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Case No. S212704

**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

TIM MENDIOLA, et al.,

Plaintiffs and Respondents,

v.

CPS SECURITY SOLUTIONS, INC., et al.,

Defendants and Appellants.

After a Decision of the Court of Appeal, Case No. B240519,
Second Appellate District, Division Four

Appeal from the Superior Court of Los Angeles County,
Case Nos. BC388956, BC391669, JCCP 4605, Honorable Jane L. Johnson

OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED

The issue presented, as set out in Plaintiffs' petition for review, is: Whether California law differs from federal law as to whether employers and employees may enter into enforceable agreements to exclude 8 hours of "sleep time" from time that would otherwise constitute compensable "hours worked" in a 24-hour shift.

INTRODUCTION

The Court of Appeal's decision below upheld the validity of agreements whereby eight hours of "sleep time" is deducted from the otherwise compensable "hours worked" by employees working 24-hour shifts, permitting the employer to pay nothing to its employees for those eight hours worked. But for the agreements authorizing the deduction, those eight hours would have to be paid at no less than the minimum wage, as the Court of Appeal held that those eight hours constituted "hours worked" within the meaning of California law.

In reaching its conclusion as to the enforceability of the agreements to pay nothing to these employees for eight hours out of each 24-hour shift worked, the Court relied on a federal regulation, 29 C.F.R. part 785.22, that permits employees who are required to be on duty for 24-hours to enter into agreements to exclude up eight hours of regularly scheduled sleep time

from hours worked.

The Court of Appeal based this holding on *Monzon v. Schaefer Ambulance Service, Inc.* (1990) 224 Cal.App.3d 16, the first California decision to import and apply 29 C.F.R. part 785.22 to California wage and hour law, and *Seymore v. Metson Marine, Inc.* (2011) 194 Cal.App.4th 361, which also followed *Monzon.* But the Court of Appeal's reliance on this federal regulation, and on *Monzon* and *Seymore,* are fundamentally incompatible with a trio of decisions issued by this Court over the past decade and a half, addressing the applicability of federal regulations to California wage and hour law. In each of these three decisions – *Ramirez v. Yosemite Water* (1999) 20 Cal.4th 785, *Morillion v. Royal Packing* (2000) 22 Cal.4th 575, and *Martinez v. Combs* (2010) 49 Cal.4th 35 – this Court declined to apply less protective federal regulations to California wage and hour laws where neither the Legislature nor the Industrial Welfare Commission ("IWC") ever adopted those less protective federal provisions. In each of these cases, this Court determined that employees were entitled to greater protection under state law than under federal law, and on that basis, declined to import the less protective provisions of the federal regulations. "Courts must give the IWC's wage orders independent effect in order to protect the commission's delegated authority to enforce the

state's wage laws and, as appropriate, to provide greater protection to workers than federal law affords." (*Martinez,* 49 Cal.4th at 68; citing *Morillion,* 22 Cal.4th at 592, and *Ramirez,* 20 Cal.4th at 798.)

The Court of Appeal acknowledged that the trial court below had found that "application of [the *Monzon*] rule to the instant case would violate the Supreme Court's proscription against adoption of federal regulations to eliminate protection to California employees." (Slip Op., at 27.) Rejecting this portion of the trial court's ruling, the Court of Appeal explained: "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." (Slip Op., at 31.)

The Court of Appeal's focus on whether "the state and federal definitions of hours worked are comparable and have a similar purpose" cannot be reconciled with the methodology adopted by this Court for analyzing whether federal regulations may be applied in determining whether time is compensable under California law: "[W]e 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." (*Morillion,* 22 Cal.4th at 590.) Instead, where a federal statute or regulation excludes certain time or activity from compensable time or activity under the FLSA, the test is (1) whether the Labor Code or the IWC orders contain express language similar to the provisions of the federal statute or regulation that exclude such time or activity from compensable hours worked, and if not, (2) whether there is evidence of IWC intent to adopt the federal law or regulation in determining whether the time or activity is non-compensable under state law. (*Id.,* at 590-592.)

"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." (*Id.,* at 592.)

Here, the Court of Appeal, like the courts in *Monzon* and *Seymore,* failed to follow the correct test for determining whether the federal regulation that allows for agreements to exclude eight hours of sleep time from otherwise compensable hours worked – 29 C.F.R. part 785.22 – may be imported into California wage and hour law. Application of the test that was set out by this Court in *Ramirez, Morillion* and *Martinez* leads to only

one result – a result that effectuates the IWC regulations that provide greater protections to employees than corresponding federal regulations, and that ensures that employees covered by IWC Wage Order 4 (and other wage orders whose provisions are the same as those in Order 4) will be paid for all of their "hours worked" on 24-hour shifts.

STATEMENT OF THE CASE

A. Stipulated Facts Regarding Defendants' Compensation Practices

Defendants and Appellants CPS Security Solutions, Inc., CPS Construction Protection Security Plus, Inc., and Construction Protective Services, Inc. (collectively "CPS") provide security guard services for construction companies at building sites throughout California. (Joint Separate Statement of Undisputed Facts [hereinafter "JSF"] , Fact 1. The JSF is contained in the Joint Appendix ["JA"] at 0076-0089, with attached exhibits at JA 0090-0197.) Some of the security guards employed by CPS are designated "Trailer Guards," a job category that is also referred to as "In-Residence Security Officers". (JSF 2.) Plaintiffs are members of a certified class defined as: "All 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

companywide policy concerning On-Call time for Trailer Guards, were not compensated for On-Call time spent at the trailer site." (JSF 3.) Since April 2004, CPS has employed at least 1,725 Trailer Guards in California. (JSF 4-5.) In the litigation below, for purposes of the cross-motions for summary judgment and summary adjudication of issues, CPS stipulated that the applicable wage order that covers these Trailer Guards is Industrial Welfare Commission ("IWC") Wage Order 4-2001. (JSF 7.)

Generally, CPS contracts with its customers to provide security services for 16 hours (from 3:00 p.m to 7 a.m.) Monday through Friday, and 24 hours on Saturdays and Sundays. (JSF 11.) Payments made to CPS under these contracts are customarily based on the number of hours that security services are provided, with 95% of CPS's customers paying an hourly rate. (JSF 12.) Generally, the package of security services provided by CPS includes the presence of a security guard at a trailer site located at the construction project. (JSF 13.) Under these contracts, if a CPS employee is not physically present at the customer's site during contracted service hours, CPS would be in breach of its service agreement. (JSF 14.)

During active construction hours, typically Monday through Friday from 7 a.m. to 3 p.m., the Trailer Guards are completely off-duty and free to leave the premises, or remain in the trailer, as they wish, without restriction

and without providing notice to CPS of their whereabouts. (JSF 57.) There is no comparable off-duty time during weekends. (JSF 17.) On weekdays, the Trailer Guards are scheduled to work 8 hours, from 5:00 a.m. to 7 a.m., and also from 3 p.m. to 9 p.m., during which time the Guards are required to actively patrol the construction site. (*Id.*) On weekends, the Trailer Guards are scheduled to patrol the construction site for a 16-hour shift, from 5 a.m. to 9 p.m. (*Id.,* JSF 56.)

For all days of the week, the eight hours of 9 p.m. to 5 a.m. are designated by CPS as "On-Call hours." (JSF 16, 56.) Immediately prior to the start of these On-Call hours, the Trailer Guard is required to place motion sensor alarms at various strategic locations around the construction site. (JSF 49.) The motion sensors are used during On-Call hours as a means of deterring theft and vandalism. (JSF 10.) The sensors are connected to an alarm panel that sounds either in the CPS Command/Dispatch Center ("Dispatch") in Gardena, California, or in the trailer at the construction site. (*Id.*) If an alarm sounds in Dispatch, the Trailer Guard is notified by telephone and instructed to investigate the disturbance. (JSF 50) If an alarm sounds in the trailer, or if the Trailer Guard hears a noise or senses motion or other suspicious activity at night, the Guard is required to contact Dispatch, leave the trailer, and investigate

the disturbance. (JSF 51.) The Trailer Guard must put on a Company uniform before leaving his or her trailer to investigate any disturbance. (JSF 50-51.)

This On-Call system is an essential component of CPS's business model, which 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," along with the placement of motion-sensitive alarms at strategic locations around the site. (JSF 9-10.)

The execution of an On-Call Agreement (entitled "Designation of Personal Time for In-Residence Guard) is required as a condition of employment as a Trailer Guard. (JSF 15, 17.) These On-Call Agreements state that these eight hours are "personal time" or "free time."(JSF 15; JA 120-144.) However, if the Trailer Guard wishes to leave the work site during these On-Call hours, he or she must first notify Dispatch in order to allow CPS to attempt to secure a relief guard. (JSF 29, 31.) The Trailer Guard must advise Dispatch how long he or she intends to be away from the construction site, and where he or she will be during that time. (JSF 33.)

Trailer Guards are not permitted to leave the construction site during On-Call hours until a reliever arrives, and it would violate Company policy to depart from the construction site prior to the arrival of a reliever. (JSF 34.) CPS employs Hourly Rover Guards and Field Supervisors who can fill in for Trailer Guards who wish to leave the construction site during the hours when a security presence is required on the site. (JSF 36-37.) But there are occasions when CPS does not have any Rover or Field Supervisor available to relieve a Trailer Guard who wishes to leave the job site. (JSF 44.) If Trailer Guard notifies CPS that he or she wishes to leave the work site during On-Call hours and a reliever is not available at the time the Guard intends to leave, CPS will typically order the Trailer Guard to remain on the premises. (JSF 38.) CPS has the right to order a Trailer Guard to remain at the construction site during On-Call hours, even if the Trailer Guard has an emergency. (JSF 39.)

Pursuant to the On-Call Agreements, each Trailer Guard "agree[s] to reside during [his or her] employment in the trailer home provided by the Company." (JSF 20; JA 120-144.) The trailers provided by CPS range in size from 150 to 200 square feet, and each trailer has a living area, a toilet and shower, a kitchen area (including a sink, refrigerator, microwave or oven and a stove top), a table, and a chair. (JSF 21-22.) Each trailer has

electricity, heat, air conditioning, fresh water, and sewage pumping. (JSF 23.) The trailers are equipped with locks, and the only persons who are provided with keys to the trailer as the assigned Trailer Guard and CPS maintenance staff. (JSF 41.) Maintenance employees may only enter the trailer with the Trailer Guard's permission. (JSF 42.)

Trailer Guards may keep personal clothing, books, magazines, televisions, radios, personal computers, and other personal belongings in the trailer. (JSF 24.) During On-Call hours, Trailer Guards are permitted to, and in fact do, engage in personal activities inside the trailer, such as sleeping, taking showers, cooking, eating, reading, watching television, listening to the radio, and surfing the internet. (JSF 25.) But there are various restrictions on Trailer Guards' activities during On-Call hours. For example, Trailer Guards are not permitted to entertain their spouses or any other adult visitors, or keep pets in their trailers, except where permitted on a case-by-case basis at the customer's sole discretion. (JSF 25.) Minors – including children of the Trailer Guards – are never permitted to visit the construction site. (JSF 26.) CPS's work rules prohibit Trailer Guards from consuming any alcoholic beverages in their trailers or on the construction site where the trailer is located, except when permitted on a case-to-case basis at the customer's sole discretion. (JSF 27.)

If a Trailer Guard is permitted by Dispatch to leave the work site during On-Call hours, the Trailer Guard must carry a pager or radio telephone, so as to enable CPS to contact the Trailer Guard while he or she is away from the work site. (JSF 35; JA 120-144.) The Trailer Guard "must stay close enough to the work site to allow [for a] return to the site within 30 minutes if paged or called by the Company" unless other arrangements are made. (*Id.*) If paged or called by CPS during this time, the Trailer Guard must respond to the page and "contact the Company immediately." (JA 120-144.)

CPS does not consider the On-Call hours to be "hours worked" and Trailer Guards are not paid for this time unless: (1) they are interrupted by an alarm; (2) they are interrupted by a noise, motion or other suspicious conditions on the site; or (3) they are waiting for or have been denied a reliever, after notifying Dispatch of a request to leave the construction site. (JSF 45.) The frequency of interruptions during On-Call hours varies by job site and over time. (JSF 54.) If a Trailer Guard is interrupted for 3 hours or more during the night, the entire 8-hour On-Call time period is counted as hours worked and paid. (JSF 55.) Otherwise, the Trailer Guard is only paid for the actual time spent responding to the interruption(s) during the On-Call period. (JSF 48, 52-53.)

As for the total annual compensation received by the Trailer Guards, there is undisputed evidence that in 2006 and 2007, the six class representatives had annual earnings that ranged from a low of $26,825 (for Tim Mendiola) to a high of $48,301 (for Emmanuel Gonzaga). (JSF 70.) It is doubtful, though, how the annual earnings of employees who work 16 hours a day Monday to Friday and 24 hours a day on Saturday and Sunday, is of any relevance. There is undisputed evidence in the record that provides a far better understanding of how these workers were compensated – for the hours for which they were paid – and this evidence shows that in 2006, both Mr. Mendiola an Mr. Gonzaga were paid at a regular rate of $6.75 an hour for their non-overtime hours. (JA 151; JA 157.) That amount, $6.75, equaled the California minimum wage that was in effect in 2006, as established by IWC Order MW-2001. (The minimum wage was increased by statute – Labor Code § 1182.12 – to $7.25 an hour effective January 1, 2007 and to $8.00 an hour effective January 1, 2008, with the increases reflected in the various wage orders including IWC Order 4-2001, as required by Labor Code § 1182.13.) The annual earnings for these workers merely reflect the staggering number of hours they worked day after day – albeit for no pay for 8 of those hours each day.

B. The DLSE's On-Again, Off-Again, Battle With CPS Over Its Compensation Practices

Prior to the filing of this lawsuit, CPS was involved in a long-running dispute with the Division of Labor Standards Enforcement ("DLSE") regarding its compensation practices. In March 1996, DLSE started an investigation as to the legality of CPS's policy of excluding 8 hours of "sleep time" from Trailer Guards' hours worked. (JSF 61.) This investigation was temporarily halted, a little over a year later, with the issuance of a letter, dated April 24, 1997, from John C. Duncan, the then Chief Deputy Director of the Department of Industrial Relations, to CPS's counsel, Ted R. Huebner. (JSF 62.) In this letter, Deputy Director Duncan found that while "this is a difficult and obviously, in some ways a close issue," it would be appropriate to "extend [the] rule" that is contained within IWC Order 9-90 that allows for written agreements between ambulance drivers and attendants and their employers for deducting sleep time from hours worked, so as to allow CPS to exclude such time from the hours worked by their live-in guards. (JA 173.)

In August 1999, Marcy Saunders, the newly appointed Labor Commissioner reversed the enforcement position that had been set out in Mr. Duncan's April 1997 letter. (JSF 63.) By letter from Labor Commissioner Saunders to Ted R. Huebner, dated August 12, 1999, CPS

was informed that "the conclusions expressed in [the 1997 letter] are incorrect and in conflict with established California law." The 1999 letter noted that CPS's security guards are covered by IWC Order 4, which contains no provision allowing for a deduction from "hours worked" for sleep time; and that federal regulations, such as 29 C.F.R. §785.23, "cannot be used to interpret or limit California law, particularly where, as here, California law is more beneficial to workers." The letter concluded by urging CPS "to immediately modify its compensation practices in order to comply with California wage and hour law," and with a warning that DLSE intended to re-start its investigation and prosecute CPS for any wages owed. (Plaintiffs' Motion for Judicial Notice ["MJN"], filed herewith, Exhibit A.)

This was followed by a letter from DLSE Chief Counsel Anne Stevason to CPS's counsel, Howard M. Knee, dated September 16, 2002, which reiterated that the 1997 letter authored by Deputy Director Duncan "misstates both the law and the enforcement posture taken by DLSE in the past." This letter also reiterated that CPS's in-residence guards are covered by IWC Order 4-2001; and that provisions in other wage orders, allowing for agreements to exclude sleep time or expressly incorporating federal hours worked regulations, that are not found in Order 4, do not apply to Order 4; and that consequently, CPS's compensation practices "are not legal

under California law," and that (with the exception of the short period between Mr. Duncan's 1997 letter and Labor Commissioner Saunder's 1999 letter), this enforcement position "is the same position (indeed the only viable position) that the DLSE has taken since it began enforcing the IWC orders." (MJN, Exhibit B.)

On November 18, 2002, CPS filed an action for Declaratory Relief against the State Labor Commissioner, seeking a declaration that CPS's sleep time compensation policy for Trailer Guards was lawful. ((JSF 65.) Prior to trial, CPS and the Labor Commissioner settled this lawsuit and signed a Memorandum of Understanding ("MOU") dated October 14, 2003. (JSF 66.) The MOU required CPS to make certain changes to its compensation practices, and CPS adopted its current On-Call policy, pursuant to the MOU, effective January 1, 2004. (*Id.*, JA 176.) Under one of the provisions of the MOU, the Labor Commissioner agreed that the stand-by plan established by the MOU "compl[ies] with all applicable current IWC Wage Orders and related wage and hour laws and regulations." (JA 177.)

C. Trial Court Proceedings

In 2008, two class action lawsuits were filed against CPS, seeking damages for failure to pay minimum wage and overtime compensation in

violation of California regulations and Labor Code provisions, including IWC Wage Order 4-2001. Plaintiffs also asserted other related claims, including a claim for declaratory relief, seeking a determination whether CPS' on-call compensation policy was unlawful under applicable statutes and regulations. CPS cross-claimed for declaratory relief, also seeking a judicial determination of the lawfulness of its on-call policy. (Slip Op., at 1-2.)

The court consolidated the cases and certified the class to include all persons who are or were employed as "Trailer Guards" 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 on-call time for Trailer Guards, were not compensated for on-call time spent at the trailer site. (Slip Op., at 1.)

The parties filed cross-motions for summary adjudication on the declaratory relief causes of action, filing a joint statement of undisputed facts. (JA 076, JA 198, JA 264.) The parties stipulated, for purposes of the litigation, that Wage Order 4-2001 was the IWC wage order applicable to the Trailer Guards. (JSF 7.) The court granted plaintiffs' motion for summary adjudication and denied CPS's motion, ruling that CPS's on-call policy violated Wage Order 4. (JA 558.) The court specifically found that

CPS's level of 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 this conclusion on 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 the court's finding that "the 'on-call' time is spent predominantly for the benefit of the employer." (*Id.*)

The trial court proceeded to reject CPS's contention that on the weekend days, when the trailer guards were on duty 24 hours, eight hours could be allocated to sleep time and excluded from compensation. The trial court distinguished *Monzon* and *Seymore* on the ground that those cases arose under a different wage order, and found that applying the rule announced in those cases, predicated upon 29 C.F.R. part 785.22, would

improperly "import a [less protective] federal standard" into Wage Order 4. (*Id.*)

Plaintiffs then sought a preliminary injunction preventing CPS from violating Wage Order 4, Labor Code § 1194, and any other applicable regulations and statutory provisions by refusing to pay the Trailer Guards for on-call time. (JA 594.) The court granted the request and entered an order enjoining CPS from (1) "continuing to violate Industrial Welfare Commission Wage Order 4-2001 ... 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." (JA 636.) CPS filed a timely appeal. (JA 649.)

D. The Court of Appeal Decision

The issue presented to the Court of Appeal, in the words of the decision, "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.'" The Court of Appeal began its analysis of this issue by noting that the term

"hours worked" is defined in Wage Order 4-2001 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." (Slip Op., at 15.)

CPS advanced two grounds for its argument that these eight hours per night are properly excluded from "hours worked." First, according to CPS, 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 an investigation. Second, according to CPS, even if the "on-call" time is deemed to constitute "hours worked," it is excludable as "sleep time" and thus, need not be compensated. (Slip Op., at 15-16.)

The Court of Appeal rejected CPS's first contention, concluding that the eight hour period of "on-call" time constitutes "hours worked" under California law. The Court's detailed analysis of this issue is found at pages 16-27 of the Slip Opinion. To summarize, the Court concluded that during the on-call hours, the Trailer Guards must be present at the construction site and are not free to leave at will; rather, the guard may leave only if and when a reliever is available. Furthermore, 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. The Court thus found that "the restrictions on the on-call time are primarily directed toward the fulfillment of the employer's requirements," and that "the guards are substantially restricted in their ability to engage in private pursuits." (Slip Op., at 21.)

In determining the degree to which CPS's trailer guards were able to engage in private pursuits during on-call time, the Court of Appeal followed the seven-factor test set out in *Gomez v. Lincare, Inc.* (2009) 173 Cal.App.4th 508, 523, namely: (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 the use of a pager could ease restrictions; and (7) whether the employee had actually engaged in personal activities during on-call time. (Slip Op., at 18.)

The Court concluded that the majority of these seven factors "favors a finding that during the on-call period, the trailer guards are significantly limited in their ability to engage in personal activities." (Slip Op., at 21.) The Court explained: "They are required to live on the jobsite. They are

expected to respond immediately, in uniform, when an alarm sounds or they hear suspicious 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." (Slip Op., at 22.)

"Most importantly, 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." (Slip Op., at 22.)

In reaching this conclusion, the Court of Appeal expressly rejected CPS's argument that a federal regulation, 29 C.F.R. part 785.23, should be applied in deciding whether the on-call hours constitute "hours worked." (Slip. Op., at 24-25.) That federal regulation 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. (MJN, Exhibit G.)

In rejecting CPS's request to import *this* regulation, the Court of Appeal wrote: "[A]s 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 Company, 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 the federal standard for security guards.... 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 26-27.)

The Court of Appeal took a very different view of the appropriateness of importing federal regulations in its determination of the compensability of the eight hours of on-call time during the trailer guards' 24-hour weekend shifts, ruling that CPS could exclude 8 hours of "sleep time" from the otherwise compensable "hours worked" on 24-hour shifts, 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. (Slip Op., at 33.) The Court of Appeal based this holding on *Monzon* and *Seymore,* citing those two cases for the proposition that "California courts have held that when an employee works a 24-hour shift, the employee and employer may exclude, by agreement, up to eight hours for 'sleep time.'" (Slip Op., at 27.) Of course, both *Monzon* and *Seymore* reached these holdings by importing the provisions of 29 C.F.R. part 785.22 into California law. The Court of Appeal explained: "We agree with the courts in *Seymore* and *Monzon* that because 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." (Slip Op., at 31.) Thus, despite the fact that neither the Labor Code nor IWC Order 4 contain any provision similar to 29 C.F.R. part 785.22 allowing for the enforcement of agreements to exclude "sleep time" from otherwise compensable hours worked, and absent any discussion of whether the IWC ever manifested any intent to adopt this federal regulation, the Court of Appeal announced its disagreement with the trial court's finding that "application of [the] rule" announced in *Seymore* and *Monzon* "would violate the Supreme Court's proscription against adoption of federal regulations to eliminate protection to California employees." (Slip Op., at 27.)

The Court of Appeal noted that "[t]here are sound reasons for permitting an employer who engages an employee to work a 24-hour shift and compensate 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 employees receive an adequate wage.... 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." (Slip Op., at 31.) There is no suggestion in the decision that the Legislature or the IWC ever made this sort of policy determination to allow for agreements to exclude "sleep time" from time that would otherwise constitute compensable "hours worked."

Both Plaintiffs and CPS filed timely petitions for review. Both petitions were granted. In this, Plaintiffs' Opening Brief on the Merits, we confine our argument to the issue presented in our petition for review, saving our discussion of the issues presented in CPS's petition of review for our opposition to CPS's opening brief on the merits.

LEGAL DISCUSSION

A. In Its Analysis of the Excludability of "Sleep Time" From "Hours Worked," the Court of Appeal Failed to Apply the Correct Test for Determining Whether A Federal Regulation Under the FLSA Applies to California Wage and Hour Law

In deciding whether California law allows for the enforcement of an agreement to exclude eight hours of "sleep time" from time that would otherwise constitute compensable "hours worked" in the absence of such an agreement, the determinative consideration is not whether federal and California wage and hour laws have a similar definition of "hours worked."

Monzon, Seymore, and now the Court of Appeal decision below reach the wrong answer by posing the wrong question. As this Court explained in *Morillion,* "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." (*Morillion,* 22 Cal.4th at 590.) "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." (*Id.*, at 592.)

As this Court has repeatedly explained, "our departure from federal authority is entirely consistent with the recognized principle that state law may provide employees with greater protection than the FLSA." (*Id.*) The "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]...." (*Ramirez,* 20 Cal.4th at 795.) "Courts must give the IWC's wage orders independent effect in order to protect the commission's

delegated authority to ... provide greater protection to workers than federal law affords." (*Martinez,* 49 Cal.4th at 68.) "Indeed, 'federal law does not control unless it is more beneficial to employees than the state law.'" (*Morillion,* 22 Cal.4th at 594.)

Here, the focus of an analysis comparing federal and state law must be the federal regulation that permits agreements to exclude up to eight hours of sleep time from hours worked during a 24-hour shift, 29 C.F.R. part 785.22. The analysis, which was not undertaken by the Court of Appeal, below, must look to whether any express provisions of the Labor Code or applicable IWC order adopt the federal regulation, and if not, whether there is any indication of intent by the Legislature or the IWC to make that regulation applicable to California law. Absent any express adoption of the federal regulation or indicia of intent, *Ramirez, Morillion,* and *Martinez* compel the conclusion that the more protective provisions of California law cannot be undercut by less protective federal regulation.

B. The Federal Regulation Allowing Agreements to Exclude "Sleep Time" From Otherwise Compensable "Hours Worked" Has Not Been Incorporated By Any California Law or By the IWC Wage Order Governing CPS's Trailer Guards

The only IWC orders that contain any language that touch on the

subject of 29 C.F.R. part 785.22 – agreements to exclude "sleep time" from otherwise compensable "hours worked" – are Wage Orders 5 and 9 (covering the public housekeeping industry, and the transportation industry, respectively), and even there, there is a glaring dissimilarity between the state and federal regulations, in that these two Wage Orders allow for such agreements only for ambulance drivers and attendants, and only where such agreements are in writing, and only provide for an exemption from the otherwise applicable requirements of daily overtime – i.e., the "sleep time" for such employees would still be counted as hours worked for minimum wage and weekly overtime purposes. (See IWC Order 5-2001, § 3(G), and Order 9-2001, § 3(K), at MJN Exhibits 4 and 5.)

No other IWC wage order contains *any* provision whatsoever regarding agreements to exclude of "sleep time" from "hours worked" for *any* purpose whatsoever.[1] Nor is there any provision in the Labor Code

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[1] Wage Order 5's definition of "hours worked" contains the following language, which is not found in any other wage order: "in the case of an employee required to reside on the employment premises, that time carrying out assigned duties shall be counted as hours worked." (IWC Order 5-2001, § 2(K).) This specific language has been construed to allow the employer to not compensate such employee for time during which the employee is restricted to the premises but is not carrying out any work duties. (*Brewer v. Patel* (1993) 20 Cal.App.4th 1017; *Isner v. Falkenberg/Gilliam & Associates, Inc.* (2008) 160 Cal.App.4th 1393.) This is an exception to the general definition of "hours worked," under which time during which the employee is restricted to the employment premises, even if the employee is free to eat, read, watch television, or sleep during such time, is considered "time during which an employee is subject to the control of an employer," so as to constitute "hours worked." (*Aguilar v. Association for Retarded Citizens* (1991) 234 Cal.App.3d 21, 30-31; *Bono Enterprises, Inc. v. Bradshaw*

regarding agreements to exclude "sleep time" from "hours worked." And the only provision in the Labor Code or in the IWC orders allowing for the FLSA to serve as a basis for construing "hours worked" under state law is found at IWC Orders 4 and 5 but is explicitly limited to the "health care industry" as follows: "Within the health care industry the term 'hours worked' means the time the 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." (IWC Order 4-2001, § 2(K); Order 5-2001, §2(K). See MJN Exhibit 3 and 4.) By its own terms, this special provision incorporating the FLSA does not apply to any employees other than those who work in the "health care industry" *and* who are covered by Wage Orders 4 or 5.

As this Court explained in *Martinez, supra,* 49 Cal 4th 35, 67: "The IWC has on occasion deliberately incorporated federal law into its wage orders. However, 'where the IWC intended the FLSA to apply to wage orders, it has specifically so stated.' (*Morillion,* 22 Cal.4th 575, 592.)" Thus, in *Morillion,* this Court declined to import a portion of the FLSA, the Portal-to-Portal Act, to the state law determination of whether compulsory travel time constitutes "hours worked." And in *Ramirez,* this Court

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(1995) 32 Cal.App.4th 968, 975, disapproved on other grounds in *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557.)

declined to import federal regulations governing outside salespersons or use those federal regulations to construe the more protective IWC provisions. The exact same logic applies here.

C. There Is No Indication That the IWC Had Any Intent to Make the Federal Regulation Allowing For Agreements to Exclude "Sleep Time" From Otherwise Compensable "Hours Worked" Applicable to California Wage and Hour Law

As for indicators of the IWC's intent, the IWC's adoption, in 1976, of the special provision for ambulance drivers and attendants in section 3 of Wage Orders 5 and 9 belies any notion that the IWC ever intended that 29 C.F.R. part 785.22 apply to any of its wage orders. Quoting from the Statement as to the Basis that was issued by the IWC for Wage Order 9-80, *Monzon* noted that the special provision for ambulance drivers and attendants, then found at Section 3(G) of Wage Order 9-80 (now located at Section 3(K) of the current version of that wage order, 9-2001), "was added in 1976 when [the] IWC 'recognized the unique need for 24-hour coverage by ambulance drivers and the special circumstances under which most ambulance driver work, and allowed relaxation of daily overtime requirements for such drivers under certain protective conditions.'"

The IWC would have had no need to adopt a special provision

allowing for the "relaxation of daily overtime requirements for [ambulance] drivers" if it believed that 29 C.F.R. part 785.22 applied to state wage and hour law. If the federal regulation applied, then *any* agreement, written or otherwise, between 24 hour-shift ambulance drivers and their employers (indeed, between *any* 24-hour shift employees and their employers) would be sufficient to exclude "sleep time" from otherwise compensable "hours worked" for *any* purpose, not just for the purpose of calculating hours worked for daily overtime. If the federal regulation gets imported into California law, such "sleep time" hours are not compensable for minimum wage purposes, weekly overtime purposes *and* daily overtime purposes. In short, if the IWC really believed the federal regulation applied, the adoption of the special provision for ambulance drivers and attendants would have served no purpose whatsoever.

D. The Court of Appeal's Stated Policy Reasons For Enforcing the Agreements to Exclude "Sleep Time" From "Hours Worked" Improperly Intrude on The IWC's Quasi-Legislative Authority

"Judicial authorities have repeatedly emphasized that in fulfilling its broad statutory mandate, the IWC engages in a quasi-legislative endeavor, a task which necessarily and properly requires the commission's exercise of a considerable degree of policy-making judgment and discretion." (*Martinez,*

supra, 49 Cal4th 35, 61; *Industrial Welfare Commission v. Superior Court* (1980) 27 Cal.3d 690, 702.) Indeed, the source of the IWC's authority is the California Constitution itself – Cal. Const., art. XIV, § 1 authorizes the Legislature to provide for minimum wages and for the general welfare of employees "and for those purposes may confer on a commission legislative, executive, and judicial powers." Pursuant to Labor Code § 1185, "The orders of the commission fixing minimum wages, maximum hours, and standard conditions of labor for all employees ... shall be valid and operative...." Consequently, "the courts have shown the IWC's wage orders extraordinary deference, both in upholding their validity and in enforcing their specific terms." (*Martinez, supra,* 49 Cal.4th 35, 61.)

The policy considerations set out in the decision below strongly echo the very same considerations expressed by the court of appeal, and rejected by this Court, in *Morillion.* There, the court of appeal observed "Since the commute was something that would have had to occur regardless of whether it occurred on [the employer's] buses, and [plaintiffs] point to no particular detriment that ensued from riding [those] buses, compensating employees for this commute time would not make sense, as a matter of policy." (*Morillion,* at 587.) This Court rejected that policy argument for two reasons.

First, quoting from its prior decision in *Industrial Welfare Commission v. Superior Court, supra,* 27 Cal.3d at 702, the Court stated: "[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." (*Morillion,* at 587.) Indeed, this Court has repeatedly held that IWC wage orders "are to be entitled to the same dignity as statutes"; in other words, they are "entitled to 'extraordinary deference, both in upholding their validity and in upholding their specific terms.'" (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1027, quoting *Martinez, supra,* 49 Cal.4th at 61.)

Second, this Court, in *Morillion,* rejected the lower court's policy argument because "it suffers from the court's failure to distinguish between travel time that the employer 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 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 buses is compensable as 'hours worked.'" (*Morillion,* 22 Cal.4th at 587.)

Here, in the decision below, the court of appeal's policy justification for excluding "sleep time" from "hours worked" – "most employees would be sleeping for a similar period every day, whether on duty or not" – likewise suffers from the failure to distinguish between eight hours of "uncontrolled sleep time" and eight hours where the employee is subject to the employer's control. This control is manifested in numerous ways – the employee is prohibited from sleeping anywhere but the on-site trailer, the employee is prohibited from leaving the job site without permission from CPS, the employee is prohibited from having friends or family visit or stay on the premises, the employee is denied the right to keep a pet on the premises, the employee is prohibited from drinking a beer or glass of wine, and the employee is required to wake up and immediately investigate an alarm or any other disturbance.

E. The DLSE's Varying Enforcement Policies on the Excludability of Sleep Time From "Hours Worked" and the Legality of CPS's Compensation Practices Are Not Binding and Are Not Necessarily Entitled to Any Deference

The DLSE is the state agency authorized to enforce California's labor laws, including IWC wage orders. (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 561-562. The DLSE, of course, does not

promulgate wage orders; that is the role of the IWC. (*Id.*) While the DLSE's construction of a statute or a wage order is entitled to consideration and respect, it is not binding and it is ultimately for the judiciary to interpret this statute or wage order at issue. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7-8.) DLSE opinion letters need not be followed if they do not contain persuasive logic. (*Cash v. Winn* (2012) 205 Cal.App.4th 1285, 1302; see also *Yamaha Corp., supra,* 19 Cal.4th 1, 6-15.) Less deference is given to an agency's interpretation when that interpretation has not been consistent over time. "[W]hen an agency's construction flatly contradicts its original interpretation, it is not entitled to significant deference." (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1105 fn. 7.)

During the period from 1990 to 2003, the DLSE's interpretation of the enforceability of agreements to exclude 8 hours of "sleep time" from "hours worked" during a 24-hour shift, and its opinion as to the legality of CPS's compensation practices as to its Trailer Guards, has wildly shifted bak and forth. Prior to the letter issued by Department of Industrial Relations Chief Deputy Director John Duncan in 1997, DLSE viewed such agreements as invalid under California law (except for written agreements to exclude sleep time for ambulance drivers or attendants working 24-hour

shifts under IWC Order 9), so as to require payment of all 24 hours worked during such a shift. (MJN, Exhibit B; *Monzon, supra,* 224 Cal.App.3d at 51 (dissenting opinion, J. Johnson), noting that "DLSE filed an amicus brief in this .... [which] takes the position it is *California* law which defines 'hours worked' in such a broad way as to encompass sleep time and it is *California* lw which defines the terms and conditions under which this narrow class of employees – ambulance drivers and attendants – can be deprived of compensation for their sleep time.")

Next, some seven years later, the Duncan letter was issued, under which for the first time, it was found "appropriate to extend the rule" set out in IWC Wage Order 9, covering ambulance drivers and attendants, to CPS's live-in security guards. (JA 173.) Two years after that, the Labor Commissioner's 1999 letter returned DLSE to its earlier interpretation and enforcement policy, with the admonition that "the conclusions expressed in [the 1997] letter are incorrect and in conflict with established California law." (MJN Exhibit A.) This letter explained that the controlling wage order for CPS's guards, IWC Order 4, contains no sleep time exclusion from its broad definition of "hours worked," and no provision allowing for agreements to exclude sleep time, and further, that because "federal regulations governing compensable time are substantially different from the

state's definition of 'hours worked' under IWC Order 4 ... the federal rules cannot be used to interpret of limit California law, particularly where, as here, California law is more beneficial to workers." (*Id.*) Another letter, highly detailed and persuasively reasoned, was issued by DLSE Chief Counsel Anne Stevason in 2002, reiterating the same conclusions expressed in the 1999 letter. (MJN Exhibit B.)

Next, we have the 2003 MOU between DLSE and CPS, resolving an action for declaratory relief regarding the legality of CPS's compensation practices with respect to its Trailer Guards. DLSE's decision to back down from its challenge to these compensation practices, when viewed against the compelling analysis set out in DLSE's 1999 and 2002 letters, is essentially inexplicable. Whatever the reasons may have been for the DLSE's litigation decision, it remains the province of this Court to construe the requirements of IWC Order 4-2001, and we submit that the analysis set out in the DLSE letters that were issued in 1999 and 2002 is far more well-reasoned than that contained in the 1997 letter, and that while none of these letters are controlling, the 1999 and 2002 letters are far more persuasive and thus entitled to greater consideration.

CONCLUSION

For all of the reasons set forth above, California law prohibits the importation of a less protective federal regulation allowing for agreements to exclude "sleep time" from otherwise compensable "hours worked." IWC Wage Order 4-2001 does not provide for any such agreements to exclude "sleep time" from time that would otherwise constitute "hours worked," and there is no indication that the IWC ever intended to allow for such agreements as to employees covered by Wage Order 4. As such, the holding of the Court of Appeal on this issue must be reversed, so as to effectuate the IWC's intent to provide greater protections to California employees than federal law affords.

Dated: December 2, , 2013

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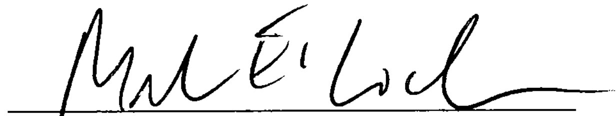

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PROOF OF SERVICE

Mendiola, et al. v. CPS Security Solutions, Inc., et al. **(Case No. S212704)**

I, Miles E. Locker, hereby state and declare:

I am a partner with the law firm of Locker Folberg LLP, with a business address at 71 Stevenson Street, Suite 422, San Francisco, California 94105. I am not a party to the above-entitled action. I am an attorney licensed to practice law in the State of California.

On the date hereof, I caused to be served the foregoing OPENING BRIEF ON THE MERITS on the interested parties, by depositing copies thereof in the United States mail at a U.S. Postal Service facility in San Francisco, California, with each said copy enclosed in a sealed envelope, with first class postage fully prepaid, separately addressed to each of the persons listed on Service List attached hereto.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this December 2, 2013 at San Francisco, California.

Miles E. Locker

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LASC Case No. BC 388956 consolidated with
Floriano Acosta, et al. vs. Construction Protective Services, Inc., et al.
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