remain on the work premises during their lunch hour had to be compensated for that time. It found that "'[w]hen an employer directs, commands or restrains an employee from leaving the work place during his or her lunch hour and thus prevents the employee from using the time effectively for his or her own purposes, that employee remains subject to the employer's control'" and must be paid. *Id.* at 583. In *Aguilar*, the court of appeal held that the time an employer required personal attendants to spend on site, including when they were allowed to sleep, should be considered "hours worked" where they did not reside on the employer's premises. *Id.*

The common denominator in *Morillion*, *Bono* and *Aguilar* is that the employer *required* their employees to remain under the employer's control. In *Morillion*, this meant requiring the employees to ride on the employer's buses from a staging area to the work site, and in *Bono* and *Aguilar* this meant requiring the employees to remain at the work site during meal periods and sleep time, respectively. Despite this framework for determining when an employee is under an employer's control, the court of appeal here looked for guidance to *Gomez v. Lincare, Inc., supra*, which adopted the federal *Owens* test.[15] In *Owens*, the Ninth Circuit looked to various "non-exclusive factors" to determine whether on-call

[15] Although *Gomez* was decided nine years after *Morillion*, the court of appeal decision never mentioned *Morillion* at all (or *Bono* or *Aguilar* either).

time was hours worked under the Fair Labor Standards Act, including (1) whether there was an on-premises living requirement, (2) whether there were excessive geographical restrictions on the employee's movements, (3) whether the frequency of calls was unduly restrictive, (4) whether a fixed time limit for response was unduly restrictive, and (5) whether the employee had actually engaged in personal activities during on-call time.

Based on the above factors, the court of appeal here found that the Trailer Guards were under CPS's control during their sleep time. The court of appeal based its ruling on the finding that "Trailer Guards are not free to leave at will" because "a guard may leave only and if a reliever is available." Slip. Op. at 21. In so holding, **the court of appeal completely ignored the fact that the Trailer Guards are on site in their trailers voluntarily and can request to leave and, if not permitted to leave, are paid from the moment of the request until the end of the shift.** Stated differently, the Trailer Guards are paid from the moment they come under CPS's control, as "control" was defined by this Court in *Morillion.*

The court of appeal below further found that, "Most important, the trailer guards do not enjoy the normal freedoms of a typical off-duty worker, as they are forbidden to have children, pets or alcohol in the trailers and cannot entertain or visit with adult friends or family without special permission." *Id. at 22.* This finding, once again, ignores that the Trailer Guards are on the premises voluntarily and are in the same position as the employees in *Overton*, who chose to take the employer-provided shuttle from the parking lot to the work site and, as a result, were unable to run errands, drop their kids off at school or engage in the other activities this Court found determinative on the issue of control in *Morillion.* The court of appeal also rejected federal case law holding that the degree to which an employee must be free to engage in personal activities does not require that the employee "have substantially the same flexibility or freedom as he would if not on

call, or else all or almost all on-call time would be working time, a proposition that the settled case law and the administrative guidelines clearly reject." *Owens* 971 F.2d at 350-351, quoting *Bright v. Houston Northwest Medical Center Survivor, Inc.* (5th Cir. 1991) 934 F.2d 671, 677 (enbanc), c*ert. denied*, (1992) 502 U.S. 1036.[16]

As is evident from the above, what constitutes "hours worked" for on-call employees, and especially on-call employees who reside on their employer's premises, is confusing to say the least. This case will give the Court the opportunity to clarify this issue once and for all. As it stands now, unless the employee is scheduled for 24-hour duty or the employer is governed by Wage Order No. 5, time spent on-call on the employer's premises will **always** be compensable hours worked even when the employee is required to reside on the premises. The added cost of such arrangements will lead to the elimination of many jobs.

D. This Court Should Grant Review In Order To Address The Proper Role of Federal Law In Interpreting California's Labor Code And Wage Orders.

In *Morillion*, this Court addressed the procedure for determining how much weight, if any, courts should give to federal law in interpreting California's wage and hour laws. The employer there argued that federal authority with respect to travel time "should serve as persuasive guidance" on the issue. The court of appeal found that although the federal statutory scheme with respect to travel time

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[16] The court of appeal also wrongly found that first *Owens* factor was whether the Trailer Guards were required to live on the job site. *Id. at 22*. Although this factor was set forth in *Owens*, the Ninth Circuit clarified the requirement in *Taylor v. American Guard and Alert, Inc.*, 1998 WL 750922 (CA9 (Alaska)), and held that the proper focus is not whether employees have to live on site during their on-call time, but whether they have to remain on site and that where employees are permitted to leave that factor weighs in favor of the employer.

was not identical to the California scheme, "the thrust of the laws is similar." 22 Cal.App.4th at 588. This Court reversed, noting that "absent from this determination, however, is any analysis of what aspect or characteristic of these two extensive statutory schemes [regarding compulsory travel time] make their 'thrust[s]...similar.' In determining how much weight to give federal authority in interpreting a California wage order, courts are cautioned to make this comparative analysis...." *Id.*

An analysis of the federal and state schemes regarding on-call time, based on court of appeal decisions, show that both turn on the level of control exercised by the employer over the employee. Indeed, in *Gomez v. Lincare, Inc., supra*, the court of appeal adopted the federal rule established by the Ninth Circuit Court of Appeals in *Owens v. Local No. 169, supra,* to determine whether on-call employees were under the control of the employer. This analysis was also adopted by the court of appeal below with respect to determining the compensability of on-call time.

Although the court of appeal here followed federal law with respect to determining whether on-call time constituted hours worked, and whether CPS can deduct eight hours of sleep time from compensable hours worked for employees who work 24-hour shifts, the court refused to follow 29 C.F.R. Section 785.23 to permit CPS to deduct sleep time from compensable hours worked for employees who do not work 24-hour shifts. The court's rationale for making such an odd distinction was based on a fallacy. The court of appeal reasoned that adopting the sleep time provision contained in Section 785.23 of the DOL regulations "would deprive employees such as those in *Seymore*, who resided for extended periods of time on the employer's ships, of the additional compensation awarded by the court." (Slip Op. at 26). But the same result would have obtained because not

more than eight hours of sleep time can be excluded from compensable hours worked under either federal regulation.

Nor would a different result have obtained in *Aguilar*, because those employees clearly did not "reside" on the employers premises – even though they stayed there for substantial periods of time. The workers in *Aguillar* did not have private quarters and they were not permitted to live in the group home on days when they were not scheduled to be at work. Therefore, they would not have met the requirements of Section 785.23 As the federal regulations recognize, the critical distinction is not the amount of time spent at work, but whether the employer requires the employee to reside on the premises and the employee agrees to do so. (Compare Section 785.20, 785.21, 785.22 and 785.23).

The seemingly haphazard way in which the court of appeal followed federal law on two issues, but not the third issue, highlights the need for this Court clarify when it is appropriate for courts to follow federal law in interpreting California's Labor Code and Wage Orders and when it is not. Unless and until this Court intervenes, the lower courts will continue to apply federal law – or to reject it – on an *ad hoc* basis, to the detriment of the public.

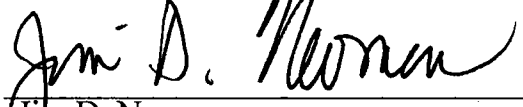
CONCLUSION

For all of the preceding reasons, CPS respectfully requests that this Court grant review of the court of appeal's decision in this case. If this Court does not grant review, and the court of appeal decision stands, the result will not be that Trailer Guards get paid more – the result will be that there will be no more Trailer Guards.

Dated: August 12, 2013

BLANK ROME LLP
Howard M. Knee

CPS SECURITY SOLUTIONS, INC.
Jim D. Newman

By: 

Jim D. Newman
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CERTIFICATION PURSUANT TO

CALIFORNIA RULES OF COURT,

RULE 8.204(b)(11)(C)(1) (formerly Rule 14(C)(1)

As counsel of record on appeal for **CONSTRUCTION PROTECTIVE SERVICES, INC.,** ***ET AL.*** I hereby certify that the Appellant's Petition for Review, excluding this certificate and the tables of contents and authorities, but including footnotes, contains 9,853 words, based on the word count program in Microsoft Word 10.

Dated: August 12, 2013

CPS SECURITY SOLUTIONS, INC.

By: _____

Jim D. Newman
Attorneys for Appellants CPS SECURITY SOLUTIONS, INC., CPS CONSTRUCTION SECURITY PLUS, INC. AND CONSTRUCTION PROTECTIVE SERVICES, INC.

Filed 7/3/13

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

TIM MENDIOLA et al., Plaintiffs, Cross-defendants and Respondents, v. CPS SECURITY SOLUTIONS, INC., et al., Defendants, Cross-complainants and Appellants.	B240519 (Los Angeles County Super. Ct. No. BC388956 c/w BC391669)

APPEAL from an order of the Superior Court of Los Angeles County. Jane L. Johnson, Judge. Reversed in part and affirmed in part, with directions.

Blank Rome and Howard M. Knee; Jim D. Newman for Defendants, Cross-complainants and Appellants.

Law Offices of Cathe L. Caraway-Howard for Plaintiffs, Cross-defendants and Respondents.

Appellants CPS Security Solutions, Inc., CPS Construction Protection Security Plus, Inc. and Construction Protective Services, Inc. (collectively "CPS") provide security guards for building construction sites throughout California. A number of the security guards employed by CPS are designated "trailer guards." They are thus described because in addition to their regular patrols, they are expected to spend the night at their assigned jobsites in CPS-provided residential-type trailers, in order to be available to investigate alarms and other suspicious circumstances and to prevent vandalism and theft. During these nighttime periods, CPS considers the trailer guards "on call," and generally compensates them only for the time spent actively conducting investigations.[1] In 2008, two lawsuits were filed against CPS, alleging violations of California law governing minimum wage and overtime compensation and seeking to represent the same class of California trailer guards. The trial court consolidated the cases and certified the class.[2]

Currently on appeal is the court's order granting a preliminary injunction requiring CPS to compensate trailer guards for all on-call time spent in the trailers. At issue are two distinct periods: weekdays, when the trailer guards are on patrol eight hours and on call eight hours, and weekends, when they are on patrol 16 hours and on call eight hours. We conclude that CPS must compensate the trailer guards for the nighttime hours spent on the jobsites during the week, as the trial

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1 There are limited exceptions, as will be explained below.

2 The class was defined as "[a]ll persons who are or were employed as 'Trailer Guards' (also known as 'In-Residence Security Officers') on an hourly basis by [CPS], within the State of California, during the period of time from April 11, 2004 to the date of judgment, who, because of a company[-]wide policy concerning [o]n-[c]all time for Trailer Guards, were not compensated for [o]n-[c]all time spent at the trailer site." There are 1,725 members of the certified class who did not opt out of the lawsuit. Respondents Tim Mendiola, Policarpio Mas, Rodolfo Tablang, Floriano Acosta, Emmanuel Gonzaga, and Rogelio Rombaoa, the plaintiffs in the consolidated actions, were appointed class representatives. (Respondents will be referred to as "the Class.")

court ruled. However, in accordance with settled principles of California law, we conclude that CPS is permitted to deduct eight hours for sleep time on those weekend days when the trailer guards are on duty for 24 hours. Accordingly, we affirm in part and reverse in part.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Complaints and Cross-Complaint*

The operative complaint sought damages for failure to pay minimum wage and overtime compensation in violation of California regulations and Labor Code provisions, including Wage Order No. 4.[3] It also asserted other related claims, including a claim for declaratory relief, seeking a determination whether CPS's on-call compensation policy was unlawful under the applicable statutes and regulations. CPS cross-claimed for declaratory relief, also seeking a judicial determination of the lawfulness of its on-call policy.

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[3] As will be discussed in greater detail, wage and hour claims are "governed by two complementary and occasionally overlapping sources of authority: the provisions of the Labor Code, enacted by the Legislature, and a series of 18 wage orders, adopted by the [Industrial Welfare Commission (IWC)]." (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1026.) The IWC, a state agency, was authorized by the Legislature and the California Constitution to formulate regulations, known as wage orders, which establish minimum wages, maximum hours and standard conditions of employment for the various industries and occupations in the state. (*Ibid.*; *Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1084, abrogated in part on other grounds in *Martinez v. Combs* (2010) 49 Cal.4th 35; *Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 701; Cal. Const., art. XIV, § 1.) Although the IWC was defunded in 2004, its wage orders remain in effect. (*Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36, 43; *California Correctional Peace Officers' Assn. v. State of California* (2010) 188 Cal.App.4th 646, 651.) Wage Order No. 4 is more formally referred to as "Wage Order No. 4-2001," but we adopt the nomenclature used by the parties for this and all other specific wage orders discussed herein.

B. *Cross Motions for Summary Adjudication*

1. *Stipulated Facts Concerning Trailer Guards*

The parties filed cross-motions for summary adjudication on the declaratory relief causes of action, filing a joint statement of undisputed facts in which they stipulated to the following: CPS contracts with its customers, construction companies at building sites throughout California, to provide security services. The package of services generally includes the presence of a security guard from 3:00 p.m. to 7:00 a.m., Monday through Friday, and for 24 hours on Saturday and Sunday.[4]

Prior to being hired by CPS, each trailer guard was required to sign a "Designation of Personal Time for In-Residence Guard," also referred to as an "On-Call Agreement[]." The On-Call Agreements designated eight hours per day, generally from 9:00 p.m. to 5:00 a.m., as "On-Call" hours. Under these Agreements, each trailer guard agreed that the trailer home was his or her "residence," and agreed to "reside during [his or her] employment in the trailer home provided by the Company for [his or her] exclusive use." Those prospective hires who did not agree to the terms and conditions of employment as a trailer guard were offered positions as hourly guards, when available.

The trailers provided by CPS ranged in size from 150 to 200 square feet. The trailers had many of the amenities of home, including a living area, a bed, a functioning bathroom and kitchen, heat, and air conditioning. The trailers were equipped with locks, and only the assigned trailer guard and CPS maintenance staff

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[4] The parties stipulated that "CPS's business model is based on the idea that construction sites should have an active security presence during the morning and evening hours when construction workers arrive and depart the site, but that theft and vandalism during the night and weekend hours can be deterred effectively by the mere presence of a security guard in a residential trailer."

had the keys. Trailer guards were allowed to keep personal items in their trailers, including clothing, books, magazines, televisions, radios, and personal computers, and to engage in personal activities while on call in the trailers, including sleeping, showering, cooking, eating, reading, watching television, listening to the radio, and surfing the internet. However, children, pets, and alcohol were not permitted on the premises, and adult visitors were permitted only if CPS's client permitted it.

On weekdays, trailer guards were generally scheduled to actively patrol the jobsites from 5:00 a.m. to 7:00 a.m. and from 3:00 p.m. to 9:00 p.m. (a total of eight hours).[5] On weekends, trailer guards were on active patrol from 5:00 a.m. to 9:00 p.m. (16 hours). During these times, they were paid an hourly rate. For eight hours every day, generally 9:00 p.m. to 5 a.m., the trailer guards were considered to be on call, which meant present on the jobsite or in the trailer, except as specified in the On-Call Agreements.

Under the On-Call Agreements, if a trailer guard wished to leave the jobsite during on-call hours, he or she was required to (1) notify a dispatcher, (2) provide information as to where the guard would be and for how long, and (3) wait for the reliever to arrive.[6] After leaving the jobsite, the guard was required to remain within a 30-minute radius and carry a pager or radio telephone. If called during that time, the guard was required to respond immediately. The trailer guards were not allowed to leave a jobsite before a reliever arrived. If no reliever was available, CPS had the right to order a trailer guard to remain at the jobsite, even if the trailer guard had an emergency. CPS did not consider on-call time when calculating hours worked, and trailer guards were paid for on-call time only if: (1)

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[5] Between 7:00 a.m. and 3:00 p.m. (eight hours) on weekdays, when construction takes place on the jobsites, the trailer guards are free to leave and do as they please.

[6] The relievers are paid an hourly rate.

an alarm, noise, motion or other condition on the jobsite required investigation; or (2) they were waiting for or had been denied a reliever.[7] When investigating a suspicious condition, the trailer guards were paid for the actual time spent conducting the investigation. If a trailer guard spent three or more hours engaged in investigations during the on-call period, the guard would be paid for the entire eight hours.

C. *Prior Governmental Opinions Related to Trailer Guards*

The parties stipulated that state and federal governmental agencies had weighed in on the legality of CPS's on-call policy or the legality of predecessor policies with similar features as set forth below.

1. *DLSE*

Beginning in 1996, the Division of Labor Standards Enforcement (DLSE) conducted an investigation and audit of CPS's policy with regard to trailer guards and their nighttime posting, which was then designated "sleep time."[8] Under the policy then in place, trailer guards who wished to leave a jobsite were required to request permission 12 hours in advance to enable CPS to secure a reliever, and were not paid if no reliever was available. In an April 1997 letter, the Chief Deputy Director of the Department of Industrial Relations and acting Labor

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[7] According to the stipulated facts, the trailer guards placed motion-sensitive alarms at strategic locations around the site. The sensors were connected to an alarm panel that sounded either in CPS's dispatch center or in the trailer. The trailer guards were required to be in uniform when investigating alarms or other suspicious activity. The stipulated facts did not state how often trailer guards were likely to spend actively engaging in investigations during the on-call periods.

[8] The DLSE, headed by the Labor Commissioner, "is 'empowered to enforce California's labor laws, including IWC wage orders.'" (*Reynolds v. Bement*, *supra*, 36 Cal. 4th at p. 1084.)

Commissioner noted that both DLSE and the federal Department of Labor had concluded "hours worked" did not include "sleep time, meal times, and all other times during which the employee is either free to leave the premises or is free to engage in private pursuits."[9] After review, the DLSE "f[ound] it appropriate to extend this rule to the live-in security guards of [CPS]" under the facts presented, which included the fact that "the guards [CPS] employ[ed] were homeless and [the trailer was] essentially their only place of residence."[10]

In 1999, the DLSE reversed its position on CPS's "sleep time" policy. In November 2002, CPS filed an action for declaratory relief seeking resolution of the policy's legality, which the parties settled by entering into an October 14, 2003 Memorandum of Understanding (MOU).[11] Under the MOU, CPS agreed to change the terms of employment for its trailer guards to include the following: "During the period between 9:00 p.m. and 5:00 a.m. (herein called 'free time') seven days a week, CPS shall implement a policy that provides the Trailer Guards are free to leave the site at will during this free time, subject to the following conditions: (i) that the Trailer Guard will be on 'stand-by' and subject to being required to respond to alarms and other recalls to work during those hours; (ii) that, before any Trailer Guard leaves the site, he/she shall call in to a central location and inform CPS that he/she is leaving, how long he/she intends to be gone from the site, and

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[9] The letter noted that historically, the rule excluding sleep time had been narrowly applied to a handful of occupations, such as ambulance drivers and attendants, and that it had recently been expanded to include mini-storage managers, mortuary attendants, and private firefighters under various wage orders then in effect.

[10] CPS's cross-complaint alleged that its business plan came about when one of its founders noticed a homeless construction laborer sleeping in a park and "saw an opportunity to solve two problems at once" -- "[h]e decided to purchase a trailer and place it on the construction site, and he asked the day laborer if he wanted to live in the trailer. . . . The laborer agreed and theft and vandalism at the site immediately stopped."

[11] The MOU expired October 1, 2007.

where he/she intends to be; (iii) that the Trailer Guard shall carry a pager or other device that will allow CPS to contact him/her; (iv) that, if paged or otherwise summoned, the Trailer Guard shall answer the page or otherwise contact CPS immediately; and (v) that the Trailer Guard may be required to stay within a radius of distance that will allow him/her to return to the construction site within 30 minutes."[12]

2. *DOL*

In 1997, CPS had also requested a formal opinion from the United States Department of Labor (DOL) concerning its sleep time policy. In a letter dated March 24, 1997, the Assistant District Director of DOL advised CPS "that its sleep time agreements complied with federal regulations and that the designated sleep time hours did not need to be compensated as 'hours worked,' provided that the unpaid sleep time period was regularly scheduled and was at least 5 hours and not more than 8 hours per day . . . [and] [the] employee [was] paid when 'the unscheduled periods are so cut through with frequent work calls that this time is not his own.'"

CPS subsequently sought to determine whether DOL had changed its position and in 2010, sent a Freedom of Information Act request seeking records related to any DOL Wage and Hour Division investigations of CPS. CPS received

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[12] In addition, CPS was to pay the trailer guards at their regular rate of pay or at an overtime rate, if applicable, "for any time when, during free time, the Trailer Guard is required to respond to a page by returning to the construction site to take care of a problem," "for any free time spent by the Trailer Guard responding to an alarm while on the site," for the entire eight hours "[i]f the free time of any Trailer Guard is interrupted by work in response to pages and/or alarms to such an extent that the Trailer Guard is unable to have at least 5 hours of consecutive, uninterrupted free time," and during any period CPS required the trailer guard to remain at the jobsite "during all or any portion of his/her free time on any given occasion."

a copy of a 2009 memorandum, stating: "[T]he Department's position has not changed since the last investigation. The employer is still allowed to deduct the 8 hour sleep time as long as the trailer guards are able to get at least 6-hour[s] of sleep time per night," and that "no further action would be taken by the Department based on the fact that the Department's position has not changed, and [CPS] is [facing] two class action lawsuits dealing with [a] similar issue."[13]

3. *Hearing Officer Decision*

In 2008, class representative Larioza filed a wage claim against CPS with the Labor Commissioner, seeking unpaid overtime wages for his on-call time.[14] At an administrative hearing on September 3, 2009, Larioza testified that he stayed on site during the on-call hours "'if he felt like it.'" The hearing officer issued a written order denying Larioza's claim, concluding that he was not under the control of his employer during that time.

D. *Trial Court's Summary Adjudication Order*

The trial court granted the Class's motion for summary adjudication and denied CPS's motion, finding that CPS's on-call policy violated Wage Order No. 4 and Labor Code section 1194.[15] The court specifically found that CPS's level of

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[13] We note that despite the memorandum's statement that DOL's position had not changed, DOL summarized its position in 2009 as requiring an additional hour of uninterrupted sleep time.

[14] As explained in *Reynolds v. Bement*, *supra*, 36 Cal.4th at p. 1084, if "'an employer fails to pay wages in the amount, time or manner required by contract or by statute,'" the employee "may seek administrative relief by filing a wage claim with the commissioner pursuant to a special statutory scheme codified in [Labor Code] sections 98 to 98.8." (Italics omitted.)

[15] For purposes of the litigation, the parties stipulated that Wage Order No. 4 was the IWC wage order applicable to trailer guards. By its terms, Wage Order No. 4 applies to
(Fn. continued on next page.)

control over the trailer guards during the on-call period was sufficient to bring the time within the applicable state law definition of "hours worked." The court found support for its conclusion in the fact that the trailer guards were required to live in the trailer during the on-call periods, the fact that their geographical movements were severely restricted, and the fact that they could engage in only limited personal activities. The court noted that the parties' On-Call Agreements expressly allowed CPS "to retain significant control over the [trailer guards]," by allowing it "to require the employees to return to the work site and/or remain on site." The fact that CPS's business model was "premised on the notion that theft and vandalism during the night and weekend hours can be deterred by the mere presence of a security guard in a residential trailer," further confirmed that "the 'on-call' time is spent predominantly for the benefit of the employer."

The trial court rejected CPS's contention that on the days the trailer guards were on duty 24 hours, eight hours could be allocated to sleep time and excluded from compensation, a rule applied to 24-hour employees in *Monzon v. Schaefer Ambulance Service, Inc.* (1990) 224 Cal.App.3d 16 (*Monzon*) and *Seymore v. Metson Marine, Inc.* (2011) 194 Cal.App.4th 361 (*Seymore*). The court distinguished those cases on the ground that a different wage order -- Wage Order No. 9, governing the transportation industry -- had been at issue, and found that applying the rule announced in those cases would "import a federal standard into . . . Wage Order [No.] 4 . . . ."

"professional, technical, clerical, mechanical, and similar occupations," including "guards." (Cal. Code Regs., tit. 8, § 11040, subds. (1) and (2)(O).) Labor Code section 1194 provides that "[n]otwithstanding 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 . . . ."

E. *Preliminary Injunction*

The Class sought a preliminary injunction preventing CPS from violating Wage Order No. 4, Labor Code section 1194, and any other applicable regulations and statutory provisions by refusing to pay Trailer Guards for on-call time. The court granted the request and entered an order enjoining CPS from (1) "continuing to violate [Wage Order No. 4], . . . and Labor Code § 1194 through CPS's application of an unlawful 'On-call' policy for Trailer Guards, which does not compensate for all time spent by the Trailer Guards at the worksites during 'On-call' time, which is generally between 9:00 p.m. and 5:00 a.m., and is specified in each 'On-call' agreement between the employer and each Trailer Guard" and (2) "failing to pay California Trailer Guards for all hours worked during 'On-call' time."[16] CPS appealed.

DISCUSSION

A. *Standard of Review*

An application for a preliminary injunction should be granted when the plaintiff is "'likely to suffer greater injury from a denial of the injunction than the defendants are likely to suffer from its grant,'" and when there is "'a reasonable probability that the plaintiffs will prevail on the merits.'" (*Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 408, quoting *Robbins v. Superior Court* (1985) 38 Cal.3d 199, 206.) An order granting a preliminary injunction is an appealable order. (Code Civ. Proc., § 904.1, subd. (a)(6).) The trial court's decision to grant a

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[16] In the same order, the court also "certifie[d] pursuant to Code of Civil Procedure § 166.1, that the Court's determination that CPS's 'On-call' policy violates Wage Order 4, [citation], and Labor Code section 1194 presents a controlling issue of law as to which there are substantial grounds for difference of opinion, appellate resolution of which may materially advance the conclusion of the litigation."

preliminary injunction is generally reviewed under an abuse of discretion standard. (*Cinquegrani v. Department of Motor Vehicles* (2008) 163 Cal.App.4th 741, 746.) However, if the facts on which the court relied are undisputed, the propriety of granting the injunction becomes a question of law. (*Ibid.*) In addition, to the extent the grant requires construction of statutes or regulations, the matter presents a question of law which we review independently. (*Ibid.*) Here, the appeal raises primarily questions of law -- in particular, whether the trial court correctly interpreted Wage Order No. 4 and other legal authorities in determining that the Class was likely to prevail on the merits of the claim seeking compensation for all on-call time.

B. *Standards Governing Interpretation of IWC Wage Orders*

"Nearly a century ago, the Legislature responded to the problem of inadequate wages and poor working conditions by establishing the IWC and delegating to it the authority to investigate various industries and promulgate wage orders fixing for each industry minimum wages, maximum hours of work, and conditions of labor." (*Brinker Restaurant Corp. v. Superior Court*, *supra*, 53 Cal.4th at p. 1026.) The IWC was "vested with broad statutory authority to investigate 'the comfort, health, safety, and welfare' of the California employees under its aegis [citation] and to establish (1) '[a] minimum wage . . . which shall not be less than a wage adequate to supply . . . the necessary cost of proper living and to maintain the health and welfare of such [employees],' (2) '[t]he maximum hours of work consistent with the health and welfare of [such employees]' and (3) '[t]he standard conditions of labor demanded by the health and welfare of [such employees] . . . .'" (*Industrial Welfare Com. v. Superior Court, supra*, 27 Cal.3d at p. 701.) Legislation enacted in 1973 directed the IWC to "continually . . . review and . . . update its 'rules, regulations and policies to the extent found by [it] to be

necessary to provide adequate and reasonable wages, hours, and working conditions appropriate for all employees in the modern society.'" (*Industrial Welfare Com. v. Superior Court, supra,* at pp. 701-702, quoting Lab. Code, § 1173 as enacted (Stats. 1973, ch. 1007, § 1.5, p. 2002), italics omitted.)

Once the IWC determined that "in any occupation, trade, or industry, the wages paid to employees [were] inadequate to supply the cost of proper living" or that "the hours or conditions of labor [were] prejudicial to the health, morals, or welfare of employees" (Lab. Code, § 1178), it was empowered to formulate wage orders to govern minimum wages, maximum hours, and overtime pay for such occupation, trade or industry. (*Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 795; *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 561.)[17] IWC wage orders "are to be accorded the same dignity as statutes"; in other words, they are "entitled to 'extraordinary deference, both in upholding their validity and in enforcing their specific terms.'" (*Brinker Restaurant Corp. v. Superior Court, supra*, 53 Cal.4th at p. 1027, quoting *Martinez v. Combs* (2010) 49 Cal.4th 35, 61.)

DLSE opinion letters, """""while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to

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[17] There are currently 18 wage orders, 16 relating to specific industries or occupations (manufacturing; personal service; canning, freezing and preserving; professional, technical, clerical, mechanical and the like; public housekeeping; laundry, linen supply and dry cleaning; mercantile; product handling after harvest (covering commercial packing sheds); transportation; amusement and recreation; broadcasting; motion picture; preparation of agricultural products for market (on the farm); agricultural; household; and construction, drilling, logging and mining), one general minimum wage order, and one order implementing the Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999. (See Cal. Code Regs., tit. 8, §§ 11000-11170; *Brinker Restaurant Corp. v. Superior Court, supra*, 53 Cal.4th at p. 1026; *Reynolds v. Bement, supra*, 36 Cal.4th at p. 1084; *California Hotel & Motel Assn. v. Industrial Welfare Comm.* (1979) 25 Cal.3d 200, 205.)

which courts and litigants may properly resort for guidance."""""" (*Brinker Restaurant Corp. v. Superior Court, supra,* 53 Cal.4th at p. 1029.)[18] However, they "need not be followed if they do not contain persuasive logic or if they unreasonably interpret a wage order." (*Cash v. Winn, supra,* 205 Cal.App.4th at p. 1302.) Although DLSE opinion letters are due "'consideration and respect,' it is ultimately the judiciary's role to construe the language [of the applicable wage order]." (*Harris v. Superior Court* (2011) 53 Cal.4th 170, 190.)[19]

"'[I]n 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 governing provisions are to be "'liberally construed with an eye to promoting such protection.'" (*Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 592, (*Morillion*) quoting *Industrial Welfare Com. v. Superior Court, supra,* 27 Cal.3d at p. 702.) Because California wage and hour laws are modeled to some extent on federal laws, federal cases may provide persuasive guidance where the language of the state statute or regulation parallels the language of the federal statute or regulation. (*Building Material &*

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[18] The same is not true of the DLSE's operations and procedures manual, which our Supreme Court has held is a void regulation, entitled to no deference. (*Cash v. Winn* (2012) 205 Cal.App.4th 1285, 1301-1302, citing *Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal.4th 554, 563 and *Tidewater Marine Western, Inc. v. Bradshaw, supra,* 14 Cal.4th at p. 572.) A court may nevertheless adopt a DLSE statutory interpretation contained in a void regulation "if the court independently determines that the interpretation is correct." (*Gattuso v. Harte-Hanks Shoppers, Inc., supra,* at p. 563.)

[19] CPS contends the Labor Commission upheld its policy in October 2003 (the date of the MOU) and in September 2009, when the hearing officer rejected Larioza's claim for additional compensation. However, the MOU expired in 2007, and the hearing officer's decision was rendered on a different evidentiary record, as Larioza testified he could leave the jobsite when he "'felt like it.'" More important, as the above authorities make clear, a decision by the Labor Commissioner or the DLSE is only as persuasive as its reasoning.

Construction Teamsters' Union v. Farrell (1986) 41 Cal.3d 651, 658; *Nordquist v. McGraw-Hill Broad.* (1995) 32 Cal.App.4th 555, 562.) However, "where the language or intent of state and federal labor laws substantially differ, reliance on federal regulations or interpretation to construe state regulations is misplaced." (*Ramirez v. Yosemite Water Co., supra*, 20 Cal.4th at p. 798.) Because "state law may provide employees greater protection than the [federal Fair Labor Standards Act]," if the IWC has not made clear its intent to adopt a federal standard, courts should "decline to import any federal standard, which expressly eliminates substantial protections to employees, by implication." (*Morillion v. Royal Packing Co., supra*, 22 Cal.4th at p. 592.)

C. *Trailer Guards' Uncompensated Nighttime Hours*

At issue here is whether the hours the trailer guards spend in the trailers between 9:00 p.m. and 5:00 a.m. should be construed as "hours worked." That term is defined in Wage Order No. 4 as "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." (Cal. Code Regs., tit. 8, § 11040, subd. (2)(K).)[20] CPS asserts two bases to support its argument that

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[20] All industry and occupation wage orders use this language to define "hours worked." (See Cal. Code Regs., tit. 8, §§ 11010, subd. (2)(G), 11020, subd. (2)(G), 11030, subd. (2)(H), 11040, subd. (2)(K), 11050, subd. (2)(K), 11060, subd. (2)(G), 11070, subd. (2)(G), 11080, subd. (2)(G), 11090, subd. (2)(G), 11100, subd. (2)(H), 11110, subd. (2)(H), 11120, subd. (2)(H), 11130, subd. (2)(G), 11140, subd. (2)(G), 11050, subd. (2)(H), 11160, subd. (2)(J); *Morillion, supra*, 22 Cal.4th at pp. 581-582.) Two include additional language: Wage Order No. 4 adds: "Within the health care industry, the term 'hours worked' means the time during which an employee is suffered or permitted to work for the employer, whether or not required to do so, as interpreted in accordance with the provisions of the Fair Labor Standards Act" (Cal. Code Regs., tit. 8, § 11040, subd. (2)(K)); Wage Order No. 5, governing the public housekeeping industry, adds: "and in the case of an employee who is required to reside on the employment
(Fn. continued on next page.)

the subject hours are properly excluded from "hours worked": (1) the trailer guards are merely "on call," free to engage in personal activities and not actively engaged in work unless and until an alarm sounds or they are otherwise actively engaged in investigation; and (2) the period constitutes excludable "sleep time." For the reasons set forth below, we conclude that the period does constitute hours worked, but that CPS may exclude from compensation up to eight hours a day as sleep time during the guards' 24-hour weekend shifts.

1. *On-Call Time*

It has long been recognized that an employee whom the employer perceives to be merely "on-call" may be engaged in compensable work. "[A]n employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a stand-by capacity. Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer." (*Armour & Co. v. Wantock* (1944) 323 U.S. 126, 133 [private firefighters required to be on employer's premises were engaged in compensable work, although much of their time was spent in "idleness" and "amusements"].) Over half a century ago, the United States Supreme Court held that on-call time falls within the category of hours worked if it is "spent predominantly for the employer's benefit," which is "dependent upon all the

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premises, that time spent carrying out assigned duties shall be counted as hours worked. Within the health care industry, the term "hours worked" means the time during which an employee is suffered or permitted to work for the employer, whether or not required to do so, as interpreted in accordance with the provisions of the Fair Labor Standards Act." (Cal. Code Regs., tit. 8, § 11050, subd. (2)(K).)

circumstances of the case." (*Ibid.*; accord, *Skidmore v. Swift & Co.* (1944) 323 U.S. 134, 136-137.) "Facts may show that the employee was engaged to wait, or they may show that he waited to be engaged. . . . The law does not impose an arrangement upon the parties. It imposes upon the courts the task of finding what the arrangement was." (*Skidmore v. Swift & Co.*, *supra*, 323 U.S. at p. 137.)

In *Morillion, supra,* 22 Cal.4th 575, our state Supreme Court held that the most significant factor in determining whether the employee's activities constitute "'hours worked'" is "[t]he level of the employer's control over its employees.'" (*Id.* at p. 587.) At issue in *Morillion* was the compensability of employee travel time where the employer required the employees -- teams of agricultural workers -- to meet at designated locations and to take the employer's buses to the various work sites. Noting that employees who commute on their own have considerably more freedom and "may choose and may be able to run errands before work and to leave from work early for personal appointments," the court held: "[B]y requiring employees to take certain transportation to a work site, [the employer] thereby subjects those employees to its control by determining when, where, and how they are to travel. Under the definition of 'hours worked,' that travel time is compensable. [Citation.]" (*Id.* at pp. 587-588.)

Courts determine the employer's level of control by analyzing a number of factors, beginning with the parties' agreement, which provides insight into how the parties believe the time should be characterized. (*Skidmore v. Swift & Co.*, *supra*, 323 U.S. at p. 137; *Gomez v. Lincare, Inc.* (2009) 173 Cal.App.4th 508, 523; *Berry v. County of Sonoma* (9th Cir. 1994) 30 F.3d 1174, 1180-1181.) Courts also consider whether the restrictions on the employee's time "are primarily directed toward the fulfillment of the employer's requirements and policies," and whether the time "is so substantially restricted that [the employees] are unable to engage in private pursuits." (*Madera Police Officers Assn. v. City of Madera* (1984) 36

Cal.3d 403, 409.) In resolving the degree to which employees are able to engage in private pursuits during on-call time, courts generally apply seven factors: "'(1) whether there was an on-premises living requirement; (2) whether there were excessive geographical restrictions on [the] employee's movements; (3) whether the frequency of calls was unduly restrictive; (4) whether a fixed time limit for response was unduly restrictive; (5) whether the on-call employee could easily trade on-call responsibilities; (6) whether use of a pager could ease restrictions; and (7) whether the employee had actually engaged in personal activities during call-in time.'" (*Gomez v. Lincare, Inc., supra*, 173 Cal.App.4th at p. 523, quoting *Owens v. Local No. 169* (9th Cir. 1992) 971 F.2d 347, 351; accord, *Seymore, supra*, 194 Cal.App.4th at p. 374.) Once the facts are ascertained, whether the limitations on employees' personal activities while on call are such that the time should be considered compensable is a question of law. (*Seymore, supra*, at p. 373.)

In *Gomez v. Lincare, Inc.,* the court found that the on-call time of employees who in their active duty hours delivered and set up in-home medical equipment was not properly categorized as hours worked. Although the employees were expected to respond to patient requests for assistance while on-call, there was no on-site living requirement, the geographic restrictions on the employees' ability to move about during on-call time were not excessive, they were provided pagers, and the time limits set for responses to pages -- 30 minutes to respond telephonically and two hours if a home visit was required -- were not unduly restrictive. (*Gomez v. Lincare, Inc., supra,* 173 Cal.App.4th at p. 524.) Moreover, the employees were permitted to freely trade on-call responsibilities with co-workers. (*Ibid.*)

Applying the same factors to different circumstances, the court reached a contrary conclusion in *Seymore, supra*, 194 Cal.App.4th at p. 361. There, the

plaintiff employees, who fell under Wage Order No. 9 governing the transportation industry, worked 14-day "hitches" on the defendant employer's ships, providing emergency cleanup of oil spills and other aquatic discharges. The employer considered the employees to be off duty or "on standby" during 12 of every 24 hours. During their hitches, the employees were required to sleep on board the vessel. They could leave during their standby time, but were required to check in and out, carry a cell phone or pager, and stay close by, so they could respond within 30 to 45 minutes if they received notification of an emergency. In concluding that the employees were entitled to additional compensation, the court found the most critical factor to be the requirement that the employees sleep at the employer's premises. The court noted that with the exception of certain occupations covered by a different wage order, "California courts have consistently held that an employee required to sleep at the worksite is subject to the employer's control during sleeping hours."[21] (*Seymore*, *supra*, at p. 376.) The employer's requirement that the employees sleep on board "significantly affect[ed] and limit[ed] what the employee[s] c[ould] and c[ould not] do during [their] . . . nonsleeping hours," and the limitations placed on the employees' whereabouts during the 12-hour standby period, viewed as a whole, "significantly restricted their ability to pursue activities of their choice." (*Id.* at p. 380.)

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[21] The court distinguished *Isner v. Falkenberg/Gilliam & Associates, Inc.* (2008) 160 Cal.App.4th 1393 and *Brewer v. Patel* (1993) 20 Cal.App.4th 1017, which reached contrary conclusions interpreting Wage Order No. 5 (Cal. Code Regs., tit. 8, § 11050). (See *Seymore*, *supra*, 194 Cal.App.4th at p. 376.) As noted, Wage Order No. 5 governs the public housekeeping industry and includes in the definition of "hours worked" by employees required to reside on the employment premises only the time spent "carrying out assigned duties." (*Seymore*, *supra*, at pp. 376-377, Cal. Code Regs., tit. 8, § 11050, subd. (2)(K).)

In reaching its conclusion, the court in *Seymore* relied on earlier California cases holding that an employee is entitled to compensation when required to be on the employer's premises. These included *Aguilar v. Association for Retarded Citizens* (1991) 234 Cal.App.3d 21 (*Aguilar*). There, the plaintiffs were employed as personal attendants at a home for the mentally impaired and thus fell under Wage Order No. 5, governing the public housekeeping industry. (See Cal. Code Regs., tit. 8, § 111050, subd. 2(N).) They worked from 6:00 a.m. until 9:00 a.m., were off duty until 2:00 p.m., and were back on duty from 2:00 p.m. until 10:00 p.m. Between 10:00 p.m. and 6:00 a.m., they were required to be "on call" at the group home, but were permitted to sleep. They were not compensated for the overnight hours unless actively assisting one of the residents living in the home. (*Aguilar, supra,* 234 Cal.App.3d at p. 24.) Although the court in *Aguilar* did not apply the factors outlined in *Seymore*, it reached the same conclusion with respect to compensability of the on-call period. In the absence of any applicable exception in the wage order, the court found that the time fell under the broad definition of "'hours worked'" -- "the hours when an employee 'is subject to the control of an employer'" -- which "clearly includes time when an employee is required to be at the employer's premises and subject to the employer's control even though the employee was allowed to sleep." (*Id.* at p. 30.) Accordingly, the employees were "entitled to compensation for all the hours worked"; the employer was "not entitled to deduct those hours when it allow[ed] the employees to sleep." (*Id.* at p. 31; accord, *Bono Enterprises, Inc. v. Bradshaw* (1995) 32 Cal.App.4th 968, 975, disapproved on other grounds in *Tidewater Marine Western, Inc. v. Bradshaw*, *supra*, 14 Cal.4th at p. 574 [lunch period was compensable where employees were restricted from leaving work premises].)[22]

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[22] The employer in *Aguilar* sought to rely on section 3(J) of Wage Order No. 5,
(Fn. continued on next page.)

Here, the pertinent factors support the trial court's finding that the trailer guards' on-call hours represent hours worked for purposes of Wage Order No. 4. By their presence on site during the on-call hours, the guards perform an important function for their employer and its clients: they deter theft and vandalism. CPS promises its clients security services throughout the night and for 24 hours on Saturday and Sunday, and would be in breach if no security guards were present between 9:00 p.m. and 5:00 a.m. The parties' On-Call Agreements designate that period as "free time," but it is clear from the Agreements and the stipulated facts that trailer guards are not free to leave at will. A guard may leave only when and if a reliever is available. From this, it can reasonably be said that the restrictions on the on-call time are "primarily directed toward the fulfillment of the employer's requirements," and the guards are "substantially restricted" in their ability to engage in private pursuits. (See *Madera Police Officers Assn. v. City of Madera*, *supra*, 36 Cal.3d at p. 409.)

Of the seven factors listed in *Gomez v. Lincare, Inc.*, the majority favors a finding that during the on-call period, the trailer guards are significantly limited in

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which excludes from daily overtime provisions "ambulance drivers and attendants scheduled for twenty-four (24) hour shifts of duty" who had "agreed in writing" to "exclude from daily time worked . . . a regularly scheduled uninterrupted sleeping period of not more than eight (8) hours." Acknowledging that this provision by its terms applied only to "ambulance drivers and attendants scheduled for twenty-four (24) hour shifts of duty," the employer argued that the court should nevertheless apply section 3(J) to the plaintiffs, as they were effectively working 24-hour shifts, while being "temporar[ily] release[d] . . . to attend to personal interests." (*Aguilar, supra,* 234 Cal.App.3d at pp. 30-31 & fn. 4.) The court was not persuaded: "[The employer's] characterization would abrogate the distinction between employees working 24-hour shifts and those working less than 24-hour shifts. Under [its] analysis, all employees in the work force could be characterized as working 24-hour shifts, with the only variation being the length of the 'temporary release . . . to attend to personal interests.' An accountant who worked 8 hours a day could be viewed as working a 24-hour shift with a 16-hour temporary release period." (*Id.* at p. 31.)

their ability to engage in personal activities.[23] They are required to live on the jobsite. They are expected to respond immediately, in uniform, when an alarm sounds or they hear suspicious noise or activity. During the relevant hours, they are geographically limited to the trailer and/or the jobsite unless a reliever arrives; even then, they are required to take a pager or radio telephone so they may be called back; and they are required to remain within 30 minutes of the site unless other arrangements have been made. They may not easily trade their responsibilities, but can only call for a reliever and hope one will be found.[24]

Most important, the trailer guards do not enjoy the normal freedoms of a typical off-duty worker, as they are forbidden to have children, pets or alcohol in the trailers and cannot entertain or visit with adult friends or family without special permission. On this record, we conclude the degree of control exercised by the employer compels the conclusion that the trailer guards' on-call time falls under the definition of "hours worked" under California law. (*Seymore*, *supra*, 194 Cal.App.4th at p. 380; *Madera Police Officers Assn. v. City of Madera*, *supra*, 36

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[23] The parties provided no evidence concerning one of the factors: the frequency of the alarms or other nighttime interruptions.

[24] The trailer guards' situation is far removed from the typical situation in which the ability to trade responsibilities has been found to be a significant factor in determining whether on-call time is compensable. Generally, courts rely on this factor where multiple employees with the same skills are on call and no single one is required to respond to every call. (See, e.g., *Gomez v. Lincare, Inc.*, *supra*, 173 Cal.App.4th at p. 524; *Owens v. Local No. 169*, *supra*, 971 F.2d at pp. 348-349, 353, 354 [when emergency arose after hours, plant's mechanics were called sequentially until one agreed to return to plant to fix equipment; each individual mechanic was required to accept a "fair share" of call-ins, which, on average, amounted to six per year]; *Martin v. Ohio Turnpike Comm'n* (6th Cir. 1992) 968 F.2d 606, 611-612 & fn. 5 [when highway maintenance worker was too distant to arrive in time to help with emergency, employer called another worker, with no adverse consequences to worker originally called]; *Boehm v. Kansas City Power and Light Co.* (10th Cir. 1989) 868 F.2d 1182, 1185 [power company linemen were required to respond to one-third of callback requests].)

Cal.3d at pp. 408-410 [police officers' meal periods were compensable where time was not their own; officers were required to respond to telephone calls from superiors and in-person requests by citizens and to take immediate action to quell crimes committed in their presence, and were forbidden to conduct personal business while in uniform]; see also *Renfro v. City of Emporia* (10th Cir. 1991) 948 F.2d 1529, 1536-1537 [firefighters were unable to meaningfully engage in personal activity during on-call hours when required to answer every call -- three to five per on-call period -- and report within 20 minutes]; *Cross v. Arkansas Forestry Comm'n.* (8th Cir. 1991) 938 F.2d 912, 916-917 [conditions imposed by employer were sufficiently restrictive to require compensation for on-call periods where employees were required to monitor radio and were unable to participate in activities that would interfere with ability to listen, including musical events, sporting events, church services, and social gatherings].)

In reaching this conclusion, we note that several federal courts have found employees on call within a geographically-restricted area were not entitled to compensation until called to active duty.[25] However, in most such cases, the employees, although restricted in the distance they could travel from the jobsite, had considerably more freedom to engage in personal activities than do the trailer guards. (See, e.g., *Dinges v. Sacred Heart St. Mary's Hospitals* (7th Cir. 1999) 164 F.3d 1056, 1058 [plaintiff emergency medical technicians were not entitled to compensation during on-call time although required to respond within seven to 15 minutes; both lived within seven minutes of hospital and could cook, eat, sleep, read, exercise, watch TV, do housework, and care for pets, family, and loved ones

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[25] Because state and federal courts both rely on the factors set forth in *Gomez v. Lincare, Inc.* and *Seymore* to determine whether on-call time is compensable, we may look to federal authorities for guidance.

at home, as well as watch children participate in sports, attend dance recitals, and frequent restaurants and parties in vicinity of home and hospital]; *Berry v. County of Sonoma, supra,* 30 F.3d at pp. 1184-1185 [coroners' on-call hours were not compensable although they were required to respond within 15 minutes; evidence indicated they were able to socialize with friends, dine out, shop, read, watch television and engage in hobbies]; *Bright v. Houston Northwest Medical Center Survivor, Inc.* (5th Cir. 1991) 934 F.2d 671, 676 [employee's on-call time was not compensable although he was required to stay within minutes of hospital; evidence showed he was able to carry on "normal personal activities at his own home," as well as "normal shopping, eating at restaurants, and the like"]; *Brock v. El Paso Natural Gas Co.* (5th Cir. 1987) 826 F.2d 369, 370 [employees of natural gas pump station located in remote area were not entitled to compensation during on-call time where on-call employees were free to eat, sleep, entertain guests, watch television or engage in any other personal recreational activity, alone or with family, as long as they stayed within hailing distance of alarm and station]; *Carman v. Yolo County Flood Control & Water Conservation Dist.* (E.D. Cal. 2008) 535 F.Supp.2d 1039, 1056-1057 ["damtender" was not entitled to additional compensation; though required to stay near dam, he was free to have visitors, dine with family, and attend lodge meetings, and spent numerous on-call hours making improvements to family home].)

CPS calls to our attention the federal rule embodied in the Code of Federal Regulations (C.F.R.), title 29, part 785.23, which provides: "An employee who resides on his employer's premises on a permanent basis or for extended periods of time is not considered as working all the time he is on the premises. Ordinarily, he may engage in normal private pursuits and thus must have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he may leave the premises for purposes of his own. It is, of course, difficult to

determine the exact hours worked under these circumstances and any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted." CPS asks us to engraft that regulation onto Wage Order No. 4, reasoning that it is part of a "comprehensive" package of federal regulations that permits exclusion of sleep time from compensable hours under various circumstances, including some that are recognized in California. (See Part C.2, *ante*.) We decline to do so.

Preliminarily, we note that under its express terms, part 785.23, of 29 C.F.R., does not appear to apply to the instant situation, or any situation in which the employee is required to be present at the employer's premises during specified hours. It anticipates an agreement encompassing those periods when the employee has "enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he [or she] may leave the premises for purposes of his [or her] own." This may accurately describe the midday hours when the trailer guards are free to leave the premises, but it does not describe the hours from 9:00 p.m. to 5:00 a.m., when they remain on call. During the on-call period, the trailer guards do not have "complete freedom from all duties," and even if permitted to leave, must carry a pager and stay sufficiently close to the jobsite to be able to return within 30 minutes if required to do so.[26]

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[26] In *Boman v. All The Little Things Count, L.L.C.* (S.D. Tex., Apr. 24, 2013, No. 3:12-CV-00077) 2013 U.S. Dist. LEXIS 70237, the court observed that "[a] plain reading of this regulation indicates that it could not apply to a situation . . . in which the employee is required to be at the employer's premises. . . , but rather addresses the quite different situation of someone who has the option of sleeping at the employer's premises but also has 'complete freedom . . . [to] leave the premises' and, for example, go to a movie theater, restaurant, or gym." (2013 U.S. Dist. LEXIS 70237, *8, fn. 2.) The court acknowledged, however, that "[d]espite this natural reading," the DOL "has long interpreted the section as applying to 'on duty' sleep time in the group home industry . . . ." (*Id.*, at p. *9.) We note that some federal courts have sided with the DOL and
(Fn. continued on next page.)

More important, as our Supreme Court has made clear, "[a]bsent convincing evidence of the IWC's intent to adopt the federal standard," we must "decline to import any federal standard, which expressly eliminates substantial protection to employees, by implication." (*Morillion*, *supra*, 22 Cal.4th at p. 592.) Likewise, we may not use federal authorities and regulations to construe state regulations where the language or intent of state and federal law substantially differs, and the federal law would provide less protection to California employees. (*Ramirez v. Yosemite Water Co.*, *supra*, 20 Cal.4th at p. 798.) CPS points to no provision of Wage Order No. 4 containing language that parallels that of 29 C.F.R. part 785.23, or to any evidence that the IWC intended to adopt that federal standard for security guards. The only wage order with language limiting the compensation to which a worker may be entitled while residing on the employer's premises is Wage Order No. 5, which states that in the case of an employee required to reside on the employment premises, only the time spent carrying out assigned duties should be counted as hours worked. But Wage Order No. 5 applies only to those in the public housekeeping industry and that language does not appear in any other wage order. Applying 29 C.F.R. part 785.23 or the language of Wage Order No. 5 to employees falling under other wage orders would deprive employees such as those in *Seymore*, who resided for extended periods of time on the employer's ships, of the additional compensation awarded by the court. Accordingly, we conclude that

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applied part 785.23, of 29 C.F.R., beyond its literal terms. (See, e.g., *Bouchard v. Regional Governing Bd.* (8th Cir. 1991) 939 F.2d 1323, 1329-1330 [applying part 785.23 where employees of group home for developmentally disabled were expected to sleep at the home]; *Beaston v. Scotland School for Veterans' Children* (M.D. Pa. 1988) 693 F.Supp. 234, 240 [applying part 785.23 to houseparents at school for orphans required to remain on campus during sleep time].)

applying part 785.23 to California employees in the manner CPS urges would substantially impair the protections provided by California law.[27]

2. *Sleep Time During 24-Hour Weekend Shifts*

Although we agree with the trial court that the trailer guards' eight hours of on-call time during the week must be compensated, we reach a different conclusion with respect to their 24-hour weekend shifts. California courts have held that when an employee works a 24-hour shift, the employer and employee may exclude, by agreement, up to eight hours for "sleep time." (*Seymore*, *supra*, 194 Cal.App.4th at p. 381; *Monzon*, *supra*, 224 Cal.App.3d at p. 46.) The Class contends that the rule announced in *Seymore* and *Monzon* does not apply to employees falling under Wage Order No. 4. The Class further contends, and persuaded the trial court, that application of that rule to the instant case would violate the Supreme Court's proscription against adoption of federal regulations to eliminate protection to California employees. We disagree.

In *Monzon*, the employees were ambulance drivers and attendants who worked 24-hour shifts every other day -- a total of seven 24-hour shifts in each two-week period -- and received pay for 14 hours per shift. (*Monzon, supra,* 224 Cal.App.3d at p. 24.) Of the remaining 10 hours of their shifts, two hours were

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[27] We find support for our conclusion in *Aguilar*, where the employer similarly urged the court to follow a federal DOL interpretation of hours worked, which permitted employers to deduct eight hours of sleep time for all resident employees, whether on duty 24 hours or not, and loosely defined "resident" to include employees who stayed at residential care home one or two nights a week, but maintained a primary residence elsewhere. (*Aguilar*, *supra*, 234 Cal.App.3d at pp. 31-34 & fn. 7.) The court stated: "[E]ven if we were persuaded by [DOL's] interpretation, federal law does not control unless it is more beneficial to employees than the state law. [Citation.] . . . Here, the state rule is clearly more beneficial to employees in compensating those employees for all the hours they are subject to [the employer's] control, including the hours during the overnight workshift when they are allowed to sleep." (*Aguilar, supra,* at p. 34.)

attributed to meal time and eight hours were attributed to sleep time, unless the driver or attendant was actively on duty so frequently during the 24-hour shift that there was no uninterrupted period of five hours available for sleep.[28] The wage order at issue, Wage Order No. 9 governing the transportation industry, contained a provision expressly permitting "ambulance drivers and attendants" to "agree[] in writing" to exclude from overtime "a regularly scheduled uninterrupted sleeping period of not more than eight (8) hours." (Cal. Code Regs., tit. 8, § 11090, subd. (3)(K).)[29] The parties had not, however, entered into written employment agreements, although there was ample evidence of an implied agreement to exclude eight hours of sleep time per shift. (224 Cal.App.3d at pp. 25, 47.) The issue was whether, in the absence of a written agreement, the sleep time could be excluded. Relying in part on the federal definition of hours worked codified in 29 C.F.R. part 785.22, the court held that "it is permissible for an employer and ambulance drivers and attendants to enter into an agreement, which need not be written, to exclude up to eight hours of sleep time from work or compensable time on twenty-four-hour shifts if adequate sleeping facilities are provided by the employer and the employee has the opportunity to get at least five hours of uninterrupted sleep." (224 Cal.App.3d at p. 46.)[30]

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[28] The employer paid for five additional hours in this situation. On appeal, it conceded it should have paid an additional eight hours when the driver or attendant did not have five continuous hours for sleep during his or her shift. (*Monzon, supra,* 224 Cal.App.3d at pp. 24-25.)

[29] At the time of the *Monzon* decision, this language was found in subdivision (3)(G) of the California Code of Regulations, title 8, section 11090. (See *Monzon, supra,* 224 Cal.App.3d at pp. 31-32.) It is now found in subdivision (3)(K) of section 11090.

[30] Title 29 C.F.R. part 785.22 states: "Where an employee is required to be on duty for 24 hours or more, the employer and the employee may agree to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period of not more than 8 hours from hours worked, provided adequate sleeping facilities are furnished by the
(Fn. continued on next page.)

Monzon was followed in *Seymore*, where the employees' active duty shifts on board the ships were 12 hours, and the court concluded the remaining 12 hours could not be designated uncompensated standby time due to the employer's requirement that the employees remain on or near the ships. The court held, however, that the employees were not entitled to compensation for the entire 12 standby hours: "As noted above, [the employer] allocated eight hours of unpaid time a day for sleep. The undisputed facts establish that sleeping facilities were provided for employees on the ships, and that it was exceptionally rare for their sleep to be interrupted by an emergency. The undisputed facts also establish an implied agreement between the parties that plaintiffs would not be compensated for eight hours of sleep time so long as their sleep was not interrupted. Prior to their employment, plaintiffs received a handbook that set forth [the employer's] compensation policies, including that employees would not be compensated for eight hours of 'off-duty' sleep time each day. Plaintiffs did not dispute that they were 'aware of and worked for [the employer] pursuant to the pay structure set forth in [the] employee handbook." (*Seymore, supra,* 194 Cal.App.4th at p. 382.) Accordingly, the plaintiffs were entitled to be compensated for "only four, rather than 12, hours of standby time during each 24-hour working day . . . ." (*Ibid.*)

The *Seymore* court rejected the plaintiffs' contention that *Monzon* applied only to ambulance drivers and attendants: "Plaintiffs are correct that wage order No. 9 provides an exemption for ambulance drivers and attendants who have agreed in writing to exclude from compensation eight hours of sleep in a 24-hour period. [Citation.] Nonetheless, the [*Monzon*] court held that this exemption was

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employer and the employee can usually enjoy an uninterrupted night's sleep." In contrast, 29 C.F.R. part 785.21, provides: "An employee who is required to be on duty for less than 24 hours is working even though he is permitted to sleep or engage in other personal activities when not busy."

not applicable in [that] case because there was no written agreement. [Citation.] Instead, recognizing that the DLSE's 'enforcement policy for sleep time closely resembles the federal policy,' the court read into the state regulation defining compensable hours worked the provisions of the federal regulation, 29 [C.F.R.] part 785.22 . . . ." (*Seymore*, *supra*, 194 Cal.App.4th at pp. 381-382, quoting *Monzon*, *supra*, 224 Cal.App.3d at pp. 41-42.) The *Seymore* court went on to observe that "[i]n the 20 years since *Monzon* was decided, no judicial decision brought to our attention has disagreed with its ruling and neither the statute nor the regulations have been amended to modify the ruling." (*Seymore*, *supra*, at p. 382.)

A careful reading of the cases thus disposes of the Class's contention that the rule announced in *Monzon* and followed in *Seymore* was limited to employees governed by Wage Order No. 9. While that wage order contained a specific provision permitting an employer and employee to agree in writing to exclude sleep time from compensation, neither court relied on the provision to exclude the eight hours of sleep time. Instead, both courts looked to the wage order's definition of "hours worked" and found it comparable to the federal definition.[31] The court in *Monzon* explained that the exclusion for sleep time need not be written into the wage order because "the IWC's historical rule had been to permit the exclusion of sleep and meal periods"; thus, even without the specific exclusion applicable to ambulance drivers and attendants found in Wage Order No. 9, the agency recognized that parties could "agree that up to eight hours sleep time of a

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[31] In fact, the court in *Monzon* found former section 3(G) of Wage Order No. 9 related only to the "relaxation of daily overtime requirements," and "did not affect the right of parties to agree that up to eight hours sleep time of a twenty-four hour shift might be excluded from compensable time." (*Monzon*, *supra*, 224 Cal.App.3d at pp. 44-45.)

twenty-four-hour shift might be excluded from compensable time." (224 Cal.App.3d at pp. 42, 45.)

We agree with the courts in *Seymore* and *Monzon* that because the state and federal definitions of hours worked are comparable and have a similar purpose, federal regulations and authorities may properly be consulted to determine whether sleep time may be excluded from 24-hour shifts. Further, we find this determination to be applicable to all wage orders that include essentially the same definition of "hours worked" found in Wage Order No. 9, including Wage Order No. 4.

There are sound reasons for permitting an employer who engages an employee to work a 24-hour shift and compensates him or her for 16 of those hours to exclude the remaining eight hours for sleep time, as long as the time is uninterrupted, a comfortable place is provided, and the parties enter into an agreement covering the period. Most employees would be sleeping for a similar period every day, whether on duty or not, and the compensation provided for the other 16 hours, which should generally include considerable overtime, ensures that the employees receive an adequate wage. While it is true that under the rule applied in *Seymore* and *Monzon*, an employee on duty less than 24 hours would be entitled to compensation for the same period, we find no incongruity. Unlike an employee called to work fewer hours, an employee on a regular 24-hour shift may be presumed to be spending a significant portion of that time asleep or resting. As the employee is being adequately compensated for all his or her waking hours, there is no need to require additional compensation for the period when the employee is asleep.[32]

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[32] Federal regulations too recognize different treatment of employees, depending on the length of their shifts. As noted, 29 C.F.R. part 785.22 allows the exclusion of eight *(Fn. continued on next page.)*

As the courts in *Seymore* and *Monzon* further held, the employer and employee must enter into an agreement before such time can be excluded; the burden is on the employer to prove that an agreement exists and to demonstrate its terms. (*Seymore*, *supra*, 194 Cal.App.4th at pp. 381-382; *Monzon*, *supra*, 224 Cal.App.3d at p. 46.) The On-Call Agreements here manifested the parties' intent that the trailer guards not be compensated for the eight hours between 9:00 p.m. and 5:00 a.m. Although the Agreements did not refer to this period as "sleep time," it is the period when most human beings are likely to be asleep and according to the stipulated facts, the guards are permitted to sleep during this period, or to relax in other ways, and are provided a home-like trailer with adequate sleeping facilities. The Agreements further provide that the guards will be compensated for all the time their ability to sleep is interrupted by the necessity of conducting investigations, and that on any night a guard does not receive at least five hours of uninterrupted free time, the entire eight hours will be compensated. Accordingly, the parties' On-Call Agreements fulfill the requirements that permit eight hours of sleep time to be excluded from their 24-hour weekend shifts.

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hours of sleep time for employees on duty 24 hours or more, while part 785.21 deems an employee engaged for less than 24 hours to be working, even though permitted to sleep or engage in other personal activities. (See fn. 32, *ante*.)

DISPOSITION

The order granting the preliminary injunction is reversed to the extent it requires CPS to compensate the trailer guards for the entirety of their 24-hour weekend shifts. On those days, the guards must be compensated for 16 hours; eight hours may be excluded for sleep time, provided the guards are afforded a comfortable place to sleep, the time is not interrupted, the guards are compensated for any period of interruption, and on any day they do not receive at least five consecutive hours of uninterrupted sleep time, they are compensated for the entire eight hours. In all other respects, the order is affirmed.

Each party is to bear its own costs.

CERTIFIED FOR PUBLICATION

MANELLA, J.

We concur:

WILLHITE, Acting P. J.

SUZUKAWA, J.

2004 WL 2146927 (DOL WAGE-HOUR)

Wage and Hour Division

United States Department of Labor
Opinion LetterFair Labor Standards Act (FLSA)

FLSA2004- 7
July 27, 2004

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*1 This is in response to issues raised in your letter of August 7, 2002, a November 11, 2002 letter from *** of *** and in a November 1, 2002 meeting between *** and Wage and Hour Division (WHD) representatives. Through this correspondence and related discussions, you have raised two principal issues:
A. Under 29 CFR § 785.23, must an employee be free to leave the premises during sleep time in order for that time to be unpaid?

B. An explanation of the relationship between 29 CFR § 785.23 and a June 30, 1988 Enforcement Policy for Hours Worked in Residential Care Establishments (June 1988 Policy) found in WHD's November 1999 Guide for the Personal Care Industry (Guide).

We will respond to these concerns in the order listed above.

A. You expressed concern over the WHD's indication in a November 1, 2002 meeting -- relating a position taken in letters of June 25, 1990, and January 6, 2000 -- that sleep time is always compensable hours worked under the Fair Labor Standards Act (FLSA) if employees are required to stay on the premises during this time. As discussed below, an employee permanently residing on the premises does not always have to be free to leave the premises during sleep time in order for the time to be unpaid.

In your letters, you describe an arrangement in which employees live on the employer's premises (the group home) on a permanent basis to provide care and support to group-home residents with mental retardation or other developmental disabilities. The employees typically share a house or apartment with one to four residents. You state that the employees always have a private bedroom. You also represent that the employees are required to be in the home during the overnight sleeping hours of 10:00 PM to 6:00 AM five or six nights per week. You further state that relief staffing is provided on the remaining nights, but the live-in employees are not required to leave the group home.

In further describing this work arrangement, you represent that the live-in employees are paid for overnight time "only when ... awakened and called to duty" and that "[t]he live-in employee[s] also typically work some awake hours [outside of the sleep time], most often the early morning hours of 6:00 a.m.-9:00 a.m., as [residents] begin their day and prepare to leave for school, work, or day program." You further state that "[t]he live-in employee[s] will also typically work longer hours on the weekend, when [residents] need support throughout the day."

You also advised in the November 1, 2002 meeting that the typical employees in your scenario are rarely awakened during sleep time to perform duties with the residents; the employees are paid for all time spent when awakened to perform such duties; and there is no limitation on the employees' freedom to leave the group home (premises) outside the sleep time period and other assigned (paid) work time.

*2 Three sections in the FLSA's Hours Worked Regulations, 29 CFR Part 785, describe the conditions under which employees are considered to be working even though some of the time is spent sleeping or in other activities:
• Section 785.21 Less than 24-hour duty;

• Section 785.22 Duty of 24 hours or more; and

• Section 785.23 Employees residing on employer's premises or working at home.

Section 785.23 (referred to as the "homeworker exception") is the appropriate section to apply in the scenario that you present, in which the employees are residing permanently on the employer's group-home premises. [1] We have thus reviewed the position previously taken in the referenced 1990 and 2000 letters in light of the "homeworker exception".

In evaluating the application of the section 785.23 homeworker exception to your scenario, we are guided by case law establishing that sleep time for employees who reside at their employer's place of business, work in their home, or have extended tours of duty may not be compensable as work time. See Skidmore v. Swift & Co., 323 U.S. 134, 139 (1944) (sleep time may not be compensable where, "although the employees were required to remain on the premises during the entire time, the evidence shows that they were rarely interrupted in their normal sleeping and eating time, and these are pursuits of a purely private nature which would presumably occupy the employees' time whether they were on duty or not and which apparently could be pursued adequately and comfortably in the required circumstances").

The Division has long recognized that the fact that an employee resides on the employer's premises "does not mean that the employee is necessarily working 24 hours a day." Wage and Hour Interpretive Bulletin No. 13 (May 3, 1939). The Division concluded in Interpretive Bulletin No. 13 that an employer may exclude payment for the extended periods of inactivity that occur when an employee resides on the premises, because the employee is generally able "to carry on a normal routine of living" during such periods. These principles are now set forth in the regulations at section 785.23.

Under section 785.23, an employer may exclude payment for sleep time if there is a reasonable agreement with the employee residing on the premises that takes into account all of the pertinent facts. As we stated in an opinion letter dated August 20, 1985, the agreement:

> must take into account not only the time actually spent working, but also the time when the employee may engage in normal private pursuits, with sufficient time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he or she may leave the premises for personal reasons. The agreement must also consider such relevant factors as the degree to which the use of the employee's personal time is limited or restricted by the conditions of employment and the extent of interruption to eating and sleeping periods. It should be noted that whether an employee is free to use time for personal pursuits will depend on the facts in each case, notwithstanding the provisions of any written agreement.

***3** The courts have looked at similar factors in evaluating the reasonableness of agreements to exclude sleep time for employees residing on the premises of their employers. See Brigham v. Eugene Water & Electric Board, 357 F.3d 931 (9th Cir. 2004); Myers v. Baltimore County, Maryland, 2002 WL 31236296 (4th Cir. 2002); Service Employees International Union v. County of San Diego, 60 F.3d 1345 (9th Cir. 1995); Kelly v. Hines-Rinaldi Funeral Home, Inc., 847 F.2d 147 (4th Cir. 1988).

Under the facts that you represented to WHD, we believe that the employees who permanently reside [2] at group homes have periods of complete freedom outside of sleep time that are sufficient to engage in normal private pursuits for purposes of their own and thus meet the section 785.23 requirement that the employees be able to "*[o]rdinarily* ...engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and *other periods of complete freedom* from all duties when he may leave the premises for purposes of his own." (Emphasis added.)

Accordingly, based upon the language of section 785.23 and limited to the work arrangement that you represented to WHD, any reasonable agreement that you reach with these employees who permanently reside on the premises to exclude sleep time, which takes into consideration all the pertinent facts, will be accepted by the WHD as compliant with the FLSA. This position is conditional upon your representations that the employees in question:
1. Reside on the premises permanently;

2. Are completely free to leave the premises for their own purposes and engage in normal private pursuits during all non-duty time other than the sleep time;

3. Are paid for all time called to duty during the sleep time;

4. Are paid for all the sleep time if such time is interrupted for duty calls to the extent that the employees cannot get at least five hours of sleep during the period (see 29 CFR § 785.22(b));

5. Typically work some hours during non-sleep time, such as, but not limited to, during early morning hours and on weekends; and

6. Are paid for all work performed during non-sleep time, *i.e.*, duty hours in the mornings, afternoons, evenings, and on weekends.

Consistent with the reasons set forth above, we are withdrawing the letters dated June 25, 1990, and January 6, 2000, to the extent those letters conflict with the above stated position. The 2000 letter is withdrawn because it is inconsistent with the applicable regulation, which does not require that an employee be completely free to leave the premises during time for sleeping, eating and entertaining. The regulation establishes that sleeping, eating and entertaining are "normal private pursuits" that may be treated like "other periods of complete freedom from all duties," when an employee may leave the premises for personal reasons. 29 CFR § 785.23. Moreover, the regulation expressly provides that "any reasonable agreement" that considers "all of the pertinent facts will be accepted." Id. Because an agreement that requires an employee who permanently resides on the premises to remain there during sleep time may, in fact, be reasonable, the 2000 letter is withdrawn because it contravenes this position.

***4** Similarly, the requirement in the 1990 letter that employees who reside on the premises permanently must be compensated for at least eight hours in each of five consecutive 24-hour periods in order for sleep time to be uncompensated is withdrawn, because it is inconsistent with the regulation authorizing the parties to reach any reasonable agreement that takes into account all of the relevant facts. This withdrawal applies only to employees permanently residing on the premises; the 1990 letter is not withdrawn with regard to workers who reside on the premises for an extended period of time or to relief workers.

B. You are concerned that the November 1999 Guide appears to indicate an intention to apply the June 1988 criteria defining those employees who reside on an employer's premises "for an extended period of time" to employees who reside on group home premises "on a permanent basis." This June 1988 Policy established a special position that allowed "relief" employees to be treated the same as employees who either reside on the employer's premises permanently or for extended periods of time, with respect to the deduction of sleep time.

The June 1988 Policy also listed the criteria, including certain work schedule and compensation requirements, under which employees who have *separate* residences in the community may be defined as residing on the employer's premises "*for an extended period of time*" under the section 785.23 exception. Employees who maintain a separate residence must meet these criteria as a prerequisite for this potential application of section 785.23. These criteria listed within the June 1998 Policy, including work schedule and compensation requirements, are *not*, however, a prerequisite for the potential application of the section 785.23 exception to employees who reside on the group home premises *on a permanent basis*.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

Sincerely,

Alfred B. Robinson, Jr.
Acting Administrator

Footnotes

1 Section 785.23 reads as follows:
An employee who resides on his employer's premises on a permanent basis or for extended periods of time is not considered as working all the time he is on the premises. Ordinarily, he may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he may leave the premises for purposes of his own. It is, of course, difficult to determine the exact hours worked under these circumstances and any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted. This rule would apply, for example, to the pumper of a stripper well who resides on the premises of his employer and also to a telephone operator who has the switchboard in her own home. [Citations omitted.]

2 WHD defines employees who "permanently reside" on the employer's premises as employees who reside on the employer's place of business seven days per week and therefore have no home of their own other than the one furnished to them by the employer under the employment contract.

2004 WL 2146927 (DOL WAGE-HOUR)

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22 Cal.4th 575
Supreme Court of California

Jose M. **MORILLION** et al., Plaintiffs and Appellants,
v.
ROYAL PACKING COMPANY, Defendant and Respondent.

No. S073725. | March 27, 2000. | As Modified May 10, 2000.

Agricultural workers brought action against their employer to recover compensation for time spent commuting on employer's buses and to recover penalties for employer's failure to compensate them. The Superior Court, Monterey County, No. 110399, William D. Curtis, J., granted employer's motion to strike, sustained employer's demurrer without leave to amend, and dismissed the complaint. Workers appealed. The Court of Appeal affirmed. The Supreme Court granted review, superseding the opinion of the Court of Appeal. The Supreme Court, Chin, J., held that the agricultural employees were subject to employer's "control" during time spent traveling to and from fields on employer-provided buses, and thus, such time was compensable as "hours worked" under Industrial Welfare Commission (IWC) wage order defining hours worked as time during which employee is subject to control of employer.

Reversed and remanded.

Opinion, 77 Cal.Rptr.2d 616, vacated.

West Headnotes (11)

[1] **Labor and Employment**
Rules and regulations

Division of Labor Standards Enforcement's (DLSE) interpretation of "hours worked" in its operations and procedures manual was a regulation that was not promulgated in accordance with the Administrative Procedure Act (APA), and thus, the DLSE interpretive policy was void. West's Ann.Cal.Gov.Code § 11340 et seq.; Cal.Code Regs. title 8, § 11140, subd. 2(G).

23 Cases that cite this headnote

[2] **Labor and Employment**
Construction and operation

Agricultural employees were subject to employer's "control" during time spent traveling to and from fields on employer-provided buses, and thus, such time was compensable as "hours worked" under Industrial Welfare Commission (IWC) wage order defining hours worked as time during which employee is subject to control of employer, where employer required employees to meet at departure points at certain time to ride its buses to work, and prohibited them from using their own cars, subjecting them to verbal warnings and lost wages if they did so, even if employees could engage in limited activities such as reading or sleeping on the bus. Cal.Code Regs. title 8, § 11140, subd. 2(G).

64 Cases that cite this headnote

[3] **Labor and Employment**
Construction and operation

An employee who is subject to an employer's control does not have to be working during that time to be compensated under Industrial Welfare Commission (IWC) wage order defining hours worked as time during which employee is subject to control of employer. Cal.Code Regs. title 8, § 11140, subd. 2(G).

24 Cases that cite this headnote

[4] **Labor and Employment**
Rules and regulations

Division of Labor Standards Enforcement (DLSE) advice letters regarding on–call time —beepers and compensable time were not subject to the rulemaking provisions of the Administrative Procedure Act (APA). West's Ann.Cal.Gov.Code § 11340 et seq.; Cal.Code Regs. title 8, § 11140, subd. 2(G).

21 Cases that cite this headnote

[5] **Constitutional Law**

Encroachment on Executive

Substitution of other words for the express language contained in the regulation amounts to improper judicial legislation.

1 Cases that cite this headnote

[6] **Labor and Employment**

Construction and operation

The level of the employer's control over its employees, rather than the mere fact that the employer requires the employees' activity, is determinative of whether the employees' time is compensable as "hours worked" under Industrial Welfare Commission (IWC) wage order defining hours worked as time during which employee is subject to control of employer. Cal.Code Regs. title 8, § 11140, subd. 2(G).

34 Cases that cite this headnote

[7] **Labor and Employment**

Scope of review

Court should not engage in needless policy determinations regarding wage orders the Industrial Welfare Commission (IWC) promulgates. West's Ann.Cal.Labor Code §§ 1173, 1178.5, 1182.

3 Cases that cite this headnote

[8] **Labor and Employment**

Construction and operation

Time that agricultural employees spent commuting from home to the departure points for buses that employer required employees to use to travel to and from the fields was not compensable as "hours worked" under Industrial Welfare Commission (IWC) wage order defining hours worked as time during which employee is subject to control of employer. Cal.Code Regs. title 8, § 11140, subd. 2(G).

37 Cases that cite this headnote

[9] **Labor and Employment**

Construction and operation

The thrust of the federal Fair Labor Standards Act (FLSA) and Portal–to–Portal Act was not similar to the state Labor Code and the Industrial Welfare Commission (IWC) wage order regarding employee travel time, and thus, the federal statutory scheme was entitled to no deference when determining whether agricultural employees' time spent traveling to and from fields on employer-provided buses was "hours worked" under IWC wage order. Fair Labor Standards Act of 1938, § 3(g), 29 U.S.C.A. 203(g); Portal–to–Portal Act of 1947, §§ 1, 4(a), 29 U.S.C.A. §§ 251, 254(a); Cal.Code Regs. title 8, § 11140, subd. 2(G).

32 Cases that cite this headnote

[10] **Labor and Employment**

Constitutional and Statutory Provisions

State law may provide employees greater protection than the Fair Labor Standards Act (FLSA). Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

4 Cases that cite this headnote

[11] **Labor and Employment**

Construction and operation

Employers may provide optional free transportation to employees without having to pay them for their travel time pursuant to Industrial Welfare Commission (IWC) wage order, as long as employers do not require employees to use this transportation. Cal.Code Regs. title 8, § 11140, subd. 2(G).

2 Cases that cite this headnote

Attorneys and Law Firms

***4** *577** **140** Van Bourg, Weinberg, Roger & Rosenfeld, David A. Rosenfeld and Amy D. Martin, Oakland, for Plaintiffs and Appellants.

Miles E. Locker, San Francisco, and William A. Reich, Ventura, for California Labor Commissioner as Amicus Curiae on behalf of Plaintiffs and Appellants.

Cynthia L. Rice, Santa Rosa, for Antonio Madrigal as Amicus Curiae on behalf of Plaintiffs and Appellants.

Saperstein, Goldstein, Demchak & Baller, David Borgen, Aaron Kaufmann and Laura L. Ho, Oakland, for Asian Law Caucus, Inc., East San Jose Community Law Center, Employment Law Center"–Project of the Legal Aid Society of San *578 Francisco, La Raza Centro Legal, Inc., and Women's Employment Rights Clinic"–olden Gate University School of Law as Amici Curiae on behalf of Plaintiffs and Appellants.

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Rynn & Janowsky, Lewis P. Janowsky, Newport Beach, and Bart M. Botta, for Defendant and Respondent.

Nancy N. McDonough, Sacramento, and Carl G. Borden, for California Farm Bureau Federation as Amicus Curiae on behalf of Defendant and Respondent.

***5 James W. Bogart, for Grower–Shipper Vegetable Association of Central California as Amicus Curiae on behalf of Defendant and Respondent.

Sheppard, Mullin, Richter & Hampton, Richard J. Simmons, Los Angeles, and Jason R. Gasper, for the Employers Group as Amicus Curiae on behalf of Defendant and Respondent.

Opinion

CHIN, J.

The general question presented in this case is whether an employer that requires its employees to travel to a work site on its buses must compensate the employees for their time spent traveling on those buses. Specifically, we must decide whether the **141 time agricultural employees spend traveling to and from the fields on employer-provided buses is compensable as "hours worked" under Industrial Welfare Commission wage order No. 14–80 (Wage Order No. 14–80; found at Cal.Code Regs., tit. 8, § 11140). Wage Order No. 14–80 defines " hours worked" as "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." (Cal.Code Regs., tit. 8, § 11140, subd. 2(G); hereafter, all undesignated subdivision references are to subdivisions of section 11140 of title 8.)

Contrary to the Court of Appeal, we conclude the time agricultural employees are required to spend traveling on their employer's buses is compensable under Wage Order No. 14–80 because they are "subject to the control of an employer" and do not also have to be "suffered or permitted to work" during this travel period. (Subd. 2(G).) Thus, we reverse the Court of *579 Appeal's judgment and remand the matter to the Court of Appeal for further proceedings consistent with this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

This appeal is taken from a judgment of dismissal entered after the trial court sustained defendant's demurrer without leave to amend. Under well-settled law, therefore, we take as true all properly pleaded material allegations. (*Preferred Risk Mutual Ins. Co. v. Reiswig* (1999) 21 Cal.4th 208, 212, 87 Cal.Rptr.2d 187, 980 P.2d 895.)

Defendant Royal Packing Company (Royal) is a corporation doing business in Monterey County. Plaintiffs Jose M. **Morillion** and the class members he represents (collectively, plaintiffs) are present and past agricultural employees of Royal. Royal required plaintiffs to meet for work each day at specified parking lots or assembly areas. After plaintiffs met at these departure points, Royal transported them, in buses that Royal provided and paid for, to the fields where plaintiffs actually worked. At the end of each day, Royal transported plaintiffs back to the departure points on its buses. Royal's work rules prohibited employees from using their own transportation to get to and from the fields. [1]

In their class action against Royal for, inter alia, California Labor Code violations, unfair business practices, and breach of contract, plaintiffs alleged that they were entitled to compensation (including overtime wages and penalties) for the time ***6 they spent traveling to and from the fields. Specifically, plaintiffs claimed Royal should have paid them for the time they spent (1) assembling at the departure points; (2) riding the bus to the fields; (3) waiting for the bus at the end of the day; and (4) riding the bus back to the departure points. [2]

Royal demurred to and moved to strike plaintiffs' first amended complaint. The trial court sustained Royal's

demurrer without leave to amend, ***580** granted its motion to strike, and dismissed plaintiffs' first amended complaint with prejudice.

Plaintiffs appealed. After concluding that the time plaintiffs spent traveling on Royal's ****142** buses is not compensable under federal authority, the Court of Appeal turned its focus to interpreting Wage Order No. 14–80. Relying on *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 576, 59 Cal.Rptr.2d 186, 927 P.2d 296 (*Tidewater*), the Court of Appeal first ruled it could give no weight to the interpretation of "hours worked" contained in the Division of Labor Standards Enforcement's (DLSE) 1989 Operations and Procedures Manual.[3] The Court of Appeal concluded the DLSE interpretive policy was a regulation and thus void because it was not adopted in accordance with the Administrative Procedure Act (APA; Gov.Code, § 11340 et seq.). However, the Court of Appeal recognized that although the DLSE interpretation of "hours worked" is void, the underlying wage order is not. Thus, the Court of Appeal proceeded to interpret Wage Order No. 14–80 itself.

Although plaintiffs were required to travel on Royal's buses and thus were arguably "subject to the control of an employer" (subd. 2(G)), the Court of Appeal did not find this determination dispositive. Instead, to determine whether the time plaintiffs spent traveling on Royal's buses should be considered "hours worked" under Wage Order No. 14–80, the Court of Appeal emphasized the second clause of the "hours worked" definition: "all the time the employee is suffered or permitted to work...." (Subd. 2(G).) This clause, the Court of Appeal concluded, limited whether the time was compensable. In affirming the trial court's judgment, the Court of Appeal held the time plaintiffs spent traveling was not compensable as "hours worked" under Wage Order No. 14–80 because plaintiffs did not work, as that term is "commonly understood," during the required transport.

We granted plaintiffs' petition for review to determine the correct interpretation of "hours worked" under Wage Order No. 14–80, and to determine whether the Court of Appeal correctly applied our decision in *Tidewater, supra,* 14 Cal.4th 557, 59 Cal.Rptr.2d 186, 927 P.2d 296.

*581 II. DISCUSSION

The Industrial Welfare Commission (IWC) "is the state agency empowered to formulate regulations (known as wage orders) governing employment in the State of California." (*Tidewater, supra,* 14 Cal.4th at p. 561, 59 Cal.Rptr.2d 186, 927 P.2d 296, citing Lab.Code, §§ 1173, 1178.5, 1182.) The DLSE "is the state agency empowered to enforce California's labor ***7** laws, including IWC wage orders." (*Tidewater, supra,* 14 Cal.4th at pp. 561–562, 59 Cal.Rptr.2d 186, 927 P.2d 296, citing Lab.Code, §§ 21, 61, 95, 98–98.7, 1193.5.)

"IWC has promulgated 15 [industry and occupation wage] orders—12 orders cover specific industries and 3 orders cover occupations—and 1 general minimum wage order which applies to all California employers and employees (excluding public employees and outside salesmen). [Citations.]" (*Monzon v. Schaefer Ambulance Service, Inc.* (1990) 224 Cal.App.3d 16, 29, 273 Cal.Rptr. 615 (*Monzon*).) Wage Order No. 14–80 governs all persons "employed in an agricultural occupation," as defined in the wage order, subject to exceptions not applicable here. (Cal.Code Regs., tit. 8, § 11140, subd. 1; see *id.,* subd. 1(A), (B), (D), (E).) All 15 wage orders contain the same definition of "hours worked" as does Wage Order No. 14–80, except for IWC wage order Nos. 4–89 and 5–89, which include additional language. (Cal.Code Regs., tit. 8, §§ 11040, subd. 2(H), 11050, subd. 2(H).)

A. Wage Order No. 14–80

[1] Both sides argue the import and application of our decision in *Tidewater* with respect to the interpretation of "hours worked" in the DLSE's 1989 Operations and Procedures Manual. In *Tidewater,* we determined that the DLSE interpretative policies contained in its manual were regulations. ****143** As regulations, the interpretive policies were void because they were not promulgated in accordance with the APA. (*Tidewater, supra,* 14 Cal.4th at p. 572, 59 Cal.Rptr.2d 186, 927 P.2d 296.) However, we held that although the interpretative policy at issue was void, the underlying wage order, which is not subject to the APA, was not. (*Id.* at pp. 569, 577, 59 Cal.Rptr.2d 186, 927 P.2d 296.) "Courts must enforce those wage orders just as they would if the DLSE had never adopted its policy." (*Id.* at p. 577, 59 Cal.Rptr.2d 186, 927 P.2d 296.)

Royal contends that the Court of Appeal correctly gave no deference to the DLSE interpretation of "hours worked" because this interpretive policy was a void regulation under *Tidewater, supra,* 14 Cal.4th at page 576, 59 Cal.Rptr.2d 186, 927 P.2d 296. On the other hand, plaintiffs argue the Court of Appeal nonetheless should have given some deference to this interpretation because it is long-standing. We have repeatedly rejected plaintiffs' argument. (*Tidewater, supra,*

14 Cal.4th at p. 576, 59 Cal.Rptr.2d 186, 927 P.2d 296, citing *582 *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204, 149 Cal.Rptr. 1, 583 P.2d 744.) The Court of Appeal correctly ruled that the DLSE interpretation of "hours worked" in its 1989 Operations and Procedures Manual should be given no deference and also properly determined that it must interpret Wage Order No. 14–80 to decide its enforcement in this case.

[2] Wage Order No. 14–80 defines "hours worked" as "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." (Subd. 2(G).) Plaintiffs argue that because they are compelled to travel on Royal's buses, they are "subject to the control of an employer," thus making their compulsory travel time compensable as "hours worked." (*Ibid.*) Pointing to the plain language of "hours worked," plaintiffs maintain the "suffered or permitted to work" language does not limit whether time spent "subject to the control of an employer" is compensable. (*Ibid.*) We agree.

[3] The word "includes" introduces the "suffered or permitted to work" language of Wage Order No. 14–80. (Subd. 2(G).) Because "includes" is generally a term of enlargement (*Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1101, 17 Cal.Rptr.2d 594, 847 P.2d 560), the definition of "hours worked" is expanded by, rather than limited to, the time spent when an employee is "suffered or permitted to work." (Subd. 2(G).) Indeed, the two phrases—"time ***8 during which an employee is subject to the control of an employer" and "time the employee is suffered or permitted to work, whether or not required to do so" (*ibid.*) —can also be interpreted as independent factors, each of which defines whether certain time spent is compensable as "hours worked." Thus, an employee who is subject to an employer's control does not have to be working during that time to be compensated under Wage Order No. 14–80. (See *Bono Enterprises, Inc. v. Bradshaw* (1995) 32 Cal.App.4th 968, 974–975, 38 Cal.Rptr.2d 549 (*Bono*) [interpreting the common meaning of "hours worked" in IWC wage order No. 1–89], disapproved on other grounds in *Tidewater, supra,* 14 Cal.4th at pp. 573–574, 59 Cal.Rptr.2d 186, 927 P.2d 296; *Aguilar v. Association for Retarded Citizens* (1991) 234 Cal.App.3d 21, 30, 285 Cal.Rptr. 515 (*Aguilar*).)

While cases interpreting the phrase "hours worked" have not thoroughly examined the definition's scope or defined the relationship between the two clauses, they nonetheless support the view that the "suffered or permitted to work" clause in Wage Order No. 14–80 does not limit the "control" clause under the definition of "hours worked." (Subd. 2(G); see, e.g., *Bono, supra,* 32 Cal.App.4th 968, 38 Cal.Rptr.2d 549; *Aguilar, supra,* 234 Cal.App.3d 21, 285 Cal.Rptr. 515; see also *583 *Madera Police Officers Assn. v. City of Madera* (1984) 36 Cal.3d 403, 410, 204 Cal.Rptr. 422, 682 P.2d 1087 ["Code 7" meal breaks for police department employees can be counted as hours worked under a two-part analysis—whether the restrictions on employees are "primarily directed toward the fulfillment of the employer's requirements and policies," and whether employees are "substantially restricted during Code 7 time, so as to be unable to attend to private pursuits"]; **144 *Monzon, supra,* 224 Cal.App.3d at p. 48, 273 Cal.Rptr. 615; *id.* at p. 50, 273 Cal.Rptr. 615 (conc. & dis. opn. of Johnson, J.) [ambulance drivers who sleep in designated sleeping area are "subject to the control of the employer," and absent an exception excluding the time spent sleeping as compensable, it counts as "hours worked"]; cf. *Brewer v. Patel* (1993) 20 Cal.App.4th 1017, 1021, 25 Cal.Rptr.2d 65 [motel employees who reside on the premises are "subject to the control of an employer" but must "carry[ ] out assigned duties" to be compensated under former IWC wage order No. 5–89].)

In *Bono,* the Court of Appeal found that employees who were required to remain on the work premises during their lunch hour had to be compensated for that time under the definition of "hours worked." (*Bono, supra,* 32 Cal.App.4th at p. 975, 38 Cal.Rptr.2d 549.) The *Bono* court focused solely on the "subject to the control of an employer" clause. (*Id.* at pp. 974–975, 38 Cal.Rptr.2d 549.) Relying on the dictionary definition of "control," it interpreted the clause to mean when an employer "directs, commands or restrains" an employee. (*Id.* at p. 975, 38 Cal.Rptr.2d 549.) Thus, "[w]hen an employer directs, commands or restrains an employee from leaving the work place during his or her lunch hour and thus prevents the employee from using the time effectively for his or her own purposes, that employee remains subject to the employer's control. According to [the definition of hours worked], that employee must be paid." (*Ibid.*) The *Bono* court, on the facts before it, did not find that the employees worked during their lunch hour, nor did it reach the issue whether the "suffered or permitted to work" language otherwise limited their right to compensation.

Similarly, in *Aguilar,* the Court of Appeal held that the time an employer required personal attendant employees to spend at its premises, even when they were allowed to sleep, should

be considered "hours worked."[4] ***9** (*Aguilar, supra,* 234 Cal.App.3d at p. 30, 285 Cal.Rptr. 515.) As in *Bono,* the *Aguilar* court found that the ***584** employees were "subject to the control of an employer" and did not consider whether or not the employees were "suffered or permitted to work." (*Aguilar, supra,* 234 Cal.App.3d at p. 30, 285 Cal.Rptr. 515.) Instead, the court held the employees should be compensated for the time they spent sleeping while on the employer's premises, even though they performed no work during that time. (*Ibid.*)

[4] Arguing the "control" clause functions independently of the "suffered or permitted to work" clause, plaintiffs' amici curiae Asian Law Caucus, Inc., et al., rely on two DLSE advice letters, entitled "On–Call" Time—Beepers, and Compensable Time. Unlike interpretive policies contained in the DLSE's 1989 Operations and Procedures Manual, advice letters are not subject to the rulemaking provisions of the APA. (*Tidewater, supra,* 14 Cal.4th at p. 571, 59 Cal.Rptr.2d 186, 927 P.2d 296; see also *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 21, 78 Cal.Rptr.2d 1, 960 P.2d 1031 (conc. opn. of Mosk, J.) (*Yamaha*).) Although Royal correctly observes that the factual situations these advice letters address may be distinguished from this case, we nonetheless find persuasive the following general statement of "hours worked" the DLSE made in each of these letters: "Under California law it is only necessary that the worker be subject to the 'control of the employer' in order to be entitled to compensation." (Cal. Dept. Industrial Relations, ****145** DLSE Chief Counsel H. Thomas Cadell, advice letter, "On–Call" Time—Beepers (Mar. 31, 1993) pp. 2–3; same author, advice letter, Compensable Time (Feb. 3, 1994) p. 3 [discussing clothes-changing time].) This DLSE interpretation is consistent with our independent analysis of hours worked.

In determining that plaintiffs' compulsory travel time may be compensable under just the "control" language, we do not agree with the Court of Appeal that we would be ignoring the "suffered or permitted to work" language of the "hours worked" definition. (Subd. 2(G).) The Court of Appeal's belief implicitly rests on the assumption that whenever an employee is "suffered or permitted to work, whether or not required to do so" (*ibid.*), that employee is subject to an employer's control; in other words, the "suffered or permitted to work" part of the definition cannot be independently satisfied. This assumption is incorrect.

Contrary to the Court of Appeal's interpretation, the phrase "suffered or permitted to work, whether or not required to do so" (subd. 2(G)) encompasses a meaning distinct from merely "working." Along with other amici curiae, the California Labor Commissioner notes that "the time the employee is suffered or permitted to work, whether or not required to do so" ***585** *ibid.*) can be interpreted as time an employee is working but is not subject to an employer's control. This time can include work such as unauthorized overtime, which the employer has not requested or required. "Work not requested but suffered or permitted is work time. For example, an employee may voluntarily continue to work at the end of the shift.... The employer knows or has reason to believe that he is ***10** continuing to work and the time is working time. [Citations.]" (29 C.F.R. § 785.11 (1998).) "In all such cases it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed." (29 C.F.R. § 785.13 (1998).) Although our state cases have not interpreted the phrase, federal cases have discussed the meaning of "suffer or permit to work" defining "[e]mploy" under the FLSA. (29 U.S.C. § 203(g).) " '[T]he words "suffer" and "permit" as used in the statute mean "with the knowledge of the employer." ' [Citation.] Thus an employer who knows or should have known that an employee is or was working overtime must comply with the provisions of [29 U.S.C.] § 207 [maximum hours]." (*Forrester v. Roth's I.G.A. Foodliner, Inc.* (9th Cir.1981) 646 F.2d 413, 414; see also 29 C.F.R §§ 785.11, 785.13.)

Implicitly relying on the Court of Appeal's revised definition of "hours worked" ("the definition of 'hours worked' should mean the hours suffered or permitted to work [in an agricultural occupation], whether or not required to do so"), Royal argues the definition of "[e]mployed in an agricultural occupation" in Wage Order No. 14–80 (subd. 2(C)(4)) supports its claim that plaintiffs' compulsory travel time is not compensable. Because the phrase "transportation on the farm or to the place of first processing or distribution" (*ibid.*) is included in the definition of "[e]mployed in an agricultural occupation" (subd. 2(C)), Royal asserts that other types of transportation are accordingly excluded, based on the principle of statutory construction that the inclusion of one term excludes another. Thus, Royal contends plaintiffs' compulsory travel time is excluded and is therefore not compensable as "hours worked." Royal's contention, however, is based on the Court of Appeal's revised definition, which we find to be improper.

[5] In redefining "hours worked," the Court of Appeal substitutes other words for the express language contained under "hours worked," which amounts to improper judicial legislation. (*County of Santa Clara v. Perry* (1998) 18 Cal.4th 435, 446, 75 Cal.Rptr.2d 738, 956 P.2d 1191 [" ' " '[W]hatever may be thought of the wisdom, expediency, or policy of the act [citations],' " ' we have no power to rewrite the statute to make it conform to a presumed intention that is not expressed. [Citations.]") Rather than focusing solely on the express definition of "hours worked," the Court of Appeal extended its review to the definitions of "[e]mployed in an agricultural occupation" and "[e]mploy" contained in Wage Order No. 14–80. (Subd. 2(C), (D).)

***586** Although the definition of "[e]mploy" ("to engage, suffer, or permit to work") (subd. ****146** 2(D)) may parallel language within the "hours worked" definition ("suffered or permitted to work") (subd. 2(G)), nothing within Wage Order No. 14–80 suggests reading the definition of "hours worked" as the Court of Appeal revised it. Wage Order No. 14–80 expressly defines " [e]mployed in an agricultural occupation" as the occupations described in subdivision 2(C) (1) through (7). (Subd. 2(C).) Thus, contrary to Royal's contention, the definition of "[e]mployed in an agricultural occupation" (*ibid.*) does not reference the type of work or activity that may be compensable, but rather lists the kinds of occupations that are subject to Wage Order No. 14–80 ("This Order shall apply to all persons employed in an agricultural occupation....") (Subd. 1.) Accordingly, we reject Royal's argument that the definition of "[e]mployed in an agricultural occupation" (subd. 2(C)) supports its argument against making plaintiffs' compulsory travel time compensable.

We also reject Royal's contention that plaintiffs were not under its control during the required bus ride because they could read on the bus, or perform other personal activities. Permitting plaintiffs to engage in limited activities such as reading or sleeping on the bus does not allow them to *****11** use "the time effectively for [their] own purposes." (*Bono, supra,* 32 Cal.App.4th at p. 975, 38 Cal.Rptr.2d 549.) As several amici curiae observe, during the bus ride plaintiffs could not drop off their children at school, stop for breakfast before work, or run other errands requiring the use of a car. Plaintiffs were foreclosed from numerous activities in which they might otherwise engage if they were permitted to travel to the fields by their own transportation. Allowing plaintiffs the circumscribed activities of reading or sleeping does not affect, much less eliminate, the control Royal exercises by requiring them to travel on its buses and by prohibiting them from effectively using their travel time for their own purposes. Similarly, as one amicus curiae suggests, listening to music and drinking coffee while working in an office setting can also be characterized as personal activities, which would not otherwise render the time working noncompensable.

[6] Royal argues that this interpretation of "hours worked" is so broad that it encompasses all activity the employer "requires," including all commute time, because employees would not commute to work unless the employer required their presence at the work site, and all grooming time, because employees might not, for example, shave unless the employer's grooming policy required them to do so. We disagree. Royal does not consider the level of control it exercises by determining when, where, and how plaintiffs must travel. In contrast to Royal's employees, employees who commute to work on their own decide when to leave, which route to take to work, and ***587** which mode of transportation to use. By commuting on their own, employees may choose and may be able to run errands before work and to leave from work early for personal appointments. The level of the employer's control over its employees, rather than the mere fact that the employer requires the employees' activity, is determinative. (See *Bono, supra,* 32 Cal.App.4th at p. 975, 38 Cal.Rptr.2d 549; *Aguilar, supra,* 234 Cal.App.3d at p. 30, 285 Cal.Rptr. 515.)

[7] Arguing that the compelled nature of plaintiffs' travel is not dispositive, Royal underscores the Court of Appeal's policy argument: "Since the commute was something that would have had to occur regardless of whether it occurred on Royal buses, and [plaintiffs] point to no particular detriment that ensued from riding the Royal buses," compensating employees for this commute time would not "make sense, as a matter of policy." We are not persuaded. First, we emphasize that we should not engage in needless policy determinations regarding wage orders the IWC promulgates. "[R]eview of the [IWC]'s wage orders is properly circumscribed.... 'A reviewing court does not superimpose its own policy judgment upon a quasi-legislative agency in the absence of an arbitrary decision....' " (*Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 702, 166 Cal.Rptr. 331, 613 P.2d 579 (*Industrial Welfare Com.*).) Second, the Court of Appeal's policy argument in this case suffers from the court's failure to distinguish between travel that the employer ****147** specifically compels and controls, as in this case, and an ordinary commute that employees take on their own. When

an employer requires its employees to meet at designated places to take its buses to work and prohibits them from taking their own transportation, these employees are "subject to the control of an employer," and their time spent traveling on the buses is compensable as "hours worked." (Subd. 2(G).)

Interpreting the plain language of "hours worked" (subd. 2(G)), we find that plaintiffs' compulsory travel time, which includes the time they spent waiting for Royal's buses to begin transporting them, was compensable. Royal required plaintiffs to meet at the departure points at a certain time to ride its buses to work, and it prohibited them from using their own cars, subjecting them to verbal warnings and lost wages if they did so. By " 'direct[ing]' ***12 " and " 'command[ing]' " plaintiffs to travel between the designated departure points and the fields on its buses, Royal " 'control[led]' " them within the meaning of "hours worked" under subdivision 2(G). (*Bono, supra,* 32 Cal.App.4th at pp. 974–975, 38 Cal.Rptr.2d 549.)

[8] This conclusion should not be construed as holding that all travel time to and from work, rather than compulsory travel time as defined above, is compensable. Therefore, while the time plaintiffs spent traveling on Royal's buses to and from the fields is compensable as "hours worked" under *588 subdivision 2(G), the time plaintiffs spent commuting from home to the departure points and back again is not. Moreover, we emphasize that employers do not risk paying employees for their travel time merely by providing them transportation. Time employees spend traveling on transportation that an employer provides but does not require its employees to use may not be compensable as "hours worked." (*Ibid.*) Instead, by requiring employees to take certain transportation to a work site, employers thereby subject those employees to its control by determining when, where, and how they are to travel. Under the definition of "hours worked," that travel time is compensable. (Subd. 2(G); see *ante,* 94 Cal.Rptr.2d at p. 11, 995 P.2d at p. 147.)

B. Weight of Federal Authority

[9] Although we find plaintiffs' compulsory travel time is compensable under the plain language of Wage Order No. 14–80, we must necessarily examine the federal FLSA (29 U.S.C. § 201 et seq.), the Portal–to–Portal Act of 1947 (Portal–to–Portal Act) (29 U.S.C. § 251 et seq.), and related federal cases and regulations, which the Court of Appeal extensively discussed in reaching a different conclusion. Royal argues that the Court of Appeal's reliance on federal authority was minimal, and, at the same time, contends that we should give deference to federal authority in this case. For reasons that follow, we conclude that the Court of Appeal, notwithstanding its attempt to separate its analyses of federal and state labor law, confounded the two differing bodies of law, leading in part to its erroneous interpretation of Wage Order No. 14–80. Further rejecting Royal's contention, we conclude that the federal statutory scheme, which differs substantially from the state scheme, should be given no deference.

Accepting Royal's argument that federal authority should serve as persuasive guidance on this issue, the Court of Appeal determined that "[t]he federal statutory scheme is not identical to the California scheme but the thrust of the laws is similar." Absent from this determination, however, is any analysis of what aspect or characteristic of these two extensive statutory schemes make their "thrust[s] ... similar." In determining how much weight to give federal authority in interpreting a California wage order, courts are cautioned to make this comparative analysis (***Ramirez*** *v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 798, 85 Cal.Rptr.2d 844, 978 P.2d 2 (***Ramirez***)), which we undertake here.

First, we recognize that the FLSA does not include an express definition of "hours worked," except "in the form of a limited exception for clothes-changing and wash-up time" under 29 United States Code section 203(*o*). (29 C.F.R. § 785.6 (1998); see also *Bono, supra,* 32 Cal.App.4th at p. 976, 38 Cal.Rptr.2d 549; *589 cf. *Monzon, supra,* 224 Cal.App.3d at pp. 45–46, 273 Cal.Rptr. 615.) However, the FLSA specifically defines the **148 term "[e]mploy," which "includes to suffer or permit to work." (29 U.S.C. § 203(g).) Federal regulations implementing the FLSA define "hours worked" to include: "(a) [A]ll time during which an employee is required to be on duty or to be on the employer's premises or at a prescribed workplace and (b) all time during which an employee is suffered or permitted to work whether or not he is required to do so." (***13 29 C.F.R. § 778.223 (1998); see also 29 C.F.R. §§ 553.221(b), 785.7 (1998).)

As the Court of Appeal observed, the Portal–to–Portal Act (29 U.S.C. § 251 et seq.), which amended the FLSA, relieves employers from paying minimum wages or overtime compensation to employees for the following activities: "(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and (2) activities which are preliminary to or postliminary to said principal activity or activities...." (29 U.S.C. § 254(a).) Thus, ordinary travel from

home to work, "which is a normal incident of employment," is not compensable time under the FLSA and Portal–to–Portal Act. (29 C.F.R. § 785.35 (1998).)

Some courts, as the Court of Appeal noted, have also interpreted the FLSA and Portal–to–Portal Act to preclude paying employees for their time spent traveling on employers' buses from designated meeting points to the actual place of work when employees do not work during the travel period. (See, e.g., *Vega v. Gasper* (5th Cir.1994) 36 F.3d 417, 425 (*Vega*) [farm workers assembled at pickup points and rode to the fields on buses that farm labor contractor-employer provided];[5] *Dolan v. Project Const. Corp.* (D.Colo.1983) 558 F.Supp. 1308 (*Dolan*) [electricians checked in at the main camp and were required to ride to the jobsite on company-provided buses]; see also 29 C.F.R. § 790.7 (1998) [giving examples of preliminary and postliminary activities under the Portal–to–Portal Act].) Applying this federal authority, the Court of Appeal concluded that plaintiffs' compulsory travel time is not compensable under federal law.

In discussing federal authority, however, the Court of Appeal failed to compare the federal definition of "hours worked" to the state definition ***590** under Wage Order No. 14–80. While one of our lower courts has recognized the "parallel" nature of the federal and state definitions of "hours worked" (*Monzon, supra,* 224 Cal.App.3d at p. 46, 273 Cal.Rptr. 615), the DLSE has underscored the substantial differences between the federal and state definitions in numerous advice letters. (See *Yamaha, supra,* 19 Cal.4th at p. 21, 78 Cal.Rptr.2d 1, 960 P.2d 1031 (conc. opn. of Mosk, J.) [administrative interpretation embodied in opinion letter is persuasive].) We need not resolve the foregoing conflict, however, in that we do not believe the similarity or differences between the two definitions of "hours worked" is dispositive of whether plaintiffs' compulsory travel time is compensable under state law. Instead, we find that the Portal–to–Portal Act, which expressly and specifically exempts travel time as compensable activity under the FLSA (29 U.S.C. § 254), should be the focus of our comparative analysis.

The California Labor Code and IWC wage orders do not contain an express exemption for travel time similar to that of the Portal–to–Portal Act.[6] As set forth in *****14** its findings ****149** and declaration of policy, Congress enacted the Portal–to–Portal Act in 1947 partly in response to its concern that the FLSA "has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees...." (29 U.S.C. § 251; see also *Dolan, supra,* 558 F.Supp. at pp. 1309–1310.) Indeed, in these findings, Congress set forth numerous factors justifying the Portal–to–Portal Act's enactment, from "(1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others ..." to "(10) serious and adverse effects upon the revenues of Federal, State, and local governments would occur." (29 U.S.C. § 251.) In addition, the congressional declaration of policy in this section identifies the need "to correct existing evils (1) to relieve and protect interstate commerce from practices which burden and obstruct it...." (29 U.S.C. § 251(b)(1).)

In contrast to these specific findings showing the congressional intent underlying the Portal–to–Portal Act, the Legislature has not similarly identified existing evils under state law. Royal and its amicus curiae California ***591** Farm Bureau Federation identify state statutes, like the California Clean Air Act of 1988 (Health & Saf.Code, § 40910 et seq.), and the Katz–Kopp–Baker–Campbell Transportation Blueprint for the Twenty–First Century, addressing, in part, traffic congestion (Gov.Code, § 65088 et seq.), as public policy grounds for not making plaintiffs' compulsory travel time compensable. Although these statutes promote cognizable benefits to the environment that may be realized when workers share transportation, we are not convinced that they bear directly on whether compulsory travel time is compensable. They do not compare to the express findings and declaration of policy in the federal statute. (29 U.S.C. § 251.) Accordingly, we do not agree with the Court of Appeal that the thrusts of the federal and state statutory schemes are similar, for purposes of deciding whether plaintiffs' compulsory travel time is compensable.

Before June 1947, California's definition of "hours worked" was entitled "Hours Employed" in most wage orders and was defined differently.[7] However, in 1947, when Congress enacted the Portal–to–Portal Act, the IWC amended the definition to the current version of "hours worked." Royal's amicus curiae, the Employers Group, argues that the 1947 amendment, which eliminated specific language regarding waiting time and time when employees are required to be on their employer's premises and on duty (in addition to "time when an employee is required or instructed to travel on the employer's business *****15** after the beginning and before the end of her work day"; see, e.g., Cal.Admin.Code, tit. 8, § 11346, subd. (h)(2)), covered preliminary and postliminary activities, including travel time, which are not

compensable under the Portal–to–Portal Act. Amicus curiae argues, therefore, that the IWC revised the definition of "hours worked" to correspond to the federal standard.

This argument proves too much. In addition to eliminating the cited language, the **150 IWC added the phrase "the time during which an employee is subject to the control of an employer" to the definition of "hours worked." *592 "Control" may encompass activities described by the eliminated language (as discussed *ante,* 94 Cal.Rptr.2d at pp. 8–9, 995 P.2d at pp. 143–145). (See *Bono, supra,* 32 Cal.App.4th at pp. 974–975, 38 Cal.Rptr.2d 549; *Aguilar, supra,* 234 Cal.App.3d at p. 30, 285 Cal.Rptr. 515.) Absent convincing evidence of the IWC's intent to adopt the federal standard for determining whether time spent traveling is compensable under state law, we decline to import any federal standard, which expressly eliminates substantial protections to employees, by implication. Accordingly, we do not give much weight to the federal authority on which the Court of Appeal relied. (See ***Ramirez,*** *supra,* 20 Cal.4th at pp. 794–798, 85 Cal.Rptr.2d 844, 978 P.2d 2.)

[10] Moreover, our departure from the federal authority is entirely consistent with the recognized principle that state law may provide employees greater protection than the FLSA. (***Ramirez,*** *supra,* 20 Cal.4th at p. 795, 85 Cal.Rptr.2d 844, 978 P.2d 2 ["IWC's wage orders, although at times patterned after federal regulations, also sometimes provide greater protection than is provided under federal law in the [FLSA] ...."], citing *Tidewater, supra,* 14 Cal.4th at pp. 566–567, 59 Cal.Rptr.2d 186, 927 P.2d 296; *Aguilar, supra,* 234 Cal.App.3d at p. 34, 285 Cal.Rptr. 515; *Skyline Homes, Inc. v. Department of Industrial Relations* (1985) 165 Cal.App.3d 239, 247, 211 Cal.Rptr. 792, disapproved on other grounds in *Tidewater, supra,* 14 Cal.4th at pp. 572–573, 59 Cal.Rptr.2d 186, 927 P.2d 296; see also *Industrial Welfare Com., supra,* 27 Cal.3d at p. 727, 166 Cal.Rptr. 331, 613 P.2d 579.)[8] Indeed, we have recognized that "past decisions additionally 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." (*Industrial Welfare Com., supra,* 27 Cal.3d at p. 702, 166 Cal.Rptr. 331, 613 P.2d 579.) Finally, we note that where the IWC intended the FLSA to apply to wage orders, it has specifically so stated. (See Cal.Code Regs., tit. 8, §§ 11040, subd. 2(H), 11050, subd. 2(H) ["Within the health care industry, the term 'hours worked' means the time during which an employee is suffered or permitted to work for the employer, whether or not required to do so, as interpreted in accordance with the provisions of the [FLSA]"].)

Royal attempts to downplay the extent to which the Court of Appeal relied on federal authority in reaching its decision, arguing that "federal authorities only provided minimal assistance to the Court in its decision." We disagree. We do not perceive any other reason why the Court of Appeal would devote much discussion to the federal scheme, except to indicate the court's view of the persuasiveness and weight of federal authority on this issue. This observation is more compelling in view of the Court of Appeal's discussion ***16 *593 interpreting Wage Order No. 14–80, which contains little state authority, but cites the federal case, *Vega, supra,* 36 F.3d at page 425, and the Court of Appeal's corresponding conclusion that plaintiffs' "travel time appears to have been nothing more than an extended home-to-work-and-back commute."

Notwithstanding Royal's contention that the Court of Appeal did not place great weight on federal authority, Royal urges us to consider federal authority in determining whether the compulsory travel time is compensable. Royal cites California cases holding that because California wage laws are patterned on federal statutes, federal cases and regulations interpreting those federal statutes may serve as persuasive guidance for interpreting California law. (*Building Material & Construction Teamsters' Union* **151 *v. Farrell* (1986) 41 Cal.3d 651, 658, 224 Cal.Rptr. 688, 715 P.2d 648; *Nordquist v. McGraw–Hill Broadcasting Co.* (1995) 32 Cal.App.4th 555, 562, 38 Cal.Rptr.2d 221; *Monzon, supra,* 224 Cal.App.3d at pp. 45–46, 273 Cal.Rptr. 615; *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 726, fn. 1, 245 Cal.Rptr. 36; *Alcala v. Western Ag Enterprises* (1986) 182 Cal.App.3d 546, 550, 227 Cal.Rptr. 453.)

Significantly, no case discusses the precise issues of whether travel time is compensable and whether the Portal–to–Portal Act applies. As discussed (*ante,* 94 Cal.Rptr.2d at pp. 14–15, 995 P.2d at pp. 149–150), Congress's extensive findings underlying the Portal–to–Portal Act, and the absence of such findings in the state scheme, compel the conclusion that federal and state law regarding travel time are dissimilar. Moreover, we recently disapproved of using federal regulations extensively to interpret a California wage order, without recognizing and appreciating the critical differences in the state scheme. (***Ramirez,*** *supra,* 20 Cal.4th at p. 798, 85 Cal.Rptr.2d 844, 978 P.2d 2.)

In ***Ramirez,*** we determined the meaning of "outside salesperson" under IWC wage order No. 7–80 (Cal.Code Regs., tit. 8, § 11070). After finding no California cases or regulations interpreting this wage order, the Court of Appeal turned to federal regulations, which employed a different, qualitative method (as opposed to a quantitative method under the California wage order) to decide whether an employee is an outside salesperson. (***Ramirez,*** *supra,* 20 Cal.4th at pp. 796–797, 85 Cal.Rptr.2d 844, 978 P.2d 2.) We found that the Court of Appeal erred in relying on federal authority to construe wage order No. 7–80. "In confounding federal and state labor law, and thereby providing less protection to state employees, the Court of Appeal and the trial court departed from the teaching that where the language or intent of state and federal labor laws substantially differ, reliance on federal regulations or interpretations to construe state regulations is misplaced." ***594** (***Ramirez,*** *supra,* 20 Cal.4th at p. 798, 85 Cal.Rptr.2d 844, 978 P.2d 2.) "The federal authorities are of little if any assistance in construing state regulations which provide greater protection to workers." (*Bono, supra,* 32 Cal.App.4th at p. 976, 38 Cal.Rptr.2d 549.) Indeed, "federal law does not control unless it is more beneficial to employees than the state law." (*Aguilar, supra,* 234 Cal.App.3d at p. 34, 285 Cal.Rptr. 515, citing 29 U.S.C. § 218.)

After comparing federal and state authority, we conclude that the relevant portions of the FLSA and Portal–to–Portal Act differ substantially from Wage Order No. 14–80 and related state authority. Therefore, Royal's reliance on federal authority, and the Court of Appeal's deference to it, are not persuasive.

C. Public Policy Considerations

Royal and its amici curiae identify public policy considerations that weigh against making plaintiffs' compulsory travel time compensable. They contend that employer-provided transportation reduces the number of cars in use, thereby reducing air pollution and traffic congestion. (See *****17** Cal. Clean Air Act of 1988 (Health & Saf.Code, § 40910 et seq.); Katz–Kopp–Baker–Campbell Transportation Blueprint for the Twenty–First Century (Gov.Code, § 65088 et seq.).) In addition, Royal notes that many agricultural fields are located in remote areas not easily accessible by cars; allowing employees to drive their own cars to the fields increases the risk of accidents and injuries. Employee safety is a significant concern, which all employers should consider. Common sense also dictates that increased automobile emissions are likely to have a detrimental effect on produce being grown in California's fields. Finally, on a practical level, employer-provided transportation benefits both employees and employers—employees travel to the work site free of charge, while employers can ensure enough employees are available and ready to work.

[11] The foregoing considerations, however, do not override the plain language of Wage Order No. 14–80, which supports plaintiffs' claim that their compulsory travel time is compensable as "hours worked." In deciding Royal must compensate plaintiffs for this time, we nonetheless remain optimistic that ****152** employers will not be discouraged from providing free transportation as a service to their employees. As we have emphasized throughout, Royal *required* plaintiffs to ride its buses to get to and from the fields, subjecting them to its control for purposes of the "hours worked" definition. However, employers may provide optional free transportation to employees without having to pay them for their travel time, as long as employers do not require employees to use this transportation.

***595 III. CONCLUSION**

We conclude that plaintiffs' compulsory travel time is compensable as "hours worked" under Wage Order No. 14–80. Therefore, we reverse the Court of Appeal's judgment and remand this action to the Court of Appeal for further proceedings consistent with this opinion.

GEORGE, C.J., MOSK, KENNARD, BAXTER, WERDEGAR, and BROWN, JJ., concur.

Parallel Citations

22 Cal.4th 575, 995 P.2d 139, 6 Wage & Hour Cas.2d (BNA) 45, 00 Cal. Daily Op. Serv. 2373, 2000 Daily Journal D.A.R. 3193

Footnotes

1 Royal's rules provided: "The employee will show up at the departure point of his appropriate area at the time indicated by his/her supervisor or foreman and the employee will park his/her personal vehicle. Then, at this same place, the employee will take the

appropriate crew bus which will take him/her to his/her place of work. In the afternoon, after the employee has completed his/her shift, the bus will take the employee back to the original departure point. [¶] If for any reason the employee did not arrive at the departure center on time or decided to drive his/her personal vehicle to his/her place of work, he/she will be given a verbal warning the first time this occurs. [¶] If for the same reason or a different reason, the employee takes his/her personal vehicle to his/her place of work a second time, the company will call this to his/her attention, indicating that if this ever happens again, the company will take the necessary action to correct the problem and he/she will be sent home and lose the days [*sic*] work when this occurs."

2 We sometimes refer to this time as "compulsory travel time." For reasons that follow, we adopt this reference to distinguish between travel to and from a work site that an employer controls and requires, and an ordinary commute from home to work and back that employees take on their own. Accordingly, this compulsory travel time does not include the time plaintiffs spent commuting from home to the departure points and from the departure points back again.

3 The interpretation in the DLSE's 1989 Operations and Procedures Manual provided, in pertinent part: "Where employers provide transportation such as farm labor buses 'for the convenience of the workers,' it should be ascertained whether employees are allowed to drive their own cars to the job site or field. If not, the time they are required to be at the point to catch the bus is the beginning of their hours worked."

4 We recognize that *Aguilar* concerned the definition of "hours worked" under former IWC wage order No. 5–80 (now superseded by IWC wage order No. 5–89, set forth at Cal. Code Regs., tit. 8, § 11050). In contrast to Wage Order 14–80, former wage order No. 5–80's definition of "hours worked" included an additional provision regarding compensable duties of an employee who resided on the employer's premises. Further, this definition was subsequently revised in 1993 to include reference to the applicability of the federal Fair Labor Standards Act of 1938 (FLSA) (29 U.S.C. § 201 et seq.) to the health care industry. The *Aguilar* court did not consider the provision regarding an employee who resided at the premises (nor obviously the 1993 amendment regarding the FLSA) in determining that the time employees spent sleeping was compensable as hours worked. (*Aguilar, supra,* 234 Cal.App.3d at p. 30, 285 Cal.Rptr. 515.) There is no indication that employees in *Aguilar* were required to reside at the employer's premises. (*Id.* at pp. 24, 33–34, 285 Cal.Rptr. 515.)

5 We find *Vega, supra,* 36 F.3d 417, to be consistent with our opinion. In contrast to plaintiffs, the employees in *Vega* "were *not* required to use [defendant] Gasper's buses to get to work in the morning. They chose ... how to get to and from work. Not all of Gasper's field workers rode his buses." (*Vega, supra,* 36 F.3d at p. 425.) Although the *Vega* court identified other factors, such as the fact that the workers did not load tools or prepare for work while on the buses, to support its finding that the travel time was "ordinary to-work or from-work travel and not compensable" under the Portal–to–Portal Act (*Vega, supra,* 36 F.3d at p. 425), we find the fact that the *Vega* employees were free to choose—rather than required—to ride their employer's buses to and from work, a dispositive, distinguishing fact.

6 Plaintiffs and their amici curiae argue Labor Code section 510 supports their claim that the compulsory travel time is compensable. The statute provides that certain time spent commuting "to and from the first place at which an employee's presence is required by the employer" on employer-provided transportation for purposes of ridesharing (defined in Veh.Code, § 522), is excluded from the calculation of an eight-hour day. (Lab.Code, § 510.) Although both Royal and plaintiffs' amici curiae have underscored certain portions of Labor Code section 510 's legislative history to support their respective positions, we are not persuaded that the section clearly applies to plaintiffs' compulsory travel time. Because that time is compensable under the plain language of Wage Order No. 14–80, we decline to determine the exact relationship between Labor Code section 510 and the definition of "hours worked" under Wage Order No. 14–80, which is not an issue squarely before this court.

7 For example, former IWC wage order No. 1 N.S. provided as follows: " 'Hours Employed' means all time during which: [¶] (1) An employee is required to be on the employer's premises, or to be on duty, or to be at a prescribed work place; or [¶] (2) An employee is suffered or permitted to work whether or not required to do so. Such time includes, but shall not be limited to, waiting time." (Cal.Admin.Code, tit. 8, § 11181, subd. (f)(1), (2); see also *id.,* § 11311, subd. (f)(1), (2) [containing additional language]; *id.,* § 11381, subd. (f)(1), (2) [same].) In addition, plaintiffs refer to former IWC wage order No. 4 N. S., governing "Professional, Technical, Clerical and Similar Occupations," which refers to "woman" and "minor," and contains language regarding the "time when an employee is required or instructed to travel on the employer's business after the beginning and before the end of her work day." (Cal.Admin.Code, tit. 8, § 11346, subd. (h)(1), (2).) This language does not seem to implicate the compulsory travel time at issue here, but rather concerns time when employees must travel on business.

8 Indeed, as amicus curiae Antonio Madrigal has noted, the FLSA provides less protection to agricultural employees, many of whom are exempted from minimum wage protections (29 U.S.C. § 213(a)(6)), and nearly all of whom are exempted from overtime protections. (29 U.S.C. § 213(b)(12),(13), (16).) In contrast, California has provided minimum wage and overtime protection to employees involved in agricultural activities under Wage Order Nos. 14–80, 13–80 and 8–80. (Cal.Code Regs., tit. 8, §§ 11140, 11130, 11080.)

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PROOF OF SERVICE

I am over the age of 18 and not a party to this lawsuit. I am employed in the County of Los Angeles, State of California. My business address is 436 W. Walnut Street, Gardena, California 90248.

On August 12, 2013, I served the following document described as PETITION FOR REVIEW on all interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed to:

SEE ATTACHED SERVICE LIST

[X] **By Mail:** I deposited the envelope in the United States mail with postage fully prepaid at Gardena, California 90248 (Courtesy Copies Only).

[X] **By Overnight Courier to the Court:** I deposited the envelope in the mail with postage fully prepaid at Gardena, California 90248 (Court Copies Only).

[X] By Email: Based on a court order to accept service by CaseAnywhere, I caused the documents to be sent to the person(s) at the email addressee(s) so indicated on August 12, 201,3 I did not receive, within a reasonable time after the email, message that the email was incomplete or unsuccessful.

Executed on August 12, 2013, at Gardena, California, I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Kathleen L. Dixon

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