Supreme Court Case No. S212704

IN THE SUPREME COURT OF CALIFORNIA

CPS SECURITY SOLUTIONS, INC.
Defendants/Cross-Complainants/Appellants/Petitioners

vs.

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

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

DEFENDANTS/CROSS-COMPLAINANTS/APPELLANTS/PETITIONERS'

MOTION FOR JUDICIAL NOTICE; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION; PROPOSED ORDER

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MOTION FOR JUDICIAL NOTICE

Please take notice that, pursuant to Evidence Code Sections 459, 451, and 452, and California Rules of Court, rules 8.520(g) and 8.252(a), Defendants and Appellants, CPS Security Solutions, Inc., *et al.*, hereby move for an order granting judicial notice of the following documents, attached hereto:

1. Exhibit A – Verified Complaint for Declaratory Relief filed by Construction Protective Services against Arthur Lujan, State Labor Commissioner, in the Superior Court of the State of California, County of Orange, in Case No. 02CC17330;

2. Exhibit B – Cross-Complaint filed by Arthur Lujan, State Labor Commissioner, *et al.* against Construction Protective Services, in the Superior Court of the State of California, County of Orange, in Case No. 02CC17330;

3. Exhibit C – The 2002 Update Of The DLSE Enforcement Policies And Interpretations Manual (Revised), Sections 46.3, 46.3.1, And 46.4 (March 2006);

4. Exhibit D – Statement As To The Basis For Amendment To Sections 2, 11 And 12 Of Wage Order No. 9 Regarding Employees In The Transportation Industry;

5. Exhibit E – Amendments To Secs. 2, 3 And 11, Order 4-89, Effective August 21, 1993; and

6. Exhibit F - Industrial Welfare Commission Order No. 5-2001 Regulating Wages, Hours And Working Conditions In The Public Housekeeping Industry, Effective August 21, 1993 As Amended.

The motion is based on this notice, the memorandum of points and authorities, and the declaration, below.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendants and Appellants CPS Security Solutions, Inc., *et al.* ("CPS") seek judicial notice of true and correct copies of court documents, official records of the Division of Labor Standards Enforcement ("DLSE"), and California regulations issued by the Industrial Welfare Commission ("IWC"). All of the materials for which judicial notice is sought are relevant to the policies, statutes, and wage orders at issue in this case.

II. JUDICIAL NOTICE IS PROPER AND SHOULD BE GRANTED

Evidence Code section 459(a) provides that a reviewing court [1] may take judicial notice of any matter specified in Evidence Code section 452; [2] shall take judicial notice of each matter that the trial court was required to notice under Section 451 or 453; and [3] shall take judicial notice of each matter properly noticed by the trial court.

CPS requests that this Court notice the court documents, official records of the DLSE, and California regulations issued by the IWC, because the documents contain information that CPS must rely on to fully address and respond to the arguments raised in Plaintiffs' Opening Brief.

A. The Verified Complaint and Cross-Complaint in California Superior Court, County of Orange, Case No. 02CC17330

Pursuant to Evidence Code Section 452(d), judicial notice may be taken of "records of [] any court of this state." CPS requests that this court take notice of the Verified Complaint and Cross-Complaint filed by and

against CPS and the Labor Commissioner, Exhibits A and B, in the Superior Court of the State of California, County of Orange, in Case No. 02CC17330.

These documents were not presented to the trial court and are not in the record below. However, they are relevant and should now be considered because [1] the Complaint and Cross-Complaint involve litigation concerning an earlier version of the CPS wage and hour policy at issue in this action, and will provide this Court with a full and complete picture of the policy; and [2] the Complaint is referenced in Jt. App. Fact No. 62 (Jt. App. Vol. 1, 0086), and noticing it will provide this Court with the option of reviewing the Complaint, if necessary, as opposed to relying on the joint fact.

B. The 2002 Update of the DLSE Enforcement Policies and Interpretations Manual (Revised), Sections 46.3, 46.3.1, and 46.4 (March 2006)

The 2002 Update of the DLSE Enforcement Policies and Interpretations Manual ("DLSE Update"), attached as Exhibit B, falls within the scope of Evidence Code section 452(c), which allows for judicial notice of "official acts of the ... executive ... department[] of ... any state." The DLSE "is the state agency empowered to enforce California's labor laws, including IWC wage orders." (*Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 581.) "The DLSE's opinion letters, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1029, fn.11, internal quotes omitted.)

The DLSE Update was not presented to the trial court and is not in the record below. It should be noticed by this Court because it reveals the DLSE's interpretation regarding the compensability of sleep time and travel time for employees working 24 hour shifts, a key issue in this proceeding. To the extent that this Court considers the DLSE's previously expressed opinions on the issue of compensable hours worked, the DLSE Update must also be considered to complete the record.

C. The IWC Wage Orders

The Statement of Basis and Amendments to IWC Wage Orders, attached as Exhibits D, E and F, fall within the scope of Evidence Code sections 451(b) and 452(b). Section 451(b) provides that judicial notice shall be taken of "any matter made a subject of judicial notice by Section ... 11343.6 ... of the Government Code." Section 11343.6 of the Government Code provides that "the courts shall take judicial notice of the contents of each regulation which is printed ... into the California Code of Regulations." Section 452(b) provides that judicial notice may be taken of "regulations ... issued by ... any public entity in the United States."

The controlling wage order herein, IWC Order 4-2001, was presented to the trial court and is part of the record below. (Jt. App. Vol. 1, 0095.) The Statement of Basis and Amendments to IWC Wage Orders Nos. 9, 4-89, and 5-2001, for which judicial notice is now sought (Exhibits D, E and F), were not formally made a part of the record below. The Statement of Basis and amendments address similar issues as IWC Order 4-2001, namely compensable hours worked in the professional, technical, clerical,

mechanical and similar occupations, health care, and transportation industries.

Reviewing the Statement of Basis and Amendments to IWC Wage Orders Nos. 9, 4-89, and 5-2001, will enable the Court to analyze the similarities and/or differences to IWC Order 4-2001. Moreover, the Statement of Basis goes to the heart of CPS's judicial acquiescence argument, a key issue in this proceeding. In *Monzon v. Schaefer Ambulance Service, Inc.* (1990) 224 Cal.App.3d 16, the court held that 29 C.F.R. Section 785.22 was incorporated into Wage Order No. 9. Plaintiffs argue that *Monzon* was incorrectly decided and that there is no indication that the IWC intended to incorporate 29 C.F.R. Section 785.22 into Wage Order No. 9. The Statement of Basis will demonstrate that the IWC amended Wage Order No. 9 in 2004, and in doing so, acquiesced in *Monzon's* interpretation of Wage Order No. 9. Thus, it is a key document in this action.

III. CONCLUSION

As the documents attached hereto are the proper subjects of judicial notice, Plaintiffs respectfully request the Court grant this motion and take judicial notice of the attached documents.

DECLARATION

I, Howard M. Knee, declare as follows:

1. I am an attorney licensed to practice law in the State of California, and am co-counsel for Defendant in these proceedings before the California Supreme Court.

2. Attached hereto as Exhibit "A" is a true and correct copy of the Verified Complaint for Declaratory Relief filed by Construction Protective Services against Arthur Lujan, State Labor Commissioner, in the Superior Court of the State of California, County of Orange, in Case No. 02CC17330.

3. Attached hereto as Exhibit "B" is a true and correct copy of the Cross-Complaint filed by Arthur Lujan, State Labor Commissioner, *et al.* against Construction Protective Services, in the Superior Court of the State of California, County of Orange, in Case No. 02CC17330.

4. Attached hereto as Exhibit "C" is a true and correct copy of the 2002 Update Of The DLSE Enforcement Policies And Interpretations Manual (Revised), Sections 46.3, 46.3.1, And 46.4 (March 2006).

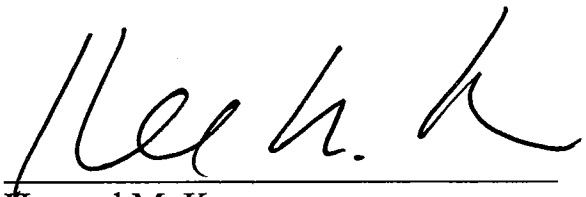
5. Attached hereto as Exhibit "D" is a true and correct copy of the Statement As To The Basis For Amendment To Sections 2, 11 And 12 Of Wage Order No. 9 Regarding Employees In The Transportation Industry.

6. Attached hereto as Exhibit "E" is a true and correct copy of the Amendments To Secs. 2, 3 And 11, Order-489, Effective August 21, 1993.

7. Attached hereto as Exhibit "F" is a true and correct copy of the Industrial Welfare Commission Order No. 5-2001 Regulating Wages, Hours And Working Conditions In The Public Housekeeping Industry, Effective August 21, 1993 As Amended.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this 10th day of January, 2014, at Los Angeles, California.



Howard M. Knee

[PROPOSED] ORDER GRANTING DEFENDANT'S MOTION FOR JUDICIAL NOTICE

The Motion for Judicial Notice filed by Defendants and Appellants, CPS Security Solutions, Inc., *et al.*, having been considered, and finding judicial notice warranted under Evidence Code sections 451, 452, and 4598;

IT IS HEREBY ORDERED that said Motion is GRANTED in full, and the Court shall take judicial notice of all of the documents attached to the Motion.

Date:

_____
Chief Justice

ORIGINAL

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FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER
NOV 18 2002
ALAN SLATER, Clerk of the Court
BY E. GAMBOA

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

02CC17330

CONSTRUCTION PROTECTIVE SERVICES, INC. Plaintiff, v. ARTHUR LUJAN, STATE LABOR COMMISSIONER, AND DOES 1 - 10, Defendants.	CASE NO.: Assigned for All Purposes to VERIFIED COMPLAINT FOR DECLARATORY RELIEF [CALIFORNIA CODE OF CIVIL PROCEDURE §1060)] JUDGE KIM G. DUNNING DEPT. C26

Plaintiff Construction Protective Services, Inc. ("CPS") alleges as follows against defendants Arthur Lujan, State Labor Commissioner for the State of California, and Does 1 through 10 (collectively, "Defendants"):

PARTIES AND VENUE

1. CPS is, and at all times mentioned herein was, a corporation. CPS was incorporated in California in 1992 and has its principal place of business in Los Angeles County.

2. Defendant Arthur Lujan is the State Labor Commissioner for the State of California, and the Chief of the Division of Labor Standards Enforcement, a division of the Department of

Industrial Relations. The State Labor Commissioner and the Division of Labor Standards Enforcement are charged with enforcing laws, regulations, and standards concerning the wages and hours of employees in the state. The regulations they enforce include, for example, Wage Orders promulgated by the Industrial Welfare Commission.

3. CPS is ignorant of the true names and capacities of defendants sued herein as Does 1-10, inclusive, and therefore sues those defendants by fictitious names. CPS will amend this Complaint to allege their true names and capacities once they are ascertained. CPS is informed and believes, and on that basis alleges, that at all times mentioned in this Complaint each defendant was the agent and employee of every other defendant, that each acted in the course and scope of his, her, or its authority as an agent, that each acted with the permission and consent of every other defendant, and that each ratified the conduct of every other defendant.

4. Venue is proper in Orange County because the parties are doing, and at all times relevant to this Complaint have done, business in that county and some portion of CPS's claim arose in that county.

FACTUAL BACKGROUND

5. CPS employs guards to provide security at construction sites. CPS has operations in California, Texas, Arizona, Nevada, and Florida. It employs about 1300 people, approximately 800 of whom work in California.

6. CPS's guards fall into two categories, hourly guards and in-residence guards. This Complaint concerns the approximately 400 in-residence guards whom CPS employs in California. In-residence guards sign employment agreements that require them to live at the job site for the duration of the construction project, often at least six months, and in some cases up to two years or more. The in-residence guards live in fully equipped trailer homes that CPS provides to them at a low monthly rent. Each trailer home has a kitchen, a bathroom with shower, eating and sleeping areas, and telephone access to corporate headquarters. Each in-residence guard has exclusive access to his trailer, and uses it as his primary residence. The guards keep their clothes and other personal belongings at their trailer homes during the time they live there, and most outfit their homes with televisions, radios, and other personal items.

7. Because, as CPS has learned, most thefts from construction sites occur when people are coming to and going from the site, the in-residence guards work during those times. While exact schedules may vary from site to site, in-residence guards typically work a split shift from 3:00 p.m. to 9:00 p.m. and from 5:00 a.m. to 7:00 a.m. on weekdays. During those working hours, the in-residence guards are required to be in uniform and to patrol the construction premises, watch tradesmen and workers enter and leave the site, and generally provide a highly visible security presence. For the eight nighttime hours between 9:00 p.m. and 5:00 a.m., the guards are free to sleep in their trailers, watch television, and engage in other private pursuits. They are not required to patrol the premises or to perform any work duties during those hours except in the rare instances when a security problem arises at night.

8. On weekends, in-residence guards typically are on duty from 5:00 a.m. to 9:00 p.m., and then sleep or engage in other personal pursuits during the nighttime hours of 9:00 p.m. to 5:00 a.m.

9. Each construction site houses numerous security sensors. Wires from the sensors are attached to an alarm panel in the guard's trailer home. If a wire is tripped somewhere on the site, the tripping of the wire causes an alarm buzzer to sound in the guard's trailer home. The guard must investigate and secure the area where the sensor detected a problem. After he has done so, he records on CPS tracking forms the amount of time he spent responding to the call and informs CPS corporate headquarters. He then is again free from duties and can sleep or relax in his trailer home.

10. CPS pays each in-residence guard an hourly amount for each of the hours the guard works during the day, typically between 3:00 p.m. and 9:00 p.m. and between 5:00 a.m. and 7:00 a.m. on weekdays and between 5:00 a.m. and 9:00 p.m. on weekends. For any overtime hours during the work week, CPS pays the guards either one and one-half times or two times their regular hourly rate, as applicable overtime law may require.

11. CPS does not pay in-residence guards for the hours they spend sleeping or engaging in personal activities during the night. If a guard has responded to a security problem during the night, however, CPS will pay him at an overtime rate for all of the time he spent doing that. That time is reflected on the CPS tracking forms that the guard completed during the night he was

awakened by the alarm buzzer. In addition, if the tracking forms show, for any particular night, that interruptions consumed more than a total of three hours, CPS assumes that the guard will not have been able effectively to make personal use of the nighttime hours during that night, and therefore will pay him for all eight of the hours between 9:00 p.m. and 5:00 a.m.

12. If on any night an in-residence guard wishes to leave his trailer home during the 9:00 p.m. to 5:00 a.m. period, he can easily arrange to do so. He is requested to call the CPS central office sometime during the day and tell them that he will be gone that night. CPS then arranges for another guard to cover the time the in-residence guard is away from the site. The substitute guard is not given access to the in-residence guard's trailer home during that period, as CPS considers that trailer home the in-residence guard's private apartment. Unlike the in-residence guard, the substitute guard must observe and patrol the premises throughout his nighttime shift. Therefore, CPS treats all of the substitute guard's nighttime hours as active duty time, and pays him for those hours.

13. Recognizing that they were the first company in California to provide live-in security to construction sites, CPS consulted with the Division of Labor Standards Enforcement (DLSE) before starting up the business. The DLSE told CPS at that time that a designated nighttime sleeping period of not more than eight hours was non-compensable, except for any time spent on calls to duty that interrupted the sleeping period. The DLSE recommended that the in-residence guards sign a written agreement that demonstrated they understood and agreed to CPS's scheduling and pay plan. CPS has at all times required in-residence guards to sign written agreements that set forth in detail the hours of work and the pay arrangement for each part of the day. (If an applicant is not willing to sign such an agreement, he or she may still be able to work for CPS in an hourly, non-resident position.)

14. Since its inception, CPS on occasion repeatedly faced wage claims from terminated in-residence guards who asserted that they should have been paid for all of their sleep time, regardless of whether the hours were spent sleeping or performing work tasks. Deputy Labor Commissioners in various offices of the DLSE handled those claims. In every instance, the Deputy Labor Commissioner dismissed the guards' claims.

15. During the late 1980's and the 1990's, the DLSE's Operations and Procedures Manual contained detailed rules concerning payment for employees' sleeping time. Section 10.75 of the Manual, which is attached here as Exhibit A and is incorporated herein, initially noted that the DLSE has "historically taken a . . . realistic and reasonable approach [to this issue], in that sleep time/meal time, and other non-active times which the employee can use for private pursuits or during which the employee is free to leave the premises have not been considered work time." The Manual then set forth a three-part approach:

a. If employees do not reside at the employer's premises, work less than a twenty-four-hour shift, and are permitted to sleep during the shift, all hours of the shift – including the sleeping time – are considered work time, and must be paid.

b. If employees do not reside at the employer's premises, work a twenty-four-hour shift, and are permitted to sleep during the shift, then up to eight hours of sleeping time per shift may be counted as non-working time and need not be paid. If the employee does not have the opportunity to get at least five hours of sleep, however, the entire time scheduled for sleeping must be considered hours worked and must be paid.

c. If employees are required to reside at the employer's premises, then sleeping time, up to eight hours per day, is not considered time worked and need not be paid. If the sleeping period is interrupted by a call to duty, the interruption must be counted as time worked. If because of interruptions the employee cannot get at least five hours of sleep, the entire eight-hour sleeping period will count as hours worked, and must be paid.

16. The federal regulations concerning sleep time under the Fair Labor Standards Act, which appear at 29 C.F.R. § § 785.20 – 785.23 and which are attached here as Exhibit B and incorporated herein, use the same three-part approach as did the DLSE's Manual section 10.75. Thus, under the federal regulations, an employee who does not reside at the premises and who works less than twenty-four-hour shifts must be paid for all scheduled hours, even if he or she can sleep for some of those hours (29 C.F.R. § 785.21). If an employee works twenty-four-hour shifts, the employee and employer may agree to exclude from working hours all scheduled sleeping periods, up

to eight hours in the twenty-four; thus, the employer will not need to pay for sleeping time (29 C.F.R. § 785.22). Finally, if an employee resides on the employer's premises, the employee and employer may agree that the employee will be paid only for hours of actual duty. The employer need not pay for time the employee "engage[s] in normal private pursuits" such as "eating, sleeping, entertaining," and the like. "An employee who resides on his employer's premises . . . for extended periods of time is not considered as working all the time he is on the premises"; rather, he is considered as working only during his active duty time. 29 C.F.R. § 785.23.

17. In 1997 the United States Department of Labor specifically approved CPS's sleep time pay plan. That approval was set forth in a March 24, 1997, letter to CPS's attorneys from Charles Striegel, then an Assistant District Director of the U.S. Department of Labor. The letter is attached here as Exhibit C and is incorporated herein. Very recently, the Department of Labor, after an exhaustive audit of CPS's operations in Los Angeles (which are typical of all of its California operations), again found that the sleep time pay arrangements comply fully with federal wage laws.

18. A few weeks after the federal agency's March 1997 letter issued, the state Department of Industrial Relations also issued a letter that approved CPS's sleep time pay plan. The April 24, 1997, letter to CPS's attorneys from John C. Duncan, then the Chief Deputy Director of the Department of Industrial Relations, which oversees the DLSE, is attached here as Exhibit D and is incorporated herein. Mr. Duncan's letter ruled in favor of "allowing . . . excludability of non-active duty times from compensation requirements for the live-in guards" (page 2). The DLSE's longtime "enforcement policy excluding sleep time and other non-active duty time hours" from the compensable time of resident employees extended to CPS's in-residence guards (page 2).

19. Two years later, however, in an August 12, 1999, letter to CPS's attorneys from then-State Labor Commissioner Marcy V. Saunders (attached here as Exhibit E and incorporated herein), the DLSE abruptly changed its course. CPS later learned that one of its direct competitors had supplied information -- much of it false – to the DLSE, and that the DLSE had based its sudden change of direction on that distorted information. (CPS also later obtained a copy of the August 12 letter that showed that Ms. Saunders had sent a blind copy of that letter to the same competitor.) The letter stated that all of the in-resident guards' hours, "including sleep and meal time, . . . constitute

'hours worked'" and thus must be paid (page 2). The agency intended to "rapidly proceed with our investigation, and any necessary litigation, in order to secure the reimbursement of all amounts owed as unpaid wages to CPS's employees for the past three years" (page 3).

20. Immediately after receiving the letter from Ms. Saunders, and particularly upon identifying in it a large number of factual inaccuracies that seemed to have influenced Ms. Saunders's conclusions, CPS's representatives wrote to Ms. Saunders to explain the correct facts and to seek a meeting with her to discuss the agency's sudden about-face on the sleep time pay plan. Despite CPS's repeated efforts to arrange such a meeting, however, no meeting took place until February 2002.

21. During the period between 1999 and 2002, the agency did not in fact "rapidly proceed" with investigation or with litigation against CPS. Rather, the matter was left to the consideration of a few scattered wage claims that individual guards filed during that time. The agency dismissed the sleep time portion of every such claim.

22. In February 2002, at CPS's insistence, representatives from the DLSE's general counsel's office finally met with CPS concerning the 1999 letter. CPS left the meeting with the impression that sending a legal memorandum to the DLSE about the sleep time issue might help fully convince the general counsel's office staff and others that the agency's longtime rule allowing employers of resident employees to exclude sleep time from compensable hours worked (rather than the agency's recent reversal of that rule) correctly embodied California law. Accordingly, on August 21, 2002, CPS's attorneys sent Ann Stevason, then Senior Trial Counsel of the DLSE, a lengthy letter analyzing case law and agency materials and demonstrating that CPS's sleep time compensation plan was lawful.

23. Ms. Stevason responded to CPS's attorneys' letter with a letter dated September 16, 2002. Her letter completely rejected the approach to sleep time issues that the agency had taken throughout the 1990's. The letter labeled as "incorrect" John Duncan's April 1997 letter (Exhibit D), saying that Mr. Duncan had misstated both the law and the enforcement posture taken by the DLSE in the past. The September 2002 letter then rejected every aspect of the analysis CPS had presented in its August letter.

24. The 2002 letter from the DLSE concluded with a threat of prompt and aggressive enforcement against CPS. The letter stated flatly that the agency views CPS's sleep time compensation plan as illegal and that, accordingly, the DLSE now will enforce its view of the law.

25. By letter dated October 17, 2002, from CPS's attorneys to Ms. Stevason at the DLSE, CPS presented a new argument establishing that the in-residence guards' sleep time was not compensable working time. In previous correspondence, both CPS and the DLSE had been assuming that CPS's employees were subject to the provisions of Wage Order 4, 8 Cal. Code Regs. § 11040, the Industrial Welfare Commission Order that sets wages and hours for clerical and other white-collar occupations, including, in some instances, security guards. In the October 17 letter, however, CPS explained that it had realized that in fact its employees are subject to Wage Order 5, 8 Cal. Code Regs. § 11050, the Order that applies to all employers that provide rental lodging to their employees. Under Wage Order 5's express provisions, resident employees' sleeping time is not compensable working time. See 8 Cal. Code Regs. § 11050 (2) (K).

26. The DLSE rejected CPS's new argument as decisively as it had rejected all prior arguments. In a telephone message on November 13, 2002, Ms. Ann Stevason told CPS's counsel that Wage Order 5 simply did not cover CPS's employees. Ms. Stevason's reasoning was conclusory, and did not address any of the analysis set forth in the October 17, 2002 letter.

27. CPS now faces immediate prosecution of wage claims filed by guards who believe that they should have been paid for all eight of their nighttime sleeping hours. A proceeding pending in Oakland was briefly stayed to enable CPS to file this Complaint. Other proceedings are pending in Long Beach (3 proceedings), San Bernardino (2 proceedings) and San Jose. In addition, the DLSE has begun an audit of CPS's pay practices, including the sleep time compensation plan If CPS's sleep time payment practices are found to be unlawful, CPS could be liable for millions (if not tens of millions) of dollars in back pay, extending back over a period of three years. Indeed, CPS will be unable to afford to continue employing its in-residence guards and thus will be forced to lay them off and to close part or all of its operations in the state.

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CAUSE OF ACTION

Declaratory Relief Against All Defendants

28. CPS realleges and incorporates by reference paragraphs 1 through 27 as though set forth here in full.

29. As alleged herein, the DLSE has stated its intention to enforce immediately its view of state law concerning the compensability of sleep time. CPS believes that the DLSE's view of the law is erroneous. Enforcement of the DLSE's view will gravely injure CPS's interests.

30. Through all the steps taken as described above, CPS has made every attempt to convince Defendants of the validity of its sleep time pay practices. All such attempts have failed.

31. An actual controversy has arisen and now exists between CPS and Defendants concerning their respective rights and duties, in that CPS contends that the sleep time compensation plan it has had in place since 1989 complies fully with California wage and hour law, and that therefore CPS owes no money in back wages to its in-residence guards and need not revise its sleep time compensation plan in any way. Defendants, however, dispute CPS's contentions in those regards, and contend that CPS's sleep time compensation plan violates California's wage and hour laws, that CPS therefore will need to pay extensive back wages to its current and former in-residence guards, and that CPS must significantly change its pay policies and practices with regard to the guards' sleep time.

32. CPS desires a judicial determination of its rights and duties, a declaration as to whether CPS's interpretation or the DLSE's interpretation of California law concerning the compensability of sleep time is correct, and a declaration as to the lawfulness of CPS's sleep time compensation plan. Specifically, CPS desires a declaration and determination that:

a. Wage Order 5, 8 Cal. Code Regs. § 11050, rather than Wage Order 4, 8 Cal. Code Regs. § 11040, governs CPS's California employees, and that under Wage Order 5 CPS and its in-residence guards may agree that CPS will not pay the guards for sleep time and that therefore CPS's sleep time compensation plan is lawful; or

b. If Wage Order 4, rather than Wage Order 5, governs CPS's California employees, then California law allows CPS to exclude sleep time from compensable work time

for its in-residence guards pursuant to CPS's plan, and therefore CPS's sleep time compensation plan is lawful.

33. Such a declaration is necessary and appropriate at this time under the circumstances in order that CPS may ascertain its rights and duties under California law and in order that, if its interpretation of the law is correct, CPS may be spared paying large amounts of unearned back wages and laying off significant numbers of California employees.

WHEREFORE, Plaintiff prays for judgment as follows:

1. For a declaration that California law permits CPS to continue its existing pay practices with respect to the sleep time period (typically 9:00 p.m. to 5:00 a.m.) of its in-residence guards in California;

2. For temporary and preliminary injunctive relief enjoining Defendants from adjudicating the pending proceedings against CPS and from seeking to enforce or enforcing any order, decision or award issued therein during the pendency of this action;

3. For reasonable attorney's fees;

4. For costs of suit; and

5. For such other relief as the Court may deem proper.

Dated: November 18, 2002

KNEE, ROSS & SILVERMAN, LLP

By: _____
Howard M. Knee, Esq.
Attorneys for Plaintiff
Construction Protective Services, Inc.

VERIFICATION

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I have read the foregoing VERIFIED COMPLAINT FOR DECLARATORY RELIEF (California Code of Civil Procedure Section 1060) and know its contents.

☐ CHECK APPLICABLE PARAGRAPHS

☐ I am a party to this action. The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

☒ I am ☒ an Officer ☐ a partner _____ ☐ a _____ of CONSTRUCTION PROTECTIVE SERVICES, INC., a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason. ☐ I am informed and believe and on that ground allege that the matters stated in the foregoing document are true. ☒ The matters stated in the foregoing document are true of my own knowledge, except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

☐ I am one of the attorneys for _____ a party to this action. Such party is absent from the county of aforesaid where such attorneys have their offices, and I make this verification for and on behalf of that party for that reason. I am informed and believe and on that ground allege that the matters stated in the foregoing document are true.

Executed on November 2002, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

CHRIS COFFEY
Type or Print Name

_____
Signature

PROOF OF SERVICE

1013a (3) CCP Revised 5/1/88

STATE OF CALIFORNIA, COUNTY OF

I am employed in the county of _____, State of California.

I am over the age of 18 and not a party to the within action; my business address is: _____

On, _____ I served the foregoing document described as _____

_____ on _____ in this action

☐ by placing the true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list:

☐ by placing ☐ the original ☐ a true copy thereof enclosed in sealed envelopes addressed as follows:

☐ BY MAIL

☐ *I deposited such envelope in the mail at _____, California. The envelope was mailed with postage thereon fully prepaid.

☐ As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at _____ California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on _____, at _____, California.

☐ **(BY PERSONAL SERVICE) I delivered such envelope by hand to the offices of the addressees.

Executed on _____, at _____, California.

☐ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

_____
Type or Print Name

_____
Signature

*(BY MAIL SIGNATURE MUST BE OF PERSON DEPOSITING ENVELOPE IN MAIL SLOT, BOX, OR BAG)

**(FOR PERSONAL SERVICE SIGNATURE MUST BE THAT OF MESSENGER)


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Acknowledgments

Preface

The current Operations and Procedures Manual, Vol. 2, Wages, is now over ten years old and significant changes to our laws have taken place during that time. The need for a new manual was and is obvious, but the work necessary to accomplish such a task is considerable, especially in light of the limited staff in headquarters. In this situation, any rewrite of the manual could only occur if staff throughout the Division contributed to the project. In late 1987/early 1988 planning began to accomplish the rewrite.

Work has progressed steadily and the manual has now been successfully completed—the work of a large number of talented and dedicated DLSE employees. Major credit for this work goes to the supervisor of this project, Albert J. Reyff, former Chief Deputy Labor Commissioner, who has carefully shepherded this work through the editing and assembly processes.

A great deal of credit also goes to H. Thomas Cadell, Jr., Chief Counsel, who participated extensively in the drafting and editing process.

Most of the credit, however, must go to the field personnel and attorneys who wrote various chapters and sections of the manual. All of this work was done without reducing their normal caseloads and manifests their dedication to DLSE and the people they serve. I want to personally thank all of the following individuals for their contributions to this manual:

Denos Carras
Carol Cole
Richie Jenkins
Stuart Kaye
Jose Millan
Richard Mitchell
Nance Steffen
Joan E. Toigo

Mariano Kramer

Of course, this manual could not have been written and assembled without the tireless efforts of the clerical staff throughout the Division who typed and retyped the various sections. I thank each of you and, in particular, Olivia Abranches and Maureen Dietz in headquarters, who typed and retyped the draft innumerable times. Their unfailing good humor in the face of an endless stream of edits was greatly appreciated.

I sincerely thank all of you for all your hard work. I believe we have put together a manual which will be useful to every Division employee as he or she enforces fairly and consistently the laws under the Labor Commissioner's jurisdiction. It has been a pleasure and an honor to have been associated with all of you on this project.

Date: *September 1989*

Lloyd W. Aubry, Jr.

Lloyd W. Aubry, Jr.
State Labor Commissioner

10.75 24-Hour Employer Control

In determining hours worked, problems arise when the job is a combination of assigned duties and time subject to varying degrees of employer control.

If the employee is subject to 24-hour employer control, DLSE could, of course, arbitrarily hold that all 24 hours constitute hours worked. However, this Division and the federal Wage and Hour Division have historically taken a more realistic and reasonable approach, in that sleep time, meal time, and other non-active times which the employee can use for private pursuits or during which the employee is free to leave the premises have not been considered work time.

LIVE-IN EMPLOYEES:

b) **The following guidelines for determining hours worked apply to:**

3) resident ambulance drivers and attendants, firefighters, mortuary attendants, and similar employees;

(a) All time on duty is time worked except for:

(1) Scheduled sleeping time not to exceed eight hours per day. If the sleeping time is interrupted by a call to duty, the interruption must be counted as hours worked. If the employee does not have the opportunity to get at least five hours of sleep, the entire time scheduled for sleeping must be considered as hours worked. These five hours need not be five continuous uninterrupted hours of sleep. However, if interruptions are so frequent as to prevent reasonable periods of sleep totaling at least five hours, the entire period would be considered hours worked.

(2) Uninterrupted meal periods of not less than 30 minutes nor more than one hour per meal.

(3) Time when the employee can engage in private pursuits, or is free to leave the premises.

10.75 24-Hour Employer Control

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LESS THAN 24-HOUR DUTY (Non Live-in):

1. Typical jobs: night watchman or attendant, hotel desk clerk.
2. An employee who is required to be on duty for less than 24 hours is considered to be working even though the employee is permitted to sleep or engage in other personal activities when not busy.
3. If the employee is relieved of all duties and free to leave the premises for a 30-minute or more meal period, the meal period may be excluded from hours worked.

DUTY OF 24 HOURS (Non Live-in):

1. Typical jobs: Firefighter, ambulance driver and attendant.
2. On shifts of 24 hours or more, sleep time and uninterrupted meal periods of not less than 30 minutes nor more than one hour per meal may be excluded from hours worked. The sleep time exclusion is limited to no more than eight hours during each 24 hours of duty, and the employer must furnish adequate sleeping facilities. If the employee does not have the opportunity to get at least five hours of sleep, the entire time scheduled for sleeping must be considered as hours worked. These five hours need not be continuous uninterrupted hours of sleep. However, if interruptions are so frequent as to prevent reasonable periods of sleep totaling at least five hours, the entire period would be considered hours worked.

LIVE-IN EMPLOYEES:

a) **Resident Care Facilities Licensed for 16 or more Guests:**

All on-duty time including night hours, is time worked. The licensing agency requires at least one employee awake and on duty during the night hours, and one or more employees on call to assist in caring for residents in the event of an emergency.

Resident employees on call in these facilities, during hours in which they are not scheduled to work, are not considered working unless called.

b) **The following guidelines for determining hours worked apply to:**

1) resident care homes licensed for 15 or less;

2) house parents in children's group homes;

3) resident ambulance drivers and attendants, firefighters, mortuary attendants, and similar employees; and

4) live-in household workers:

(a) All time on duty is time worked except for:

(1) Scheduled sleeping time not to exceed eight hours per day. If the sleeping time is interrupted by a call to duty, the interruption must be counted as hours worked. If the employee does not have the opportunity to get at least five hours of sleep, the entire time scheduled for sleeping must be considered as hours worked. These five hours need not be five continuous uninterrupted hours of sleep. However, if interruptions are so frequent as to prevent reasonable periods of sleep totaling at least five hours, the entire period would be considered hours worked.

(2) Uninterrupted meal periods of not less than 30 minutes nor more than one hour per meal.

(3) Time when the employee can engage in private pursuits, or is free to leave the premises.

Houseparents in most children's homes will be covered by the 54-hour provision in Section 3(D) of IWC Order 5. (No such exception from the 40-hour week is made for kitchen, maintenance or clerical personnel or program staff.)

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Supp. 213 (E.D. Mich 1950), aff'd 194 F. 2d 493 (C.A. 6, 1952); *Biggs v. Joshua Hendy Corp.*, 183 F. 2d 515 (C. A. 9, 1950), 187 F. 2d 447 (C.A. 9, 1951); *Walling v. Dunbar Transfer & Storage Co.*, 3 W.H. Cases 284; 7 Labor Cases para. 61,565 (W.D. Tenn. 1943); *Lofton v. Seneca Coal and Coke Co.*, 2 W.H. Cases 669; 6 Labor Cases para. 61,271 (N.D. Okla. 1942); aff'd 136 F. 2d 359 (C.A. 10, 1943); cert. denied 320 U.S. 772 (1943); *Mitchell v. Tampa Cigar Co.*, 36 Labor Cases para. 65,198, 14 W.H. Cases 38 (S.D. Fla. 1959); *Douglass v. Hurwitz Co.*, 145 F. Supp. 29, 13 W.H. Cases (E.D. Pa. 1956))

(b) *Where no permission to leave premises.* It is not necessary that an employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period.

Sleeping Time and Certain Other Activities

Sec. 785.20 General.

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.

Sec. 785.21 Less than 24-hour duty.

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. (*Central Mo. Telephone Co. v. Conwell*, 170 F. 2d 641 (C.A. 8, 1948); *Strand v. Garden Valley Telephone Co.*, 51 F. Supp. 898 (D. Minn. 1943); *Whitsitt v. Enid Ice & Fuel Co.*, 2 W. H. Cases 584; 6 Labor Cases para. 61,226 (W.D. Okla. 1942).)

Sec. 785.22 Duty of 24 hours or more.

(a) *General.* 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 employer and the employee can usually enjoy an uninterrupted night's sleep. If sleeping period is of more than 8 hours, only 8 hours will be credited. Where no expressed or implied agreement to the contrary is present, the 8 hours of sleeping time and lunch periods constitute hours worked. (*Armour v. Wantock*, 323 U.S. 126 (1944); *Skidmore v. Swift*, 323 U.S. 134 (1944); *General Electric Co. v. Porter*, 208 F. 2d 805 (C.A. 9, 1953), cert. denied, 347 U.S. 951, 975 (1954); *Bowers v. Remington Rand*, 64 F. Supp. 620 (S.D. Ill, 1946), aff'd 159 F. 2d 114 (C.A. 7, 1946) cert. denied 330 U.S. 843 (1947); *Bell v. Porter*, 159 F. 2d 117 (C.A. 7, 1946) cert. denied 330 U.S. 813 (1947); *Bridgeman v. Ford, Bacon & Davis*, 161 F. 2d 962 (C.A. 8, 1947); *Rokey v. Day & Zimmerman*, 157 F. 2d 736 (C.A. 8, 1946); *McLaughlin v. Todd & Brown, Inc.*, 7 W.H. Cases 1014; 15 Labor Cases para. 64,606 (N.D. Ind. 1948); *Campbell v. Jones & Laughlin*, 70 F. Supp. 996 (W.D. Pa. 1947).)

(b) *Interruptions of sleep.* If the sleeping period is interrupted by a call to duty, the interruption must be counted as hours worked. If the period is interrupted to such an extent that the employee cannot get a reasonable night's sleep, the entire period must be counted. For enforcement purposes, the Divisons have adopted the rule that if the employee cannot get at least 5 hours' sleep during the scheduled period the entire time is working time. (See *Eustice v. Federal Cartridge Corp.*, 66 F. Supp. 55 (D. Minn. 1946).)

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

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. (*Skelly Oil Co. v. Jackson*, 194 Okla. 183, 148 P. 2d 182 (Okla. Sup. Ct. 1944; *Thompson v. Loring Oil Co.*, 50 F. Supp. 213 (W.D. La. 1943).)

Preparatory and Concluding Activities

Sec. 785.24 Principles noted in Portal-to-Portal Bulletin.

In November, 1947, the Administrator issued the Portal-to-Portal Bulletin (part 790 of this chapter). In dealing with this subject, §790.8 (b) and (c) of this chapter said:

(b) The term "principal activities" includes all activities which are an integral part of a principal activity. Two examples of what is meant by an integral part of a principal activity are found in the report of the Judiciary Committee of the Senate on the Portal-to-Portal bill. They are the following:

(1) In connection with the operation of a lathe, an employee will frequently, at the commencement of his workday, oil, grease, or clean his machine, or install a new cutting tool. Such activities are an integral part of the principal activity, and are included within such term.

(2) In the case of a garment worker in a textile mill, who is required to report 30 minutes before other employees report to commence their principal activities, and who during such 30 minutes distributes clothing or parts of clothing at the workbenches of other employees and gets machines in readiness for operation by other employees, such activities are among the principal activities of such employee.

Such preparatory activities, which the Administrator has always regarded as work and as compensable under the Fair Labor Standards Act, remain so under the Portal Act, regardless of contrary custom or contract.

(c) Among the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance. If an employee in a chemical plant, for example, cannot perform his principal activities without putting on certain clothes, changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity. On the other hand, if changing clothes is merely a convenience to the employee and not directly related to his principal activities, it would be considered as a "preliminary" or "postliminary" activity rather than a principal part of the activity. However, activities such as checking in and out and waiting in line to do so would not ordinarily be regarded as integral parts of the principal activity or activities.

Sec. 785.25 Illustrative U.S. Supreme Court decisions.

These principles have guided the Administrator in the enforcement of the Act. Two cases decided by the U.S. Supreme Court further illustrate the types of activities which are considered an integral part of the employees' jobs. In one, employees changed their clothes and took showers in a battery plant where the manufacturing process involved the extensive use of caustic and toxic materials. (*Steiner v. Mitchell*, 350 U.S. 247 (1956).) In another case, knifemen in a meatpacking plant sharpened their knives before and after their scheduled workday (*Mitchell v. King Packing Co.*, 350 U.S. 260 (1956)). In both cases the Supreme Court held that these activities are an integral and indispensable part of the employees' principal activities.

Sec. 785.26 Section 3(o) of the Fair Labor Standards Act.

Section 3(o) of the Act provides an exception to the general rule for employees under collective bargaining agreements. This section provides for the exclusion from hours worked of time spent by an employee in changing clothes or washing

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U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

300 S. Glendale Ave., Suite 400
Glendale, CA 91205
(213) 894-8375
(213) 894-8845

Wage-Hour Opinion Letter No.

March 24, 1997

CONFIDENTIAL

RECEIVED
MAR 27 1997
By _____

Howard M. Knee
Attorney At Law
2049 Century Park East, Suite 2080
Los Angeles, CA 90067

In reply to: Designated Sleep Time for Employees Residing at Their Site of Employment

Dear Mr. Knee:

This letter is in response to your inquiry to the above subject. The department holds several tests from 29 CFR 785.22 on covered firms to see whether an employee's sleep time should be justified as hours worked.

(1) If an employee is required to be on duty for 24 or more consecutive hours, the time allotted for sleep must not fall below 5 hours and should not go beyond 8 hours. This means that if an employee has less than 5 hours of sleep time; all sleep time hours shall be counted as hours worked. If an employee exceeds 8 hours of sleep time, only 8 hours may be deducted from his/her hours worked.

(2) If an employee has no regular schedule of hours or a schedule in name only, and is required to perform work on a hatter-skelter basis at any time during the day or night, then the time constitutes as hours worked.

(3) If an employee has a regular schedule of hours but the unscheduled periods are so cut through with frequent work calls that the time is not his own, then that time constitutes as hours worked.

In order for an employer to claim that his/her employee for sleep time, the employer must show that the above practices do not occur. I have reviewed the agreement that you provided under exhibit-1, and determined that it conforms to the standards set forth by 29 CFR 785.22, and FOH § 31b02. I therefore conclude that your agreement may be used as a bona fide agreement for designating sleep time for employees residing at their site of employment. However, the employer may not force this agreement on his/her employees or discriminate against his/her employees if they choose not to sign this agreement.[1]

Sincerely,

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CONFIDENTIAL

Charles Striegel
Assistant District Director
Enclosures: FOH § 31b02 and Interpretative Bulletin, Part 785

[1] Cunningham and Reynolds v. Gibson County, No. 95-6665 and 95-6667, 1997 U.S. App. LEXIS 5398, at *1 (6th Cir. Mar. 18, 1997.)

custom or practice under the collective bargaining agreement to exclude this time from the measured working time, and FLSA Sec. 3(o) applies to the time.

31b01a **Clothes changing and wash up time on a formula basis.** An employer may set up a formula by which employees are allowed given amounts of time to perform clothes changing and wash up activities provided the time set is reasonable in relation to the actual time required to perform such activities. The time allowed will be considered reasonable if a majority of the employees usually perform the activities within the given time.

31b02 **Employees residing temporarily on employer's premises.** (a) There are certain circumstances (usually at locations such as hard-to-reach construction jobs, isolated dredging barges and off shore drilling sites) where practical considerations make it necessary for an employee to remain temporarily on the employer's premises and to eat and sleep there during his stay. In such situations, the employee shall not be considered as on "duty of 24 hours or more" if he has a regular schedule of hours and thereafter is relieved of duties except for extra work required by the exigencies of the job. Only the actual working time need be counted as hours worked.

(b) The rules governing "duty of 24 hours or more" (13 785.22) are applicable where, from all the conditions of employment, including the understanding of the parties, it is clear that the employee is employed to wait rather than waiting to be employed. Among the factors which would support such a conclusion are:

(1) the employee has no regular schedule of hours, or a schedule in name only, and is required to perform work on a helter-skelter basis at any time during the day or night; or

(2) the employee has a regular schedule of hours but the unscheduled periods are so cut through with frequent work calls that this time is not his own.

(c) Some employers, such as offshore oil well drilling contractors, arrange transportation to remote locations in such a way that two crews having regular work schedules as in (a) above, arrive at the work site at the same time. One crew will ordinarily go to work immediately and the other must wait through an entire shift (or a substantial portion thereof) before starting work. At the end of the tour of duty at the work site, one crew, after completing its last shift, must wait through the last shift (or a substantial portion thereof) of the other crew before crews are transported back from the work site at the same time. Such waiting time on the initial and terminal days is as much an integral part of those particular 24-hour periods as the idle periods between the regular work shifts on the other workdays. Where the employees are not on call and are completely relieved of duty, such idle time on the initial and terminal days is not considered hours worked.

31b04 Radio announcers and performers. Time spent by performers, including radio announcers on out-of-stretch (see FOH 32d08a) radio and television programs for which talent fees (as defined in Reg. 550) are paid, is not counted as hours worked provided the fee is sufficient to compensate for the straight time and OT compensation which would normally be due for such time.

31b05 Participation in athletic contests. As an enforcement policy, Wage-Hour will not consider as hours worked under the FLSA or PCA any time spent by an employee as a participant in, or as an umpire, referee, scorer, or similar official in an athletic contest sponsored by the employer, if the participation of the employee in these activities is completely voluntary and if his regular employment is not conditioned upon his participating in these activities.

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STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
45 Fremont Street, 32nd Floor
San Francisco, CA 94105

PETE WILSON, Governor

ADDRESS REPLY TO:
P.O. Box 420603
San Francisco, CA 94142

April 24, 1997

CONFIDENTIAL

(VIA FAX AND FIRST CLASS MAIL)

Ted R. Huebner, Esq.
Huebner & Hirshfield
12233 W. Olympic Boulevard, Suite 254
Los Angeles, CA 90064

Re: **Construction Protective Services, Inc.**
State Case #26-33417/145

Dear Mr. Huebner:

This is in response to the meeting held in the Director's office of the Department of Industrial Relations on April 7, 1997, in which the Department undertook to provide you with a definitive response to your client's [Construction Protective Services, Inc. (CPS)] compensation package for its live-in guards employed at construction sites statewide. The meeting on April 7 was the culmination of an investigation by the Division of Labor Standards Enforcement (DLSE), since March 1996, into the compensation practices of CPS.

Over the past five years, in a number of cases, division staff have reviewed the compensation plan and found it proper. In light of this, it is understandable that recent contacts with the Division have been confusing to your client.

Historically, both the Division and its federal counterpart, the U.S. Department of Labor/Wage and Hour Division, have taken the realistic and reasonable position that by voluntary written agreement between employee and employer, the employer may exclude from hours worked 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. There is no duty to compensate the employee for these times.

While the federal government has been far more liberal in the application of this rule to various classifications of employees governed by the provisions of 29 CFR 785.22 and 785.23, the state rule has historically been more narrowly applied to a handful of occupations: ambulance drivers and their attendants covered under Industrial Welfare Commission (IWC) order #9-90, and any occupation in which the employee is required to reside on the premises of an employer subject to IWC order #5-89. The historical reason for limiting the application of the general exclusionary rule to only these classifications was that these occupations are

governed by the pro[illegible]ons of the IWC orders, which c[illegible]ain specific language that easily allows for this interpretation. However, over the past 20 years, DLSE has adopted an enforcement policy excluding sleep time and other non-active duty hours of mini-storage managers under IWC order #9-90, mortuary attendants under IWC order #2-80, and private firefighters under IWC order #4-89 as being consistent with the IWC orders. The inclusion of these classifications in the excludability of sleep time acknowledged the common sense and fairness underlying the wage orders, and their proper interpretation in light of applicable federal law, with which the IWC was undoubtedly familiar when it adopted the language contained in the wage orders.

This is a difficult issue and obviously in some ways, a close issue. However, in light of the facts and after a careful and thorough review of Construction Protective Services' compensation documents, we find it appropriate to extend this rule to the live-in security guards of your client.

The compensation plan you have adopted would apply to those guards who, as a condition of employment, are required to reside at their place of employment for varying periods of time. It is significant that the guards you employ were homeless and this is essentially their only place of residence. The voluntary, written agreement between the guards and CPS properly provides a method by which the employees are required and are able to report extra work hours that result from sleep time interruptions to their employer to ensure for their proper compensation. The plan also allows for specifically designated times during which the employee is free from all active duty assignments or is free to leave the premises. All of these factors militate in favor of allowing the use of the excludability of non-active duty times from compensation requirements for the live-in guards.

Accordingly, DLSE's case in this matter is now closed and the *subpoena duces tecum* issued by Senior Deputy Labor Commissioner Michael Medrano is hereby withdrawn. If I may provide you with any further information, please feel free to contact me in writing.

Very truly yours,

John C. Duncan
Chief Deputy Director

Lloyd W. Aubry, Jr., Director
Thomas H. Cadell, DLSE Chief Counsel
Gregory Rupp, Assistant Labor Commissioner
Nance S. Steffen, Assistant Labor Commissioner

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STATE OF CALIFORNIA GRAY DAVIS, Governor
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
455 Golden Gate Avenue, 9th Floor
San Francisco, CA 94102
(415) 703-4810
MARCY V. SAUNDERS, State Labor Commissioner

August 12, 1999

Ted R. Huebner, Esq.
Huebner & Hirshfield
12233 W. Olympic Boulevard, Suite 254
Los Angeles, CA 90064

Re: Construction Protective Services, Inc.

Dear Mr. Huebner:

As you are now probably aware, the Bureau of Field Enforcement of the Division of Labor Standards Enforcement recently began an investigation of the compensation practices of Construction Protective Services, Inc. ("CPS"), a business that provides security guards at construction sites. Specifically, our investigation is directed at allegations that CPS requires its security guards to remain on the construction premises (in or near trailers that contain sleeping quarters), and to be available to respond to any security problems, on weekdays from approximately 4 PM to approximately 7 AM, and for 12 hour shifts on Saturdays, Sundays, and holidays, but that the security guards are not paid for all of these hours.

In what is now the preliminary stage of our investigation, we have uncovered a letter, dated April 24, 1997, that was sent to you, as the attorney for CPS, by John C. Duncan, the former chief deputy director of the Department of Industrial Relations. That letter concluded that pursuant to "voluntary" written agreements, CPS could exclude "sleep time" and "meal time" from the hours worked by its security guards, so that such time need not be compensated. You are hereby advised that the conclusions expressed in that letter are incorrect and in conflict with established California law.

Security guards employed by a security guard company to provide security at construction sites are covered by the provisions of Industrial Welfare Commission ("IWC") Order 4-98 (and, prior to January 1, 1998, were covered by its predecessor, Order 4-89). Order 4 defines "hours worked" as "the time during which an employee is subject to the control of an employer, and includes all time the employee is suffered or permitted to work, whether or not required to do so." Compensation is required for all hours worked, with overtime compensation required for all overtime hours worked.

Order 4 does not contain any express provision allowing for a deduction from hours worked for "sleep time" or "meal time." The issue, then, is whether periods during which a security guard is sleeping or eating fall within the definition of "hours worked." The fact that each security guard is restricted, during the entire work shift, to the construction site that he or she is responsible for guarding compels the conclusion that all such hours, including sleep and meal time, are "subject to the control of the employer," and thus, constitute "hours worked."

This conclusion is consistent with the decision in *Aguilar v. Association for Retarded Citizens* (1991) 234 Cal.App.3d 21, wherein the court held that non-exempt employees must be paid for all hours under the control of the employer absent an express exemption in the applicable IWC wage order. The *Aguilar* court therefore ruled that the IWC's "broad definition" of hours worked "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." *Ibid.*, 234 Cal.App.3d at 30.

The April 24, 1997 letter issued by then chief deputy director Duncan asserts that "[i]t is significant that the guards you employ were homeless and [that the trailer on the construction site] is essentially their only place of residence." Initially, we note that the only basis for any finding that CPS employed "homeless persons" was an assertion set out in a prior letter from you; that is, no facts were gathered by the Division upon which any such statement could be made. Moreover, a trailer containing a cot or bed (which, presumably, the guard must vacate once his or her shift is over) cannot in any way be equated to a home residence. More importantly, even if it were true that these security guards had no home residence, we fail to apprehend any legal significance. IWC Order 4 does not treat homeless workers differently than any other workers, and Order 4's definition of "hours worked" (in contrast to IWC Order 5) does not contain any special provision for employees required to reside on the employment premises.

The security guards are restricted to the construction sites during their shifts for the benefit of CPS and its customers. The very purpose of employing the security guard is to have someone on the premises to deter theft or vandalism and to respond to any emergencies. As the United State Supreme Court held in *Armour & Company v. Wantock* (1944) 323 U.S. 126 "an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. Refraining from other activities 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 as a

benefit to the employer." *Ibid.*, 323 U.S. at 133. Thus, in *Wantock*, the Supreme Court held that a company's private firefighters were entitled to compensation for all hours during which they were restricted to the employer's premises and expected to respond to any emergencies, despite the fact that they were free to sleep or otherwise engage in private pursuits during those hours. We fail to perceive any reason to treat CPS and its security guards any differently.

In earlier correspondence with our Division, you have argued that under federal law, the security guards qualify as "permanent in-residence employees," so as to permit deductions for sleep time and meal periods under 29 CFR section 785.23. To fall within that federal regulation, the employees must reside on the employer's premises "on a permanent basis or for extended periods of time." Those facts do not appear to be present here. Moreover, whether or not the security guards have a claim for unpaid wages under federal law, the federal regulations governing compensable time are substantially different from the state's definition of "hours worked" under IWC Order 4, and thus, the federal rules cannot be used to interpret or limit California law, particularly where, as here, California law is more beneficial to workers. See *Ramirez v. Yosemite Water Company* (1999) 20 Cal.4th 785.

We urge you to advise your client to immediately modify its compensation practices in order to comply with California wage and hour law. Please be advised that it is our intention to rapidly proceed with our investigation, and any necessary litigation, in order to secure the reimbursement of all amounts owed as unpaid wages to CPS' employees for the past three years.

Sincerely,

Marcy V. Saunders

Marcy V. Saunders
State Labor Commissioner

cc: Steve Smith, Director
Miles E. Locker, DLSE Chief Counsel
Rich Clark, Chief Deputy Labor Commissioner
Tom Grogan, Assistant Labor Commissioner
Greg Rupp, Assistant Labor Commissioner
Nance Steffen, Assistant Labor Commissioner
All Senior Deputy Labor Commissioners
All DLSE Staff Attorneys

DIVISION OF LABOR STANDARDS ENFORCEMENT
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Attorneys for Defendant/Cross-Complainant
ARTHUR LUJAN, LABOR COMMISSIONER STATE OF CALIFORNIA

EXEMPT FROM FEES LABOR CODE §101, ET SEQ.

SUPERIOR COURT UNLIMITED FOR THE STATE OF CALIFORNIA

COUNTY OF ORANGE

CONSTRUCTION PROTECTIVE SERVICES, Plaintiff, vs. ARTHUR LUJAN, STATE LABOR COMMISSIONER, AND DOES 1-10, Defendants.	CASE NO. 02CC17330 Assigned to the Hon. Gerald Johnston, Dept. C29 **CROSS-COMPLAINT FOR** **UNPAID WAGES;** **ILLEGAL DEDUCTIONS;** **PENALTIES PER LABOR CODE §203;** **LIQUIDATED DAMAGES PER LABOR CODE §1194.2; AND** **INJUNCTIVE RELIEF**
ARTHUR LUJAN, LABOR COMMISSIONER, DIVISION OF LABOR STANDARDS ENFORCEMENT, DEPARTMENT OF INDUSTRIAL RELATIONS, STATE OF CALIFORNIA, Cross-Complainant, vs. CONSTRUCTION PROTECTIVE SERVICES, INC., and ROES 1 through 20, Cross-Defendants.	FILED BY FAX [No fee per Labor Code §101 *et seq.*]

Cross-Complainant, DIVISION OF LABOR STANDARDS ENFORCEMENT, Department of Industrial Relations, State of California, by and

through Arthur S. Lujan, the State Labor Commissioner, complains of Cross-Defendants, and each of them and alleges as follows:

FIRST CAUSE OF ACTION

(Unpaid Wages)

(Against All Cross-Defendants)

1. Cross-Complainant, ARTHUR S. LUJAN (hereinafter "ARTHUR LUJAN"), the Labor Commissioner of the State of California, and the Chief of the DIVISION OF LABOR STANDARDS ENFORCEMENT (hereinafter the "DIVISION" or the "Labor Commissioner"), a division of the Department of Industrial Relations, State of California, and as such is authorized to bring this action pursuant to Labor Code sections 97, 98.3, 217, 1193.5, 1193.6, 1195.5 and 1198 to determine and recover any sums owing to any worker in the State of California without assignment of such wages.

2. At all times herein mentioned, Cross-Defendant CONSTRUCTION PROTECTIVE SERVICES, INC. (hereinafter "CPS"), was and is a corporation organized within State of California and subject to the Labor Code of the State of California and to the Orders of the Industrial Welfare Commission (hereinafter "IWC") promulgated by the Commission pursuant to and by virtue of the authority vested in it by Sections 1171 and 1204 of the Labor Code and Article 14 Section 1 of the Constitution of the State of California. Plaintiff is informed and believes and based on such information and belief alleges that at all times mentioned herein Cross-Defendant conducted business within the jurisdiction of this Court.

3. Cross-Complainant is ignorant of the true names and capacities of ROES 1 through 20, inclusive, and for that reason sues said Cross-Defendants by such fictitious names. Cross-Complainant

will amend this complaint to allege their true names and capacities when the same have been ascertained. Cross-Complainant is informed and believes and upon such information and belief alleges that each of said fictitious Cross-Defendants, was and is doing business in the State of California and is legally responsible for the occurrences set forth herein, or committed the same violations of the Labor Code, either by act or omission as the named Cross-Defendants.

4. Cross-Complainant is informed and believes, and upon such information and belief alleges, that at all times herein mentioned, each of the Cross-Defendants was a joint employer and/or agent of the other Cross-Defendants and was, in doing the things complained of, acting within the course and scope of such agency and/or employments. Cross-Complainant is further informed and believes that each of the Cross-Defendants herein were involved in a single enterprise together such that each of the Cross-Defendants were or should be considered "employers" of the employees of CPS.

4. California Labor Code sections 200, 201, 202, 204, 510, 1194, 2926, 2927, and Industrial Welfare Commission Orders 4-98 4-2000 and 4-2001, Title 8 California Code of Regulations section 11040, *et. seq.*, at Section 3 (hereinafter "IWC Order 4") requires the full and complete payment of all wages earned, including all minimum and overtime wages, during employment and at the time of termination of the employment relationship.

5. IWC Order 4 Section 4 provides that every employer is required to pay each employee not less than minimum wage for all hours worked. "Hours worked" is defined at Section 2 (K) of the Wage Order 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."

6. Cross-Defendant, **CPS**, is and at all times herein mentioned herein was an employer engaged in the business of providing security guards to construction sites, and with respect to the wages sought herein subject to the provisions of IWC Order 4, which covers employees employed in professional, technical, clerical and similar occupations and specifically includes "guards.". Since at least December 27, 1999, and to the time this Cross-Complaint is being filed, Cross-Defendants, and each of them, have employed workers in furtherance of their business.

6. Prior to the commencement of this action defendants and and each of them, by oral and written agreements hired, employed and/or retained, expressly and impliedly, numerous workers in the capacity of "in residence" security guards, to perform labor and services on behalf of Cross-Defendants, and as a result of said agreements, as alleged herein, Cross-Defendants and each of them were joint employers of the employees and jointly and severally liable for their wages.

7. Generally, during the period from December 27, 1999 to the filing of this Cross-complaint, the employees who worked for Cross-Defendants as "in residence" worked but were not fully compensated for such time.

6. Cross-Defendants, having the ability to pay, have employed approximately 400 workers at any one time, without paying minimum, contract and overtime wages to those workers for all hours worked as required by IWC Order 4. In particular, Cross-Defendants fail to pay its employees for the hours of 9:00 p.m. to 5:00 a.m. even though the employees are required to remain on premises and monitor security

sensors at construction sites.

8. Cross-Defendant CPS, was notified by DLSE in August 1999 by letter, a copy of which is attached hereto as Exhibit 1, and again in September 2002 by letter, a copy of which is attached hereto as Exhibit 2, that they were not in compliance with California's laws by continuing this practice of not paying for the hours of 9:00 p.m. through 5:00 a.m., but CPS has failed to change its illegal practices or pay current or former employees the wages due.

9. Cross-Defendants have refused, and continue to refuse to change its practice of not paying their employees for all hours worked, including the hours of 9:00 p.m. to 5:00 a.m. when the employees are required to be on premises at the construction site.

10. As a result of each of the Cross-Defendants' failure to comply with the provisions of IWC Order 4, the workers employed by defendants have been injured directly through the loss of minimum, contract and overtime wages in an exact amount to ascertained upon obtaining Defendant's records, but in no event less than $5 million.

SECOND CAUSE OF ACTION

(Illegal deduction for cost of staying in Trailer)

(Against All Cross-Defendants)

11. Cross-Complainant realleges and incorporates herein by reference as though fully set forth at length herein Paragraphs 1 through 10 of the First Cause of Action.

12. On information and belief, since December 27, 1999 and up to the date of this complaint, Cross-Defendants have deducted $70.00 every two weeks from the wages of its "In-residence Trailer Security Guards" for providing the Guard with a trailer for full time use and occupancy, in violation of Labor Code Sections 221, 223 and 224.

13. As a result of Cross-Defendants' illegal deduction of $70.00 every two weeks, the workers employed by cross-defendants in this capacity have been directly injured in an amount to be determined at trial but in no event less than $1 million.

THIRD CAUSE OF ACTION

(Liquidated Damages pursuant to Labor Code Section 1194.2)

(Against All Cross-Defendants)

14. Cross-Complainant incorporates herein each and every allegation contained in Paragraphs 1 through 10, inclusive, of the First Cause of Action and Paragraphs 11 through 13 of the Second Cause of Action, as though fully set forth herein.

15. As a result of failing to pay its "in-residence" employees for all hours worked, Cross-Defendants have failed to pay these employees minimum wage for all hours worked. On information and belief, numerous employees make an hourly wage of no more than minimum wage.

16. Labor Code Section 1194.2 provides that in any action to recover minimum wages, the employees are entitled to liquidated damages in an amount equal to the wages unlawfully unpaid and interest thereon.

FOURTH CAUSE OF ACTION

(Waiting Time Penalties, Labor Code §203)

(Against All Cross-Defendants)

17. Cross-Complainant incorporates herein each and every allegation contained in Paragraphs 1 through 10, inclusive, of the First Cause of Action and Paragraphs 11 through 13 of the Second Cause of Action, and Paragraphs 14 through 16 of the Third Cause of Action, as though fully set forth herein.

18. Since December 27, 1999 and continuing to the date the instant action has been filed, Cross-Defendants employed workers in the State of California, without paying those workers all wages earned and unpaid, at the time of termination of employment, as required in Labor Code Sections 201, 202 and 2926 and 2927.

19. These actions by Cross-Defendants were willful in that they knew or should have known that at the time each worker's employment was terminated all wages earned were not paid because Cross-Defendants were responsible for keeping each employee's time and payroll records fully and accurately, and paying the correct amount to each employee.

20. As a result of the actions of Cross-Defendants, in failing to pay their workers all of the final wages to which Cross-Defendants' employees were entitled at the separation of their employment, these workers are entitled to have their wages continue, up to thirty days, as and for waiting time penalties pursuant to Labor Code Section 203 in an amount to be ascertained at or before trial.

FIFTH CAUSE OF ACTION

(Injunctive Relief)

(Against All Cross-Defendants)

21. Cross-Complainant incorporates herein each and every allegation contained in Paragraphs 1 through 10, inclusive, of the First Cause of Action and Paragraphs 11 through 13 of the Second Cause of Action, and Paragraphs 14 through 16 of the Third Cause of Action, and Paragraphs 17 through 20 of the Fourth Cause of Action, as though fully set forth herein.

22. By doing the acts complained of hereinabove, despite

repeated requests by Cross-Complainant to change its practices, Cross-Defendant, CPS, has willfully violated the provisions of Industrial Welfare Order 4 and Labor Code 1194 and Section 3 of Industrial Welfare Commission Order 4, among other statues and regulations.

21. Labor Code §1194.5 provides for an injunction against any person employing an employee who willfully violates any laws, regulations or orders governing the payment of wages, against further violation of these laws.

WHEREFORE, Cross-Complainant prays for judgment against Cross-Defendants, and each of them, as follows:

AS AND FOR THE FIRST CAUSE OF ACTION:

Against each Cross-Defendant herein named:

1. For unpaid wages according to proof of no less than $5 million;

2. For interest on all unpaid wages;

3. For costs and attorney's fees pursuant to Labor Code §1193.6; and

4. For any other relief the Court deems just and proper.

AS AND FOR THE SECOND CAUSE OF ACTION:

Against each Cross-Defendant herein named:

1. For reimbursement of unlawful deductions from wages for "housing accommodations" in an amount to be proved at trial and no less than $1 million.

AS AND FOR THE THIRD CAUSE OF ACTION:

Against each Cross-Defendant herein named:

1. For waiting time penalties pursuant to Labor Code Section 203 according to proof;

2. For costs and attorney's fees pursuant to Labor Code §1193.6, and

3. For any other relief the Court deems just and proper.

AS AND FOR THE FOURTH CAUSE OF ACTION:

Against each Cross-Defendant herein named:

1. Liquidated damages pursuant to Labor Code §1194.2 in an amount equal to the unpaid minimum wage obligation plus interest.

AS AND FOR THE FIFTH CAUSE OF ACTION:

Against each Cross-Defendant herein named:

1. For an order and judgment directing and requiring Cross-Defendants forthwith to: (1) Comply with all provisions of the California Labor Code and Industrial Welfare Commission Order No. 4 regarding the payment of wages for all hours worked; (2) To cease and desist from deducting $70 every two weeks from wages for "housing accommodations"; (3) To cease and desist from its practice of not paying its "in-resident" security guards for the hours of 9:00 p.m. to 5:00 a.m. which is labeled "sleeptime."

AS AND FOR ALL CAUSES OF ACTION:

1. For costs of suit;

2. For attorneys' fees incurrred herein;

3. And for such other and further relief as the Court may deem just and proper.

Dated: December 27, 2002 DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
State of California

By _____
ANNE STEVASON,
Attorneys for Cross-Complainant

(N.B. When the State is plaintiff, complaint need not be verified,

but that the Answer thereto must be verified. C.C.P. section 446).

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
45 Fremont Street, 32nd Floor
San Francisco, CA 94105

PETE WILSON, Governor

ADDRESS REPLY TO:
P.O. Box 420603
San Francisco, CA 94142

April 24, 1997

(VIA FAX AND FIRST CLASS MAIL)

Ted R. Huebner, Esq.
Huebner & Hirshfield
12233 W. Olympic Boulevard, Suite 254
Los Angeles, CA 90064

Re: Construction Protective Services, Inc.
State Case #26-33417/145

Dear Mr. Huebner:

This is in response to the meeting held in the Director's office of the Department of Industrial Relations on April 7, 1997, in which the Department undertook to provide you with a definitive response to your client's [Construction Protective Services, Inc. (CPS)] compensation package for its live-in guards employed at construction sites statewide. The meeting on April 7 was the culmination of an investigation by the Division of Labor Standards Enforcement (DLSE), since March 1996, into the compensation practices of CPS.

Over the past five years, in a number of cases, division staff have reviewed the compensation plan and found it proper. In light of this, it is understandable that recent contacts with the Division have been confusing to your client.

Historically, both the Division and its federal counterpart, the U.S. Department of Labor/Wage and Hour Division, have taken the realistic and reasonable position that by voluntary written agreement between employee and employer, the employer may exclude from hours worked 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. There is no duty to compensate the employee for these times.

While the federal government has been far more liberal in the application of this rule to various classifications of employees governed by the provisions of 29 CFR 785.22 and 785.23, the state rule has historically been more narrowly applied to a handful of occupations: ambulance drivers and their attendants covered under Industrial Welfare Commission (IWC) order #9-90, and any occupation in which the employee is required to reside on the premises of an employer subject to IWC order #5-89. The historical reason for limiting the application of the general exclusionary rule to only these classifications was that these occupations are

EXHIBIT "1"

governed by the provisions of the IWC orders, which contain specific language that easily allows for this interpretation. However, over the past 20 years, DLSE has adopted an enforcement policy excluding sleep time and other non-active duty hours of mini-storage managers under IWC order #9-90, mortuary attendants under IWC order #2-80, and private firefighters under IWC order #4-89 as being consistent with the IWC orders. The inclusion of these classifications in the excludability of sleep time acknowledged the common sense and fairness underlying the wage orders, and their proper interpretation in light of applicable federal law, with which the IWC was undoubtedly familiar when it adopted the language contained in the wage orders.

This is a difficult issue and obviously in some ways, a close issue. However, in light of the facts and after a careful and thorough review of Construction Protective Services' compensation documents, we find it appropriate to extend this rule to the live-in security guards of your client.

The compensation plan you have adopted would apply to those guards who, as a condition of employment, are required to reside at their place of employment for varying periods of time. It is significant that the guards you employ were homeless and this is essentially their only place of residence. The voluntary, written agreement between the guards and CPS properly provides a method by which the employees are required and are able to report extra work hours that result from sleep time interruptions to their employer to ensure for their proper compensation. The plan also allows for specifically designated times during which the employee is free from all active duty assignments or is free to leave the premises. All of these factors militate in favor of allowing the use of the excludability of non-active duty times from compensation requirements for the live-in guards.

Accordingly, DLSE's case in this matter is now closed and the *subpoena duces tecum* issued by Senior Deputy Labor Commissioner Michael Medrano is hereby withdrawn. If I may provide you with any further information, please feel free to contact me in writing.

Very truly yours,

John C. Duncan
Chief Deputy Director

Lloyd W. Aubry, Jr., Director
Thomas H. Cadell, DLSE Chief Counsel
Gregory Rupp, Assistant Labor Commissioner
Nance S. Steffen, Assistant Labor Commissioner

STATE OF CALIFORNIA GRAY DAVIS, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
LEGAL SECTION
320 West 4th Street, Suite 430
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(213) 897-1511

ANNE STEVASON, *Chief Counsel*

September 16, 2002

Howard M. Knee
Knee & Ross, LLP
2049 Century Park East, Ste. 2050
Los Angeles, CA 90067

Re: **Construction Protective Services, Inc.**

Dear Mr. Knee:

This letter is in response to your letter of August 21, 2002, regarding the above-referenced matter. Please excuse the delay in this response, but we felt that a full review and response to your letter and attached 26-page legal memorandum concerning what you refer to as "sleep time claims" was appropriate.

In your letter you state that your client, Construction Protective Services (CPS) employs both "hourly" and "in-residence" guards. You explain that these in-residence guards are employed at construction sites and that they sign employment agreements which require them to live at the job site. You state that 400 of the firm's 1300 employees are "in-residence" guards. You describe the facilities you state are provided to the "in-residence" guards as "fully-equipped trailers, with kitchen and bathroom facilities.

Your letter states that your client "normally requires in-residence guards to remain on the construction site, and to be available to respond to any security problems, from 3:00 p.m. to 7:00 a.m. on weekdays, and from 5:00 a.m. to 9:00 p.m. on Saturdays and Sundays. In resident guards," your letter continues, "are free to sleep or engage in personal activities and are not paid for any time between 9:00 p.m. and 5:00 a.m., except for time spent investigating possible security problems. In this event, the guards keep track of their time and are compensated for it; if an interruption exceeds 3 hours, the guards are paid for the full eight hours of sleep time."

EXHIBIT "2"

According to your letter, "[T]he guards are also provided with cell phones to call in their sleep interruption time and fill out and submit an alarm response log sheet. In addition, guards are permitted to leave the job site during this period provided they first notify CPS [12 hours in advance] so that CPS can assign a replacement for the time they are off site. Replacement guards do not have access to the trailers of the in-residence guards."

Your letter states that CPS's compensation plan (we assume you mean the one outlined above) was approved by the U.S. Department of Labor in a March 24, 1997, letter from Charles Striegel, the Assistant District Director, to you. Unfortunately, you have failed to attach a copy of that letter so we cannot, of course, comment on that approval. Indeed, we don't even know what district Mr. Striegel may supervise.

You also state that the plan was approved in an April 24, 1997, letter from then Chief Deputy director of the Department of Industrial Relations, John C. Duncan, to Ted C. Huebner, an attorney then representing CPS. Mr. Duncan's letter misstates both the law and the enforcement posture taken by the DLSE in the past. For instance, the letter states:

> "However, over the past 20 years, DLSE has adopted an enforcement policy excluding sleep time and other non-active duty hours of mini-storage managers under IWC order #9-90, mortuary attendants under IWC order #2-80, and private firefighters under IWC order #4-89 as being consistent with the IWC Orders."

That statement is incorrect.

Provisions in Orders 5 and 9 exclude ambulance drivers and attendants scheduled for 24-hour shifts from overtime coverage if certain requirements are met. If the worker is (1) scheduled for 24-hour shifts and (2) agrees to exclude from daily time worked (a) not more than three meal periods of not more than one hour each and (b) a regularly scheduled uninterrupted sleeping period of not more than eight hours, the employer is relieved of the obligation to pay overtime during that day. The employer must provide adequate dormitory and kitchen facilities. (See IWC Orders 5-2001, Section 3(J) and 9-2001, Section 3(K))

For enforcement purposes, the ambulance driver and attendant language which allows the employer to deduct eight hours of uninterrupted sleep and up to three meals periods per day has been extended by DLSE to include certain privately employed firefighters working 24-hour shifts in employment covered either under the Transportation Order (9) or the Public Housekeeping Order (5)

industries if the workers also typically perform first aid or medical transportation (Order 9). Mortuary attendants are typically employed by removal services; that is employers covered by the Transportation Industry order (Order 9). If those workers are on 24-hour shifts they are also covered under the DLSE enforcement policy. These services are not typically performed by employees employed on 24-hour shifts by individual mortuaries and, if they were, they would be under Order 2 which does not have an exception for 24-hour shifts and, consequently, there could be no sleep time or meal time exception.

It must be noted, however, that the exemption from the daily overtime requirements that is applicable to ambulance drivers, is not applicable to any worker who does not meet the definition of an ambulance driver or an attendant. Thus, while the DLSE has taken the position that mini storage managers and mortuary drivers and attendants who are required to work 24-hour shifts may agree to have the eight hours of sleep and up to three meal periods excluded from their time worked, those workers are not exempt from the overtime requirements as are the ambulance drivers and attendants. Unless the worker falls within the strict exception afforded to ambulance drivers (which would cover certain fire fighters who afford first aid and transport sick and injured) the daily overtime exception does not apply.

Thus, the conclusions reached by Mr. Duncan in the "approval" letter were, as was pointed out to Mr. Huebner in a letter dated August 12, 1999, from then Labor Commissioner Marci Saunders, "incorrect and in conflict with established California law." As that letter pointed out, your client's employees fall under the protection of IWC Order 4, which does not contain any provision (express or implied) allowing for a deduction from hours worked for "sleep time" or "meal time." The August 12, 1999, letter then concludes that the issue is "whether periods during which a security guard is sleeping or eating fall within the definition of 'hours worked'." The conclusion reached in the letter signed by Commissioner Saunders is that under a correct interpretation of the California law, absent an express exception in the statutes or the IWC Orders or in the narrow enforcement posture adopted by the DLSE, those workers who are required to remain on the premises are entitled to be paid for all such hours.

Your reliance on the provisions of 29 C.F.R. § 785.23 is misplaced as well, as was explained in the letter of August 12, 1999. The California IWC has adopted a limited utilization of Section 785.23 in the express language contained in Order 5 which expands the definition of "hours worked" in that Order to include "in the case of an employee who is required to reside on the employment premises, that time spent carrying out assigned

duties..." (See *Brewer v. Patel* (1993) 20 Cal.App.4th 1017, 25 Cal.Rptr.2d 65) It must be noted, of course, that Order 5 is the only order which contains that language. As pointed out above, your client's operations involve workers protected under Order 4-2001, not Order 5.

In addition, it must be recognized that the DLSE's limited extension of the "sleep time" provisions for enforcement purposes[1] to similarly situated employees within Orders 5 and 9, was undertaken with the approval of the IWC but before the advent of AB 60. The Legislature, in adopting the provisions of the "eight-Hour-Day Restoration and Workplace Flexibility Act of 1999 (AB 60), provided a strong statement regarding the Legislative intent in its findings and declarations:

> "The eight-hour workday is the mainstay of protection for California's working people, and has been for over 80 years," the Legislature announced. The Legislators went on to note that California adopted the 8-hour day in 1911, long before the federal government enacted overtime protections for workers and concluded that "[e]nding daily overtime would result in a substantial pay cut for California workers who currently receive daily overtime..." Additionally, "[n]umerous studies have linked long work hours to increased rates of accident and injury" and "[f]amily life suffers when either or both parents are kept away from home for an extended period of time on a daily basis."

Clearly, then, the Legislature intended that the eight-hour day was to be the norm and any extension of that norm was to be the exception and not the rule. Based on that announcement of the strong public policy underlying the eight-hour law, coupled with the fact that the Legislature has specifically precluded even the IWC from establishing any additional exemptions except as to "break periods, meal periods, and days of rest" (See Labor Code § 516), DLSE should be reluctant to extend any enforcement policy which

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[1]In addressing questions raised regarding the enforcement policy, the DLSE has continued to insist that only employees on 24-hour shifts under Orders containing the ambulance driver exemption may qualify. (See O.L. 1992.11.23) This position is, of course, contrary to the statement you make in your letter that "under California case law, agreements to exclude sleep time from hours worked have been, and continue to be, enforceable for employees subject to Wage Order 4." We note, in addition, that you offer no support for this statement and our research has failed to disclose any such case law.

impacts on the strict implementation of the eight-hour law unless the statute or the applicable IWC Order specifically provided for such exception.

As the California Supreme Court announced many years ago, in *Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 166 Cal.Rptr. 331, 613 P.2d 579, "The Commission relies on the imposition of a premium or penalty pay for overtime work to regulate maximum hours consistent with the health and welfare of employees covered by this order." That announced purpose has not changed. (See *Skyline Homes v. Department of Industrial Relations* (1985) 165 Cal.App.3d 239, 249; 211 Cal.Rptr. 792; 166 Cal.App.3d 232(c) (hrg. den. 5/29/85)) Both the California courts and the Legislature understand that any deviation from the eight-hour day requirement would require the payment of a premium. It was this premium which was designed as an incentive to employers not to employ workers for more than eight hours in a workday.

Addressing The Arguments In The Legal Memorandum You Attached

You note in your legal memorandum that one of the Commissioners (actually Commissioner Broad) alluded to the ambulance driver exception in discussing the subject of whether or not to continue the exemption from the minimum wage for "personal attendants". What you fail to mention is that the same Commissioner (Barry Broad) noted later in his comments that he didn't think that adoption by the IWC of such an exception would be appropriate because the issue they were discussing was whether the personal attendants would continue to be exempt from the minimum wage.

While we don't understand exactly what point you are making in citing to that particular language, we do feel it necessary to point out that: (1) ambulance drivers are specifically exempt from the overtime provisions if the criteria set out in the exemption is met, and (2) personal attendants under Order 15 (Household Occupations) which was the subject of the discussion you cited, had never been entitled to overtime - indeed, a personal attendant was not entitled to minimum wage under Order 15. What the IWC did in the new Orders is to extend the minimum wage requirements to those workers. Thus, when you say that "Order 15 exempts personal attendants from all overtime requirements" that is correct; but that was not a new exemption. Unlike under the former Orders, IWC Order 15 <u>now</u> requires that personal attendants (not babysitters) be paid the minimum wage for all "hours worked". Contrary to the implication contained in your memorandum, the IWC did not provide the sleep and meal deductions for personal attendants.

In your memorandum you then cite to the provisions of Orders

10 and 14 which provide that workers on fishing craft may be paid based on the formula set out in those IWC Orders[2]. You state that there was "one issue that received close attention" and that was "the need to address sleeping and leisure time that fishing employees had on boats." We are not sure what you mean by "close attention" but our review of the transcript reveals that the word sleep was mentioned three times and one of those times had to do with time a captain could rely on crew members to spell him or her while the captain had the opportunity to "go below and sleep" (p. 46, l. 19).

As you note, an attorney from DLSE was called to provide some guidance to the IWC on the issue. Miles Locker, attorney for the Labor Commissioner, explained to the Commission:

> "For example, you have, let's say, in other IWC Orders a situation where you have 24-hour shifts, and the IWC has carved out from that, let's say, 8 hours of sleep time and one hour for each of three meals. And then...you might say the employee is subject to the employer's control by virtue of being on this boat, from which there's no escape - because the IWC can carve out from that, certainly, areas where the employee is not subject to control by virtue of sleep time or meal time or time where just the worker is - you know, the IWC can do what is wants on that to say, `No, we view this as being non-work time.' Then that's how DLSE would enforce that. We would look to what the IWC did there."

We further note that the IWC did, in fact, choose to exempt the certain workers employed on the fishing craft from the overtime laws and gave the employer the right to craft a pay schedule which provides for pay based on the length of the trip (six hours for a half-day, ten hours for a three-quarter day, twelve hours for a full-day, and twelve hours for an overnight) From this you conclude that "the IWC showed an intent to relieve employers of the obligation to pay for hours or sleep and leisure."

Inasmuch as the DLSE had already told the IWC that there existed precedent for the IWC announcing that sleep time could be excluded from the "hours worked", it is difficult for us to conclude, as you have, that the IWC evidenced such an intention. Why would the IWC not simply say that it was their intention to, as

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2Again, it must be noted that workers on the fishing craft at issue had never been entitled to either minimum wage or overtime. Thus, the IWC was providing a new entitlement, not restricting an old one.

the DLSE suggested, use the same criteria it had used in the ambulance exemption and exclude sleep and meal hours. We find it far more likely that the IWC concluded, as they stated in the Statement As To The Basis of the Orders:

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

Obviously, if sleep and meals were the concern, the IWC would have included clerical or maintenance personnel who do not perform duties as licensed crew members. Maintenance personnel must sleep as well. In addition, of course, the fact that the U.S. Coast Guard limits the hours that crew members (but not maintenance or clerical workers) may work while at sea was a very important consideration. We note that there is no mention of sleep or meals in the discussion of the provisions by the IWC.

Next, you use the language contained in the IWC's Statement As To The Basis for the changes made to Wage Order 5 which became effective January 1, 2002[3]. The language you quote regarding the

[3]It should be noted at this point that the Statement As To The Basis promulgated by the IWC in connection with the changes made to Order 5-2001 was the subject of a law suit brought against the IWC. The order of the Superior Court of San Francisco requires that the IWC "cease publication of this Statement as to the Basis" and further orders that the Commission "adopt an amended Statement as to the Basis, excising the extraneous material, defined as that

definition of the term "sleeping" appears to be consistent with the action taken by the IWC in that Order.

Initially, we must that until the IWC added the provisions found at Section 3(E)(2) of the Order concerning "employees with direct responsibility for children who are under 18 years of age" and "receiving 24-hour residential care" those workers were not entitled to the overtime protections of the law. What the IWC did in amending Order 5, was add that protection for those workers.

In doing so, the IWC adopted the language which was suggested by the Wage Board. That language, contained at Section 3(E)(2)(d) which provides:

> "(d) No employee shall work more than 24 consecutive hours until said employee receives not less than eight (8) consecutive hours off-duty immediately following the 24 consecutive hours of work. Time spent sleeping shall not be included as hours worked." (Emphasis added)

As you point out in your memorandum, the IWC in the Statement As To The Basis for that change, stated:

> "The second point is that the definition of "sleeping" is intended to be consistent with the meaning in the Fair Labor Standards Act (29 U.S.C. § 201 *et seq.*, hereinafter "FLSA") and in the IWC's other wage order that sleep time is not included in the definition of "hours worked".

In the following paragraph, the IWC goes on to state that the "amendment of the overtime provisions regarding time spent for these employees to more closely resemble the federal standards promotes the IWC's intention to make the state and federal exemptions consistent where the Legislature has not expressed a clear contrary intention." In the following paragraph the Commission twice refers to the "partial exemption" it has adopted concerning the specific employees at issue and notes:

> "The partial exemption at issue in the current amendments to Wage Order 5 is limited to some of the overtime rules and does not depend on the employee's pay or whether it is paid in the form of a salary."

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portion of the Statement of the Basis beginning with the words "[t]he IWC sought'..." The IWC has made a decision not to appeal that decision.

The Commission then addresses the so-called "white collar" exemptions which became an issue in the law suit referred to above. It is clear, however, that the IWC was addressing the specific language which it adopted in the amendments. The IWC was not indicating that it was adopting a general rule that "sleep time" was not to be counted as time worked.

If for instance, as you argue in your memorandum at pages 7 and 8: "[T]he intent of the IWC now could not be clearer: under all wage orders, sleep time is to be excluded from hours worked under state law to the same extent that it is excluded under federal law", why did the IWC find it necessary in the "partial exemption at issue in the current amendments to Wage Order 5" to specifically state: "[T]ime spent sleeping shall not be included as hours worked." If the IWC was enacting a new rule which extended the meaning of "sleep time" to preclude any employee who was allowed to sleep while on duty from claiming that time as hours worked, there would be no reason to mention the obvious. The fact is, as the IWC recognized, under the normal rules of statutory construction, any exception from remedial legislation such as the Labor Code or the IWC Orders must be narrowly construed. (*Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794-95) Thus, absent the specific language in Section 3(E)(2)(d) which discounts "sleep time" in calculating hours worked, the IWC recognized that the usual DLSE enforcement policy would apply.

Also, the IWC mentions that they wish to make the IWC Orders consistent with the FLSA." The provision of federal law which is "consistent" with the proposition that time spent "sleeping" shall not be included as hours worked is found at 29 C.F.R. § 785.22; though the federal regulation allows sleep time and meal periods to be deducted. That consistency, as discussed above, is already recognized by the California Industrial Welfare Commission in the exemption granted for ambulance drivers and attendants. However, again, as discussed above, that exemption is contained in only two Orders and your client does not fall under either of them.

Next you allude to the case of *Monzon v. Shaefer* (1990) 224 Cal.App.3d 16, and argue that the case, which arose under the provisions of Order 9, somehow is relevant to your client's position. Without belaboring the point, your client's employees fall under the provisions of Order 4-2001, not Order 9 which deals with the Transportation Industry.

However, the *Monzon* case does, we think, illustrate the importance of the exception contained in IWC Order 9. The California Supreme Court in *Morillion v. Royal Packing Co.* (2000)

22 Cal.4th 575, cited to the dissenting[4] opinion in the Monzon case to support its position that absent a specific exemption, the term "hours worked" includes all time under the control of the employer. Citing *Monzon* at 224 Cal.App.3d, p. 48; id. at p. 50 (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'."

We find, also, that the California Supreme Court's conclusion in that same case (*Morillion, supra)* that the court found "persuasive the following general statement of `hours worked' the DLSE made...'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'," *Id.*, at page 584, to be compelling. In view of the Supreme Court's decision in *Morillion* any contrary interpretation you may be able to decipher from *Monzon* is really irrelevant. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455)

Your arguments concerning the case of *Aguilar v. Association for Retarded Children* (1991) 234 Cal.App.3d 21, are misleading. You state that while the previous letter you received stated that the *Aguilar* case stands for the proposition "that non-exempt employees must be paid for all hours under the control of the employer absent an express exemption in the applicable IWC wage order" that, in fact is not what the case stands for. We submit the following language from the *Aguilar* case for your consideration:

> "ARC argues DLSE's interpretation is unreasonable because DLSE did not treat the ARC employees under the rule applying to 24-hour shifts. We, however, find nothing unreasonable in DLSE's analysis. Wage Order 5-80 generally provides "hours worked" for which compensation must be paid includes the hours when an employee "is subject to the control of an employer," including "all the time the employee is suffered or permitted to work whether or not required to do so...." This broad definition clearly includes time when an employee is required to be at the

[4]The dissent was based, in part, on the requirement that the majority found unnecessary that the agreement be in writing. The majority had based its finding on the fact that the federal law did not require a writing.

work rules which permit a guard to leave the premises during the night time hours if the guard has given 12 hours advance notice to the company equates to the employees in the *Bono* case who made "prior arrangements to re-enter the plant". Although the *Bono* decision does not elaborate, the "prior arrangements" amounted to the worker telling the guard on the way out that they were going to return. That is a far cry from what you state is the company policy employed by CPS requiring 12 hours notice.

Assuming that your client's workers are resident employees, on page 20 you argue that California cases would require that such resident employees as CPS's be treated like other resident workers. You again fail to support your premise with any case law. You miss the point if you conclude that the employees are suffering discrimination. The fact is, Order 4-2001 which protects your client's employees offers more protection than Order 5 or 9 which you want to incorporate. How, then, would the law require that the rational basis test require that lesser protections should apply to them?

The California Supreme Court long ago determined that the right to regulate hours and working conditions are very broad. In the case of *Industrial Welfare Commission v. Superior Court, supra*, 27 Cal.3d 690, 731-732, the court concluded:

> "From at least as early as the United States Supreme Court decision in *West Coast Hotel Co. v. Parrish* (1937) 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703, sustaining the constitutionality of a state minimum wage law in the face of a similar due process challenge, the cases have made clear that state regulations of minimum wages, maximum hours and working conditions come to the courts `freighted with (a) strong presumption of regularity' (*Ralphs Grocery Co. v. Reimel* (1968) 69 Cal.2d 172, 175, 70 Cal.Rptr. 407, 410, 444 P.2d 79, 82) and are not subject to `de novo' judicial review. As the court emphasized in *West Coast Hotel*: `(T)imes without number we have said that the Legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.' (300 U.S. at p. 398, 57 S.Ct. at p. 585)

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particular language you cite is *dicta*, Supreme Court dictum can be highly persuasive. (*Evans v. City of Bakersfield* (1994) 22 Cal.App.4th 321.

> employer's premises and subject to the employer's control even though the employee was allowed to sleep. ARC does not contest this construction. Rather, ARC argues an exemption from "hours worked" compensation rule applies to the employees here. We disagree.
>
> "The Wage Order expressly provides an exemption from compensation for sleep time only for employees who work 24-hour shifts. The record is clear the employees here do not work 24-hour shifts." (*Id.*, at page 30) (Emphasis added)

Based on the above languge, DLSE firmly believes that the statement contained in the letter which you cite is correct.

Your contention to the effect that the ambulance driver exception at issue in *Monzon* did not deal with "deduction from hours worked for sleep time", but, instead the provision allows the sleep time "to be paid at straight time rates" is simply erroneous. A thorough reading of the provision[5] will illustrate the error of your conclusion.

Your argument concerning the case of *Bono Enterprises, Inc. v. Bradshaw* (1995) 32 Cal.App.4th 968, is not clear. The *Bono* case involved employees who were required to remain on the employer's premises during the "duty-free" meal period. As we understand your argument, you find fault with the DLSE's position that there are "substantial differences between the federal and state definitions of "hours worked". (Memorandum, page 18)[6]. You argue that the CPS

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[5]"The daily overtime provisions of subsection (A) above shall not apply to ambulance drivers and attendants scheduled for 24-hour shifts of duty who have agreed in writing to exclude from daily time worked not more than three (3) meal periods of not more than one (1) hour each and a regularly scheduled uninterrupted sleeping period of not more than eight (8) hours..."

[6]While you do admit that the California Supreme Court has noted that DLSE has correctly "underscored the substantial differences" between the definitions of hours worked under California and federal law, you contend that this "somewhat equivocal statement [by the Court] is dictum." A finding that the language cited by the Court was dictum would require that you first find that the language was not "necessary for the resolution of the case." *Gyerman v. United States Lines Co.* (1972) 7 Cal.3d 488, 498. an unbiased reading of the language in the *Morillion* case will reveal, we are sure, that the California Supreme Court was not musing on unnecessary points. But, even if one were to conclude that the

> "Moreover, the authorities similarly declare that the `legislative power' to regulate employment conditions is very broad indeed, even though such regulations almost inevitably impose some economic burden upon employers. Again, as the Supreme Court stated in *West Coast Hotel*, `In dealing with the relation of employer and employed, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression.' (*Id.*, at p. 393, 57 S.Ct. at pp. 582-583.) The employers completely fail to show that the wage and hours regulations they attack are not rationally related to these permissible state interests."

Your argument regarding the application of *Brewer v. Patel* (1993) 20 Cal.App.4th 1017, does not address the problem your client has with the fact that his employee's are covered under the definition of hours worked found in Order 4 and not the definition found in Order 5. Would you have this agency (or a court) adopt new definitions of hours worked in order to allow your client to escape the obligation to pay for all the hours the guards he employs are under the direction and control of the employer?

Suffice to say that the position that the DLSE takes in regard to the hours worked by the guards employed by your client is the same position (indeed the only viable position) that the DLSE has taken since it began enforcing the IWC Orders. As the letter of August 12, 1999, clearly stated, the letter written by Mr. Duncan expressed conclusions which were, and are, "incorrect and in conflict with established California law."

We hope you advise your client of the fact that the firm's pay provisions currently in effect are not legal under California law. We hope that you and your client will cooperate with DLSE investigators and turn over the records as required by law.

Both you and your client should be aware, however, that this agency intends to enforce the law.

Yours truly

ANNE STEVASON
Chief Counsel

PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is DIVISION OF LABOR STANDARDS ENFORCEMENT, Department of Industrial Relations, 320 W. Fourth Street, #430, Los Angeles, CA 90013.

On December 27, 2002, I served the following document described as: **CROSS-COMPLAINT FOR UNPAID WAGES; ILLEGAL DEDUCTIONS; PENALTIES PER LABOR CODE §203; LIQUIDATED DAMAGES PER LABOR CODE §1194.2; AND INJUNCTIVE RELIEF**

On the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope, addressed as follows:

KNEE, ROSS & SILVERMAN LLP
Howard M. Knee, Esq.
Lora Silverman, Esq.
2049 Century Park East, Suite 2050
Los Angeles, CA 90067

[xx] BY MAIL I am readily familiar with the firm's business practice of collection and processing of correspondence for mailing with the United States Postal Service and said correspondence is deposited with the United States Postal Service the same day.

Executed on December 27, 2002 at Santa Ana, California, I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

RANDI GUERRERO

The 2002 Update Of

The DLSE

Enforcement Policies and Interpretations

Manual

(Revised)

ACKNOWLEDGEMENTS

The Division of Labor Standards Enforcement (DLSE) Enforcement Policies and Interpretations Manual summarizes the policies and interpretations which DLSE has followed and continues to follow in discharging its duty to administer and enforce the labor statutes and regulations of the State of California.

We would like to thank the following DLSE management, deputies, attorneys and clerical staff members for editing, cite checking and otherwise contributing to the Manual:

Robert Jones, Acting State Labor Commissioner

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March, 2006

46 HOURS WORKED.

46.1 Under the basic definition set out in all of the IWC Orders, "Hours Worked" means the time during which an employee is subject to the control of any employer, and includes all of the time the employee is suffered or permitted to work, whether or not required to do so. (e.g., Order 1-2000, § 2.(H).) Where it is determined that the employee's time is subject to the control of the employer, as in the contexts delineated below, the time constitutes "hours worked".

46.1.1 **The DLSE Interpretation Of Hours Worked** which provides that: "[U]nder California law it is only necessary that the worker be subject to the 'control of the employer' in order to be entitled to compensation" was found by the California Supreme Court to "be consistent with [the Court's] independent analysis of hours worked." *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 583 [citing to DLSE O.L. 1993.03.31].

46.2 **Travel Time**: If an employee is required to report to the employer's business premises before proceeding to an off-premises work site, all of the time from the moment of reporting until the employee is released to proceed directly to his or her home is time subject to the control of the employer, and constitutes hours worked. (O.L. 1994.02.16; *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575.

46.3 **Extended Travel Time**. The California rule requires wages to be paid for all hours the employee is engaged in travel. The state law definition of "hours worked" does not distinguish between hours worked during "normal" working hours or hours worked outside "normal" working hours, nor does it distinguish between hours worked in connection with an overnight out-of-town assignment or hours worked in connection with a one-day out-of-town assignment. These distinctions, and the treatment of some of this time as non-compensable, are purely creatures of the federal regulations, and are inconsistent with state law. (O.L. 2002.02.21).

46.3.1 Under state law, if an employer requires an employee to attend an out-of-town business meeting, training session, or any other event, the employer cannot disclaim an obligation to pay for the employee's time in getting to and from the location of that event. Time spent driving, or as a passenger on an airplane, train, bus, taxi cab or car, or other mode of transport, in traveling to and from this out-of-town event, and time spent waiting to purchase a ticket, check baggage, or get on board, is, under such circumstances, time spent carrying out the employer's directives, and thus, can only be characterized as time in which the employee is subject to the employer's control. Such compelled travel time therefore constitutes compensable "hours worked." On the other hand, time spent taking a break from travel in order to eat a meal, sleep, or engage in purely personal pursuits not connected with traveling or making necessary travel connections (such as, for example, spending an extra day in a city before the start or following the conclusion of a conference in order to sightsee), is not compensable. If the employee's travel from his home to the airport is the same or substantially the same as the distance (and time) between his home and usual place of reporting for work, the

travel time would not begin until the employee reached the airport. The employee must be paid for all hours spent between the time he arrives at the airport and the time he arrives at his hotel. No further "travel" hours are incurred after the employee reaches his hotel and is then free to choose the place where he will go. (O.L. 2002.02.21)

46.3.2 **Different Pay Rate For Travel Time Permissible**. The employer may establish a different pay scale for travel time (not less than minimum wage) as opposed to the regular work time rate. The employee must be informed of the different pay rate for travel before the travel beings. For purposes of determining the regular rate of pay for overtime work under the circumstances where a different rate is applied to travel time, the State of California adopts the "weighted average" method. (See Section 49.2.5 of this Manual; see also O.L. 2002.02.21).

46.4 **Uninterrupted Sleep Time**. DLSE enforcement policy has historically allowed eight hours to be deducted if an employee is scheduled for 24-hour work shifts and is required to remain on the employer's premises during the work shift and, in fact, receives eight hours of uninterrupted sleep. (But see specific exemption for ambulance drivers at Sections 47.3.1., 50.9.8 and 50.9.8.2 of this Manual). In addressing this issue, the Fourth District Court of Appeal in the case of *Aguilar v. Association of Retarded Citizens* (1991) 234 Cal.App.3d 21, upheld the DLSE policy:

> First, the IWC Wage Order clearly distinguishes between employees who work 24-hour shifts and those who work less than 24-hour shifts. The Wage Order expressly provides an exemption from compensation for sleep time only for employees who work 24-hour shifts. The record is clear the employees here do not work 24-hour shifts.
>
> Second, we do not find ARC's characterization of the shifts as being 24-hour shifts with the employees being 'temporar[ily] release[d]...to attend to personal interests' to be persuasive. ARC's characterization would abrogate the distinction between employees working 24-hour shifts and those working less than 24-hour shifts. Under ARC's 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.
>
> ARC's interpretation requires a non-commonsense interpretation of the words; if IWC had intended the interpretation that ARC urges – that employers do not have to compensate employees working 17-hour shifts for sleep time – IWC easily could have so provided. They, however, did not. We conclude the employees here are entitled to compensation for all the hours worked; ARC is not entitled to deduct those hours when it allows the employees to sleep.

46.5 **Meal Periods**: Where an employee – although relieved of all duties – is not free to leave the work place during the time allotted to such employee for eating a meal, the meal period is on duty time subject to the control of the employer, and constitutes hours worked. *Bono Enterprises v. Labor Commissioner* (1995) 32 Cal.App.4th 968.

46.6 **Caveat**: Orders 4 and 5 contain a "Health Care Industry" exception which provides that "hours worked" is to be interpreted in accordance with the provisions of the Fair Labor Standards Act. This means that for *the employees engaged in* the "health care industry" the provisions of 29 CFR § 785.19(b) would apply and the *Bono Enterprises* case would have no applicability.

STATEMENT AS TO THE BASIS FOR AMENDMENT TO SECTIONS 2, 11 AND 12 OF WAGE ORDER NO. 9 REGARDING EMPLOYEES IN THE TRANSPORTATION INDUSTRY

TAKE NOTICE that the Industrial Welfare Commission of the State of California ("IWC"), in accordance with the authority vested in it by the California Constitution, Article 14, Section 1, as well as by Labor Code Sections 500-558, and 1171-1204, has promulgated amendments to Wage Order 9, Sections 2, 11 and 12, for employees working in the transportation industry. The promulgation of the amendments was initiated by a request contained in a letter petition dated October 29, 2002, from the California Conference Board of the Amalgamated Transit Union, the California Teamsters Public Affairs Council, and the California Conference of Machinists, through their attorney, Shane Gusman. This letter incorporated by reference a prior letter of petition dated April 25, 2001 and petitioners requested that both letters be taken together as their formal petition to the IWC under California Labor Code Section 1176.1. Petitioners requested that "the IWC eliminate the exemption for meal periods and rest breaks for public employees covered by Wage Order 9." No specific language was proposed in the petition letters.

However, in their letters of petition to the IWC, the petitioners asked that "...the IWC open an investigation into the working conditions of public transit drivers and other commercial drivers with respect to their exemption from required meal periods and rest periods." The petitioners asserted that the current exemption for publicly employed commercial and transit drivers resulted in conditions that are detrimental to the health and safety of workers and of the public. They asserted that on a routine basis some commercial drivers are required to log 10-hour shifts and employers are not required to provide either meal or rest periods. Petitioners also urged the IWC to consider the issue of equity. They alleged that "...private employers engaged in public transit operations through subcontracting are covered by the wage orders. Thus, their employees are entitled to rest and meal periods even though they are performing the same work as those transit employees who are not."

The IWC began its preliminary investigation under the provisions of Labor Code Sections 1173, 1178, and 1178.5, in the summer of 2001 in response to the petition letter of April 25, 2001.

A hearing on the matter was held before the IWC on June 15, 2001, at 505 Van Ness Ave. in San Francisco. Several proponents spoke including the following: Shane Gusman representing the California Conference Board of the Amalgamated Transit Union, the California Teamsters Public Affairs Council, and the California Conference of Machinists; Tom Rankin, on behalf of the California Labor Federation, AFL-CIO, Matt McKinnon representing the Machinists Union and J. P. Jones with the United Transportation Union. The proponents explained that most of the drivers affected would be public transit drivers but that some commercial drivers as in haulers of property were

also affected. They pointed out specific inequities as in the fact that while public transit drivers and commercial drivers are not covered by break and mealtime provisions of Wage Order 9, Laidlaw drivers (employees of a private contractor) who are performing the exact same duties are entitled to 10 minute break period after four hours and the normal lunch periods required under Wage Order 9. Regarding worker safety, proponents stated that bus drivers can be behind the wheel 10 hours a day and on duty 15 hours, while intrastate haulers of property can be required to drive a 12 hour shift and be on duty 15 hours. Without breaks and meal period, petitioners asserted that the drivers" health and the public safety is affected. Some commercial drivers operate vehicles 45 feet long weighing 80,000 pounds, and according to the speakers not requiring breaks and meal periods creates a public safety hazard due to driver fatigue. In addition testimony urged that the IWC consider the fact that these drivers have the lives and safety of school children and the disabled riders in their hands and their safety may be compromised by not requiring that school bus drivers be given regular breaks and meal periods.

Commissioner Rose established that most of the drivers the speakers represented were working under negotiated contracts and he asked if the drivers were "...enjoying something else within those contracts because of the exclusion?" Mr. Gusman and Mr. Jones replied that most of the drivers they represent are covered by contracts and that nothing has been provided on meal and rest periods except end of the route "recovery time" that is only allowed if the driver is on schedule. Picking up a wheelchair passenger, construction, weather etc. often results in the driver being behind schedule. Therefore issues beyond the driver's control can eliminate any possibility of a break or meal period. Mr. McKinnon stated that the issue is not whether or not workers are covered by a contract, but whether the IWC should protect these workers.

Commissioner Coleman asked to be informed of how many drivers were operating under union contracts. Mr. Jones indicated that possibly 11 out of the thirteen public transit districts are unionized. Commissioner Coleman asked the IWC staff to find out if A.B. 60 exempted those workers under bargaining agreements from most of the requirements of the statute, such as meal and rest periods, under the theory that the agreement will negotiate these issues. Mr. Gusman stated that many drivers are not covered by bargaining agreements.

Opponents of the petition also spoke. Mr. Douglas Barton represented the California Transit Authority. He stated the following: that he was not aware of one public transit entity in the state that was not organized; that the issues of meals and break periods were clearly on the minds of all parties in negotiations; that public needs for reliable service and schedules were balanced with the needs of the drivers; and that drivers were more interested in how the work is laid out than in meal periods. He stated that he never heard a driver complain about not being allowed to eat. He advised the commission that this matter should be left "...to the collective bargaining process to be dealt with as an issue of public accountability at the local level." He explained in some detail how shifts are run and how breaks are given and commented that his transit district had an outstanding system and an outstanding safety record.

Mr. Rick Ramacier, general manager of the Contra Costa Transit Authority, also spoke in opposition to the IWC convening a Wage Board on this matter. Mr. Ramacier stated that recently the Contra Costa Transit Authority had renegotiated a 3- year contract, and that a meal break issue never came up. He indicated that they work out schedules with the unions that take bathroom stops into consideration and that many working conditions such as shifts and recreational and comfort accommodations are negotiated in lieu of a formal lunch break.

There was testimony regarding whether the IWC taking action would add flexibility to the bargaining process, as suggested by Commissioner Cremins, or limit the flexibility of the negotiations. After the opponents to a Wage Board spoke, Mr. Matt McKinnon and Mr. Tom Rankin spoke in favor of a wage board. Mr. McKinnon vigorously urged that his members sent him there to state that they do care about meal and rest periods, and that "What we're asking for is something very simple and straightforward: that workers get treated the same in both private and public sector doing this work." Mr. Rankin, representing the California Labor Federation, stated the same viewpoint. He added that the duty of the IWC is to look at the wages and working conditions of all the workers in California. He pointed out that the IWC had already included public employees under the minimum wage law. He also stated that all of the discussion presented in this meeting is really the proper discussion for a wage board in his opinion. Mr. Rankin and Mr. Jones stated that individual drivers will be nominated to serve on the Wage Board although none were present in this hearing and all viewpoints of employees and employers will come together at the appropriate time and place if the IWC convenes a Wage Board.

Commissioner Bosco expressed several concerns after the testimony was heard. He saw two issues "...one, do we want to get into the province of public employees...and secondly, do we want to augment contacts, union contracts?" In addition, he suggested that the IWC explore the issue of public safety as it might be affected by the exclusion of public drivers from meal and rest period requirements. He suggested that a Wage Board was premature and would probably come back to the Commission with a deadlock, so more investigation was warranted. Commissioner Cremins spoke in favor of convening a Wage Board and commented that Wage Order 16 allows exemptions to be bargained for but they must be considered and dealt with and not remain silent on the issue and that is what he was suggesting he would like to see in this Wage Order.

Chairman Dombrowski suggested that the matter be continued and set on the agenda for the next meeting. He asked that both sides provide information on the issues the Commissioners raised to the IWC staff to be prepared for the next meeting that was set for June 29, 2001.

At the meeting held in June, the IWC staff reported that neither side had presented facts or statistics regarding the public safety issue or other issues raised at the previous meetings. Subsequently, the petition was withdrawn by the proponents because the proponents chose to move forward with a legislative proposal that they hoped would address the problems the petitioners wished to remedy.

Assembly Bill 1677 was proposed by Senator Koretz on February 28, 2001, and among many proposals the bill included the following language "This bill would require that public employees who operate commercial motor vehicles be subject to the same regulations regarding meal and rest periods as their private employee counterparts, *or to receive equivalent protections through a collective bargaining agreement.*" This bill was passed by both houses and the enrolled bill was sent to the governor. The governor vetoed the bill.

Subsequently, by letter of October 29, 2002, the petition to appoint a Wage Board to consider possible amendments to Wage Order 9 was re-urged. The letter indicated that since the initial hearing in June, 2001, described above, the parties had engaged in extensive negotiations to no avail and that A.B. 1677, a proposed legislative solution had been vetoed.

On November 22, 2002, the IWC met and took additional testimony and accepted letters and documents provided by representatives of both sides. At this meeting the Commission voted to appoint and convene a Wage Board to consider possible amendments to Wage Order 9. A motion to convene a wage board was made by Commissioner Cremins soon after the public testimony on this matter started. Mr. Cremins apologized for offering a motion prior to all testimony being heard, but explained that he had just received word of a family emergency that required him to leave immediately. A vote was taken and the motion to convene a wage board passed. However, in spite of the vote to convene the wage board taken early in the meeting, the IWC agreed to take all public testimony offered, as required by law.

Mr. Douglas Barton, representing the California Transit Authority, testified at this hearing and reiterated much of his testimony given to the Commission in June, 2001. He stated that the public transit arena was unique for many reasons, the first of these being that the public transit exists because the private sector failed when private companies tried to provide transit. He stated that publicly run entities have a high degree of public accountability for the safety and well-being of the workers and of the public. Public officials serve on the boards of public transit entities, meetings are held in public, and Mr. Parker suggested that is how the situation should continue, and not to bring the industry under the IWC regulations and break with tradition. Mr. Barton also stated that most public transit companies are unionized and contract driven and that one solution arrived at by a wage board could not possibly meet the many different needs of very differing areas served.

Commissioner Bosco stated his opinion that a wage board could provide the right arena to arrive at flexible and ingenious solutions to the different needs of different locales. He expressed a firm belief that the wage board could solve the problem of drivers not being able to take breaks for a brief meal and a bathroom stop. Mr. Barton responded that drivers do get to eat and use the bathroom, but not in "...the prescribed intervals that are typical of a wage order." He repeated that the localized solutions are worked out

depending on schedules and routes, and that a wage board could not solve the problem with one rule applied to everyone in the State.
Commissioner Coleman expressed her agreement with Commissioner Bosco that drivers certainly need reasonable breaks. She also stated that she had worked on 4 billion dollars of transit initiatives to Silicon Valley, but that she did not think a statewide single solution would fit all localities. She agreed with Mr. Barton that local solutions should continue to be worked out, not a wage order solution. At this point, the before mentioned vote on Commissioner Cremins' motion was called for. The motion passed 4-1, with Commissioner Coleman casting the single "nay" vote.

Mr. Barry Broad testified that he wished to get clarification regarding the scope of the investigation by the wage Board. He indicated that his understanding was that the group of workers affected would be all public commercial drivers and not just public transit drivers. Commissioner Dombrowski instructed the staff to craft the charge to the wage board to include public drivers of commercial vehicles.

Mr. Rick Ramacier of the Contra Costa Transit Authority testified that some pieces of work lend themselves to regular and scheduled meal and rest breaks and some do not. He pointed out that generally the public transit authorities pay their drivers better than private companies like Laidlaw. He stated that meal and break periods were never a priority with drivers in Contra Costa in 30 years of negotiations. He described the process in Contra Costa County by which many and varied problems regarding scheduling and meal and break periods are addressed, and he stated a single wage order rule for all situations won't work.

Ms. Sue Zulke, representing the Orange County Transit Authority explained the negotiation method and procedure for working out problems on "tight" runs. She indicated the process recently resolved problems for drivers on four such tight runs. She stated that in the last negotiation between the company and drivers, 112 issues were raised by drivers and only one dealt with breaks. She also provided the commission with a comparison between Foothill Transit, who contracts with a private Transit company for its drivers, and Orange County Transit in regard to pay and benefits. She stated that Orange County is paying drivers 82% more than Foothills is paying the privately contracted for drivers. She also stated the cost to Contra Costa to provide the breaks as suggested will be 2.3 million per year.

Ms. Mindy Jackson, transit Director for El Dorado County testified that 56 of 58 counties in California have rural operations of some kind and that these operations require long routes and shifts on public highways, state highways and country roads. These facts make the break periods a serious operational problem and to implement breaks would reduce the services offered by El Dorado County. She indicated that in the 91-92 negotiations, it was agreed that several long runs would have breaks scheduled, but that soon after these were put in place, the drivers came to employers and requested that they be allowed to revert to no scheduled breaks so they could finish their runs and leave more quickly.

At the IWC meeting held on January 10, 2003, the IWC appointed a Wage Board consisting of 5 members representing employers in the transit industry, with one alternate, and five members representing employees of the transit industry, with one alternate.

The Wage Board was charged by the IWC as follows:

The IWC charges you to consider all material provided to you for review, and after review to report to the IWC your recommendations on the following matter:

1. **Should the meal and rest period requirements in Wage Order 9, sections (11) and (12) be amended to include public drivers of commercial vehicles.**

2. **Should any proposed amendment include language to the effect that the existence of a collective bargaining agreement which provides protections equivalent to the current meal and break period requirements of Wage Order 9 will satisfy the meal and break period requirements of the Wage Order.**

The wage board met on April 9, 2003. All testimony, documents, letters, and other exhibits in the possession of the Commission or the IWC staff was copied and forwarded to each of the participants in the wage board discussions and decision-making process. The proceedings and findings of this meeting were presented to the IWC in the form of the wage board report submitted by the chair to the IWC. The report reflected that all appointed members were present and C. Allen Poole chaired the board. During the brief meeting, employee representative Barry Broad explained that he and employer representative Douglas Barton had met prior to the meeting and worked out proposed amendments as well as proposed language for they felt should be included in the IWC's Statement as to the Basis for adopting the proposed amendments, if the IWC voted to approve the amendments. The proposed amendments and proposed language are as follows:

Wage Order 9, Section 2, Definitions

(C) "Commercial driver" means an employee who operated a vehicle as described in subdivision (b) of Section 15210 of the Vehicle Code.

(L) "Public Transit Bus Driver" means a commercial driver who operates a transit bus and is employed by a government entity.

Section 11, Meal Periods

(F) This section shall not apply to any public transit bus driver covered by a valid collective bargaining agreement if the bargaining agreement expressly provides for meal periods for those employees, final and binding arbitration of disputes concerning its meal period provisions, premium wage rated for all overtime hours

worked, and regular hourly rate of pay of not less than 30 percent more than the State minimum wage rate.

Section 12, Rest Periods

(C) This section shall not apply to any public transit driver covered by a valid collective bargaining agreement if the bargaining agreement expressly provides for meal periods for those employees, final and binding arbitration of disputes concerning meal period provisions, premium wage rates for all overtime hours worked, and regular hourly rate of pay of not less than 30 percent more than the State minimum wage rate.

In addition, language that was proposed by the wage board and later adopted by the IWC to be incorporated into this Statement as to the Basis is as follows:

> " In approving the amendment to the wage order to extend meal and rest period requirements to commercial drivers employed by government entities, the wage board included language allowing an exemption from Sections 11 and 12 for a collective bargaining agreement covering public transit drivers if the agreement 'expressly provides' for meal and rest periods for those employees and contains other protective conditions. It was the intent of the wage board that this provision provide the parties to the collective bargaining agreement maximum flexibility to define the length of meal and rest breaks and the circumstances in which such breaks will be taken as long as the agreement makes some provision for meal and rest breaks for the drivers covered by the agreement."

This language is hereby incorporated as part of the Statement as to the Basis for amending Wage Order 9.

Employee representative Barry Broad explained that the proposed amendments would make the meal and rest break provisions of Wage Order 9 applicable to drivers of commercial vehicles employed by governmental agencies effective either on July 1, 2004, or after the expiration date of a valid bargaining agreement but in no case later than August 1, 2005. As noted in the wage board report, Mr. Broad stated that "...the amendments proposed to Sections 11 and 12 create an exception in cases where collective bargaining agreements expressly provide for meal and break periods, final and binding arbitration of disputes, premium pay for overtime, and a regular hourly pay rate of not less than 30 percent more than the state minimum wage." Mr. Broad also explained that Section 2 of the proposal contains language the wage board can recommend to be included in the Statement as to the Basis. (as cited above)

Employer representative Barton confirmed that both sides had worked diligently to arrive at a proposal. As stated in the wage board report to the Commission, "He noted that public transit is a unique industry, and that local transit agencies need enough flexibility

to develop schedules for their employees and customers. He said that the industry was almost completely unionized, and the proposed amendments recognize the importance of allowing management and workers to negotiate issues within the collective bargaining context.

In addition the wage board was given a copy of A.B. 98 (Koretz), which contains language that clarifies the authority of the IWC to grant exemptions from meal and break periods to transit employees covered by a valid bargaining agreement. A.B. passed the legislature and was signed into law in 2003, prior to the public hearings on the proposed amendments to Wage Order 9 approved by the IWC.

Employer representative Marlene Heuser of the Orange County Transportation Authority expressed concern that the language proposed requires employers and employees to come to agreement about meal and rest periods in collective bargaining, as opposed to the current requirement that the issues must be the subject of bargaining but not necessarily agree to by both sides. She also felt the language was vague and ambiguous.

Employer representative Brenda Diederichs, Los Angeles County Transportation Authority, agreed with Ms. Heuser that the language was vague and ambiguous. She noted that it may be impractical for many public agencies to provide specific meal and rest breaks. She expressed concerns about the cost impact and stated that it will cost the Los Angeles County Transit Authority over 10 million dollars per year to implement the proposed changes. She also stated that in 20 years of bargaining history that meal and break periods were never an issue in the Los Angeles Transit Authority.

Mr. Barton acknowledged the concerns expressed but stated he felt the proposed changes gave maximum flexibility to employers, that the problem of bathroom breaks had been an issue for many years, and acknowledged that non-union shops might be more restricted than union shops by the proposals but that there were very few of those.
Mr. Broad stated that 30 percent of public transit service is provided by private contractors whose workers are already subject to Wage Order 9 requirements also that the San Mateo bargaining agreement providing breaks and meal periods works well.

Employer representative Pia-Harris, San Marcos Council Member, stated that she supported the proposal but that since her district's bargaining agreement expired on July 1, 2005, she asked for more time for implementation. Mr. Broad amended the last time proposed after expiration of a bargaining agreement to August 1, 2005.

Peter Cooper, California Labor Federation, stated he felt the proposal was fair and flexible and he was in favor of it.

A motion was made and seconded to accept the proposal, a vote was taken, and the motion passed 8-2, employer representatives Diederich and Heuser opposed.

On July 9, 2003, the IWC met and as part of its agenda considered the Wage Board Report and the proposals made by the wage board. Mr. Shaw of the California Transit

Authority appeared and testified on behalf of the proposal, and particularly recommended the adoption of the proposed language for the Statement as to the Basis. Also appearing in support was Barry Broad, Douglas Barton, Peter Cooper (California Labor Federation) James Jones (United Transportation Union), and Allen Davenport (Service Employees International Union).

Appearing in opposition were Mr. Christopher Kahn, representing Orange County Transportation Authority, Sue Zulke, Orange County Transportation Authority, and Suzanne Fox, Los Angeles Metropolitan Authority. Ms. Zulke strongly urged that the IWC lacks the authority to provide an exemption to the meal and rest break provisions for employees covered by a valid bargaining agreement. She stated that Senate Bill 88 and Senate Bill 1208 limited the authority of the IWC to adopt the amendments as proposed. She requested that until such time as the IWC receive statutory authority to provide such an exemption, that the IWC refrain from acting on the wage board's proposal.

Prior to the July 9, 2003 meeting of the wage board by letter of May 7, 2003, IWC Chairman Dombrowski was formally notified by Mr. Richard J. Bacigalupo, Assistant Executive Officer of the Orange County Transit Authority, that his agency was of the opinion that the IWC did not have the authority to adopt the proposals recommended even though they were approved by a two-thirds vote of the wage board, that would normally require the IWC to approve the proposal and send the measure to public hearing. He further stated that the transit authority together with other transit employers was opposing A.B. 98 that contained language specifically authorizing the IWC to exempt employees as proposed in the amendments. He felt that the opposition would succeed as in the opposition to the vetoed A.B. 1677 the prior year.

Chairman Dombrowski sought the legal opinion of counsel to the IWC, Marguerite Stricklin. Ms. Stricklin advised that the IWC had no choice at this time whether to send the proposal to public hearing, but was required to send the proposal out since it was approved by a two-thirds majority of the wage board, and she also stated that a vote of the Commission should be taken regardless of the mandatory result. She cited Labor Code 1178.5 mandating the approval of recommendations supported by at least two thirds of the wage board, and also cited section 1182(a) which mandates the Commission to ultimately adopt such a recommendation absent a finding "...that there is no substantial evidence to support such a recommendation."

It was moved and seconded that the Commission accept the recommendation of the wage board, and the motion passed 5-1 unanimously.

Public meetings were held in October, 2003, in San Diego, San Francisco, and Sacramento. On October 10, 2003, in San Diego, Commissioner Rose convened the hearing and took public testimony. James Jones appeared for the United Transportation Union, that represents many transit districts in California, and spoke for the proposal. Barry Broad appeared in support of the measure and shared the information that A.B. 98 had passed and was signed into law by Governor Gray Davis, and the law clarified that the IWC had the authority to adopt the exemptions as proposed.

Mr. Ed Procter, business agent for Amalgamated Transit Union, Local 1574. He expressed support for the amendments, and also stated that his union had anticipated this development and worked out a bargaining agreement to deal with meal and break periods a year ago. He stated that he had driven a bus for over twenty-five years and that sitting in the driver's seat for three and four straight hours with no break for food or bathroom use was an extreme but common hardship that his employer, the San Mateo Transit District, refused to address.

Ms. Judylynn Gries, representing the Riverside Transit Agency, spoke in opposition to the amendments. She stated that accommodating the required breaks would cost her agency approximately 15 percent of its annual budget, or 4.5 million dollars per year. She also stated that the ATU drivers were upset when they heard about the amendments because they were afraid that they would supercede their tenured bidding order, that allowed senior drivers to get very desirable routes.

There was no other testimony at any public meeting regarding these proposals. The proposals were unanimously adopted by the IWC in its meeting in Sacramento on October 17, 2003, based in part on the mandates set forth in Labor Code Section 1178.5 and Section 1182(a), i.e. that any proposal recommended to the IWC by the wage board by over two-thirds of the voting members be sent out for public hearings (1178.5) and ultimately adopted (1182 (a) by the IWC unless a finding is made that there is no substantial evidence to support the recommendation. **The amendments shall be in effect as of July 1, 2004**.

The IWC has received no testimony, correspondence, or other information that would support changing these decisions.

The IWC received no compelling evidence, and concluded there was no authority at this time, to warrant making any other changed to the provisions of this Section.

Amendments to
Secs. 2, 3, and 11
Order 4-89
Title 8 California Code of Regulations 11040
Effective August 21, 1993

Amendments to Sections 2, 3, and 11 of
INDUSTRIAL WELFARE COMMISSION ORDER NO. 4-89
REGULATING

PROFESSIONAL, TECHNICAL, CLERICAL, MECHANICAL AND SIMILAR OCCUPATIONS

These changes affect only the health care industry

OFFICIAL NOTICE

To employers and representatives of persons in occupations covered by IWC Order No. 4-89 who work in the **health care industry:**

The Industrial Welfare Commission (IWC) Of the State of California proceeded according its authority in the Labor Code and the Constitution of California, and concluded that Sections 2, 3, and 11 of its Order 4-89, regulating Professional, Technical, Clerical, Mechanical, and Similar Occupations, should be amended to affect persons who work in the health care industry. The IWC promulgated these amendments to Order 4-89, made pursuant to the special provisions of Labor Code Section 1182.7, on June 29, 1993. The amendments become effective on August 21, 1993. The amendments become effective on August 21, 1993.

All other provisions of Section 2, Definitions, Section 3, Hours and Days of Work, and Section 11, Meal Periods, and all other sections of Order 4-89 remain in full force and effect.

The amendments allow more flexibility with respect to work scheduling, managerial and administrative exemptions and the definition of hours worked for compensation. They apply only to persons covered by this order who work in the health care industry. This includes, but is not limited to, all employees who work for doctors' or dentists' offices, clinics medical laboratories, kidney dialysis clinics, home health care agencies, and other health/allied services.

The amendments printed in this mailer must be posted next to the calendar-style poster on which the entire Order 4-89 is printed, and which should already be posted where employees can read it.

The reasons for the changes accompany the amendments in the Statement as to the Basis, provided for you information. If you have any questions on interpreting the amendments or how they apply to you, please contact your nearest Division of Labor Standards Enforcement office, list below. If you need additional copies of this amendment, please write to:

Division of Labor Standards Enforcement,
P. O. Box 420603
San Francisco, CA 94142-0603

2. DEFINITIONS

(The following language is added to Section 2, *Definitions*, subsection (H).)

(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 Fair Labor Standards Act.

(The following language is added to Section 2, *Definitions*, subsection (k).)

(K)...Within the health care industry, the term "primarily" as used in Section 1, Applicability, means (1) more than one-half the employee's work time as a rule of thumb or, (2) if the employee does not spend over 50 percent of the employee's time performing exempt duties, where other pertinent factors support the conclusion that management, managerial, and /or administrative duties represent the employee's primary duty. Some of these pertinent factors are the relative importance of the managerial duties as compared with other types of duties, the frequency with which the employee exercises discretionary powers, the employee's relative freedom from supervision, and the relationship between the employee's salary and the wages paid other employees for the kind of nonexempt work performed by the supervisor.

3. HOURS AND DAYS OF WORK

(The following is added to Section 3, *Hours and Days of Work*, as subsection (J).)

(J) Employees in the health care industry may work on any days any number of hours a day up to twelve (12) without overtime, as long as the employer and at least two-thirds (2/3) of the affected employees in a work unit agree to this flexible work arrangement, in writing, in a secret ballot election before the performance of the work, provided:

(1) An employee who works beyond twelve (12) hours in a workday shall be compensated at

(3) Prior to the secret ballot vote, any employer who proposes to institute a flexible work arrangement shall make a disclosure in writing to the affected employees, including the effects of the proposed arrangement on the employees' wages, hours, and benefits. Such a disclosure shall include meeting(s), duly noticed, held at least fourteen (14) days prior to voting, for the specific purpose of discussing the effects of the flexible work arrangement. Failure to comply with this section shall make the election null and void;

(4) The same overtime standards shall apply to employees who are temporarily assigned to a work unit covered by this subsection;

(5) Any employer who institutes an arrangement pursuant to this subsection shall make a reasonable effort to find an alternative work assignment for any employee who participated in the secret ballot election and is unable or unwilling to comply with the agreement. An employer shall not be required to offer an alternative work assignment to an employee if an alternative assignment is not available or if the employee was hired after the adoption of the flexible work arrangement. There is no maximum number of employees whom an employer may voluntarily accommodate consistent with its desire and ability to do so;

(6) After a lapse of twelve (12) months and upon petition of a majority of the affected employees, a new secret ballot election shall be held and a two-thirds (2/3) vote of the affected employees shall be required to reverse the arrangement above. If the arrangement is revoked, the employer shall comply within sixty (60) days. Upon a proper showing by the

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double the employee's regular rage of pay for all hours in excess of twelve (12); (2) An employee who works in excess of forty (40) hours in a workweek shall be compensated at one and one-half (1 ½) times the employee's regular rate of pay for all hours over forty (40) hours in a workweek;	employer of undue hardship, the Division may grant an extension of time for compliance; (7) For purposes of this subsection, affected employees may include all employees in a readily identifiable work unit, such as a division, a department, a job classification, a shift, a separate physical location, or a recognized subdivision of any such work unit. A work unit may consist of an individual employee as long as the criteria for an identifiable work unit in this subsection are met	Lyn Jam Rob Don Dor

Statement as to the Basis of Amendments to Sections 2, 3, and 11 of Industrial Welfare Commission Order No. 4-89

Labor Code Sec. 1182.7 requires Industrial Welfare Commission (IWC) to provide accelerated review of petitions filed by organizations recognized in the health care industry who request amendments to an IWC order directly affecting only the health care industry. Under this authority, the California Association of Hospitals and Health Systems (CAHHS) petitioned the IWC to amend and/or clarify certain sections of Order 4, solely for employers and employees in the health care industry. The IWC accepted the petition which proposed to redefine "primarily" and 'hours worked" to parallel federal law in Section 2, *Definitions;* to clarify and expand regulations regarding flexible schedules and overtime in Section 3, *Hours and Days of Work*; and to permit employees to waive meal periods in Section 11, *Meal Periods*. The IWC held three public hearings on its proposals in April 1993.

After deliberating on all the evidence presented with respect to its proposals, the IWC adopted amendments to Order 4 for the health care industry on June 29, 1993, and offers the following statement as to the basis for its actions:

2. DEFINITIONS

Testimony suggested the current DLSE interpretations of "hours worked" were "unduly narrow" resulting in "substantial confusion and resulted in less than 51 percent of the time being devoted to exempt duties. On June 29, 1993, the IWC adopted language consistent with the FLSA, which promoted clarity and compliance while providing needed flexibility to allow exempt executive and administrative employees to perform nonexempt duties without losing their exempt status. In response to public comment suggesting the term "other pertinent factors" was unclear and confusing to employees, the IWC clarified the meaning of that item by listing some, but not all, examples of pertinent factors.

3. HOURS AND DAYS OF WORK

Testimony supported the petitioner's claims that DLSE's interpretations regarding the flexible scheduling rules adopted in 1986 and 1988 limited desirable options for employees and frustrated the IWC's intent of more, not less, flexibility. Many employees told the IWC they voluntarily worked 12-hour shifts at a "reduced rate of pay," with overtime after eight hours a day. Although this practice is permissible, it sometimes adversely affected their

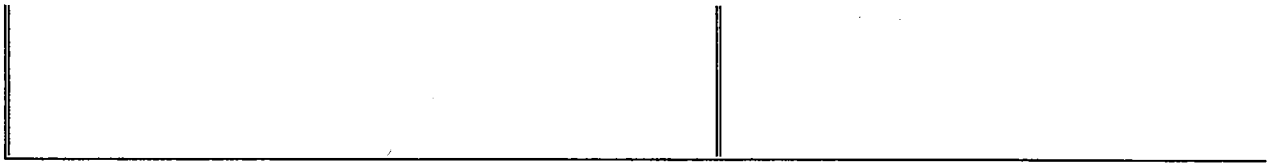
serious technical problems," and consistency with the Fair Labor Standards Act (FLSA) would eliminate this confusion. In response to testimony presented at the public hearings that the reference to "29 CFR Part 785" was unclear, the IWC amended that language and referred to "the Fair Labor Standards Act" instead, a term more easily understood by the public. On June 29, 1993, the IWC adopted language to assure "hours worked" in the health care industry would be interpreted in accordance with the FSLA, the regulations interpreting the FLSA including, but not limited to, those contained in 29 CFR Part 785, and federal court decisions. The clarification confirms the IWC's intention that issues related to working time will be resolved consistently under state and federal law.

With respect to redefining "primarily" for the health care industry, the IWC decided since it had examined the professional component of the administrative/executive/professional exemption and adopted language to exempt learned and artistic professions as recently as 1989, it was time to respond to demands for a more flexible application of the executive/ administrative exemption than the rigid 51 percent rule. Employees testified current regulations sometimes resulted in treating an employee as nonexempt under a rigid application of a 51 percent rule, such as where emergency or other conditions

benefits and pensions-in order to cope with DLSE's overly "restrictive" policies. Other employees said they preferred to "mix days off" and working the same days each week was an "unrealistic" practice. The revised language clarifies the IWC's original intent to maximize flexibility in scheduling so that the days and hours of work can vary. While some employees argued part-time employees who have flexible work arrangements should be paid premium wages when asked to work beyond their normal part-time arrangements, by the end of the public hearings, most employees agreed requiring premium wages for part-time or temporary employees who work less than 12 hours a day or 40 hours a week is unfair to full-time workers in the same work unit who earn straight time pay for the same daily and weekly hours. While a few employees suggested the "secret ballot election process" allowed under the IWC orders was "flawed" due to "lack of oversight," the Labor Commissioner testified DLSE had received few, if any, complaints regarding the election process.

After evaluating all the evidence, on June 29, 1993, the

IWC adopted its proposal to amend flexible scheduling rules



NOTE: The Internet version of this Industrial Welfare Commission Order may be posted as is required at places of employment. To obtain the official printed Order, you may call 415.703.5070 and it will be mailed to you free of charge. You may also request copies by writing to the Department of Industrial Relations, Public Information Office, P.O. Box 420603, San Francisco, CA 94142-0603.

INDUSTRIAL WELFARE COMMISSION
ORDER NO. 5-2001
REGULATING
WAGES, HOURS AND WORKING CONDITIONS IN THE PUBLIC HOUSEKEEPING INDUSTRY

Effective August 21, 1993 as amended)

OFFICIAL NOTICE

To employers and representatives of persons in occupations covered by IWC Order No. 5-89 who work in the health care industry:

The Industrial Welfare Commission (IWC) Of the State of California proceeded according its authority in the Labor Code and the Constitution of California, and concluded that Sections 2, 3, and 11 of its Order 5-89, regulating the Public Housekeeping Industry, should be amended to affect persons who work in the health care industry. The IWC promulgated these amendments to Order 5-89, made pursuant to the special provisions of Labor Code Section 1182.7, on June 29, 1993. The amendments become effective on August 21, 1993. The amendments become effective on August 21, 1993.

All other provisions of Section 2, Definitions, Section 3, Hours and Days of Work, and Section 11, Meal Periods, and all other sections of Order 5-89 remain in full force and effect.

The amendments allow more flexibility with respect to work scheduling, managerial and administrative exemptions and the definition of hours worked for compensation. They apply only to persons covered by this order who work in the health care industry. This includes, but is not limited to, all employees who work for hospitals, skilled nursing facilities, intermediate care and residential care facilities, convalescent care institutions, and similar establishments.

The amendments printed in this mailer must be posted next to the calendar-style poster on which the entire Order 5-89 is printed, and which should already be posted where employees can read it.

The reasons for the changes accompany the amendments in the Statement as to the Basis, provided for you information. If you have any questions on interpreting the amendments or how they apply to you, please contact your nearest Division of Labor Standards Enforcement office, list below. If you need additional copies of this amendment, please write to:

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San Francisco, CA 94142-0603

2. DEFINITIONS
(The following language is added to Section 2, Definitions, subsection (H).)

(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 Fair Labor Standards Act.

(The following language is added to Section 2, Definitions, subsection (L).)

(L)...Within the health care industry, the term "primarily" as used in Section 1, Applicability, means (1) more than one-half the employee's work time as a rule of thumb or, (2) if the employee does not spend over 50 percent of the employee's time performing exempt duties, where other pertinent factors support the conclusion that management, managerial, and /or administrative duties represent the employee's primary duty. Some of these pertinent factors are the relative importance of the managerial duties as compared with other types of duties, the frequency with which the employee exercises discretionary powers, the employee's relative freedom from supervision, and the relationship between the employee's salary and the wages paid other employees for the kind of nonexempt work performed by the supervisor.

3. HOURS AND DAYS OF WORK

(The following language replaces subsection (C) in Section 3, Hours and Days of Work.)

(C) No employer engaged in the operation of a hospital or an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises shall be deemed to have violated any provision of this Section if, pursuant to an agreement or understanding arrived at between the employer and employee before performance of the work, a work period of fourteen (14) consecutive days is accepted in lieu of the workweek of seven consecutive days for purpose of overtime computation and if, for any employment in excess of eight (8) hours in any workday and in excess of eighty (80) hours in such fourteen (14) day period, the employee receives compensation at a rate not less than one and one-half (1 ½) times the regular rate at which the employee is employed., provided:

(1) An employee who works beyond twelve (12) hours in a workday shall be compensated at double the employee's regular rage of pay for all hours in excess of twelve (12);

(2) An employee who works in excess of forty (40) hours in a workweek shall be compensated at one and one-half (1 ½) times the employee's regular rate of pay for all hours over forty (40) hours in a workweek;

The following language replaces subsection (K) in Section 3, Hours and Days of Work.)

K. Employees in the health care industry may work on any days any number of hours a day up to twelve (12) without overtime, as long as the employer and at least two-thirds (2/3) of the affected employees in a work nit agree to this flexible work arrangement, in writing, in a secret ballot election before the performance of work, provided:
(1) An employee who works beyond twelve (12) hours in a workday shall be compensated at double the employee's regular rate of pay for all hours in excess of twelve (12);

(2) An employee who works in excess of forty (40) hours in a workweek shall be compensated at one and one-half (1 ½) times the employee's regular rate of pay for all hours over forty (40) in the workweek;

(3) Prior to the secret ballot vote, any employer who proposes to institute a flexible work arrangement shall make a disclosure in writing to the affected employees, including the effects of the proposed arrangement on the employees' wages, hours, and benefits. Such a disclosure shall include meeting (s), duly noticed, held at least fourteen (14) days prior to voting, for the specific purpose of discussing the effects of the flexible work arrangement. Failure to comply with this section shall make the election null and void;

(4) The same overtime standards shall apply to employees who are temporarily assigned to a work unit covered by this subsection;

(5) Any employer who institutes an arrangement pursuant to this subsection shall make a reasonable effort to find an alternative work assignment for any employee who participated in the secret ballot election and is unable or unwilling to comply with the agreement. An employer shall not be required to offer an alternative work assignment to an employee if an alternative assignment is not available or if the employee was hired after the adoption of the flexible work arrangement. There is no maximum number of employees whom an employer may voluntarily accommodate consistent with its desire and ability to do so;

(6) After a lapse of twelve (12) months and upon petition of a majority of the affected employees, a new secret ballot election shall be held and a two-thirds (2/3) vote of the affected employees shall be required to reverse the arrangement above. If the arrangement is revoked, the employer shall comply within sixty (60) days. Upon a proper showing by the employer of undue hardship, the Division may grant an extension of time for compliance;

7) For purposes of this subsection, affected employees may include all employees in a readily identifiable work unit, such as a division, a department, a job classification, a shift, a separate physical location, or a recognized subdivision of any such work unit. A work unit may consist of an individual employee as long as the criteria for an identifiable work unit in this subsection are met.
(The following is added to Section 3, Hours and Days of Work, as subsection (L).)

(L) When an employee in the health care industry requests in writing, and the employer concurs, the employee shall be permitted to make up work time lost as a result of personal obligations. The amount of make up time shall not exceed two (2) hours in any one workweek or, where applicable, four (4) hours in any one fourteen (14) day work period and must be made up during that workweek or work period, whichever is applicable. With the exception of the make up time authorized in this subsection, the appropriate overtime provisions in Section 3 shall apply to all other excess daily or weekly hours worked in the workweek or fourteen (14) day work period.

11. MEAL PERIODS

(The following is added to Section 11, Meal Periods, as subsection (C).)

(C) Notwithstanding any other provision of this order, employees in the health care industry who work shifts in excess of eight (8) total hours in a workday may voluntarily waive their right to a meal period. In order to be valid, any such waiver must be documented in a written agreement that is voluntarily signed by both the employee and the employer. The employee may revoke the waiver at

any time by providing the employer at least one day's written notice. The employee shall be fully compensated for all working time, including any on-the-job meal period, while such a waiver is in effect.

Amendments adopted in San Francisco on June 29, 1993. Amendments effective August 21, 1993.

INDUSTRIAL WELFARE COMMISSION STATE OF CALIFORNIA

Lynnel Pollack, Chairperson
James rude
Robert Hanna
Donald Novey
Dorothy Vuksich

Statement as to the Basis of Amendments to Sections 2, 3, and 11 of Industrial Welfare Commission Order No. 5-89

Labor Code Sec. 1182.7 requires Industrial Welfare Commission (IWC) to provide accelerated review of petitions filed by organizations recognized in the health care industry who request amendments to an IWC order directly affecting only the health care industry. Under this authority, the California Association of Hospitals and Health Systems (CAHHS) petitioned the IWC to amend and/or clarify certain sections of Order 5, solely for employers and employees in the health care industry. The IWC accepted the petition which proposed to redefine "primarily" and 'hours worked" to parallel federal law in Section 2, Definitions; to clarify and expand regulations regarding flexible schedules and overtime in Section 3, Hours and Days of Work; and to permit employees to waive meal periods in Section 11, Meal Periods. The IWC held three public hearings on its proposals in April 1993. After deliberating on all the evidence presented with respect to its proposals, the IWC adopted amendments to Order 5 for the health care industry on June 29, 1993, and offers the following statement as to the basis for its actions:

DEFINITIONS

Testimony suggested the current DLSE interpretations of "hours worked" were "unduly narrow" resulting in "substantial confusion and serious technical problems," and consistency with the Fair Labor Standards Act (FLSA) would eliminate this confusion. In response to testimony presented at the public hearings that the reference to "29 CFR Part 785" was unclear, the IWC amended that language and referred to "the Fair Labor Standards Act" instead, a term more easily understood by the public. On June 29, 1993, the IWC adopted language to assure "hours worked" in the health care industry would be interpreted in accordance with the FSLA, the regulations interpreting the FLSA including, but not limited to, those contained in 29 CFR Part 785, and federal court decisions. The clarification confirms the IWC's intention that issues related to working time will be resolved consistently under state and federal law.

With respect to redefining "primarily" for the health care industry, the IWC decided since it had examined the professional component of the administrative/executive/professional exemption and adopted language to exempt learned and artistic professions as recently as 1989, it was time to respond to demands for a more flexible application of the executive/ administrative exemption than the rigid 51 percent rule. Employees testified current regulations sometimes resulted in treating an

employee as nonexempt under a rigid application of a 51 percent rule, such as where emergency or other conditions resulted in less than 51 percent of the time

being devoted to exempt duties. On June 29, 1993, the IWC adopted language consistent with the FLSA, which promoted clarity and compliance while providing needed flexibility to allow exempt executive and administrative employees to perform nonexempt duties without losing their exempt status. In response to public comment suggesting the term "other pertinent factors" was unclear and confusing to employees, the IWC clarified the meaning of that item by listing some, but not all, examples of pertinent factors.

HOURS AND DAYS OF WORK

With respect to the petitioner's request to amend Order 5 so that the IWC's standard for a 14-day work period conformed with federal law, the IWC was advised that while such work periods are ordinarily implemented on a departmental-wide or institutional-wide basis, DLSE's interpretation of the current regulation would allow one employee "to destroy the validity of such an arrangement by individually insisting of a seven day workweek standard." Public testimony in favor of the proposal claimed it set a "reasonable standard" one similar to the FLSA. Other arguments suggested a change was necessary to prevent individual employees from "opting in and out" of 14-day work periods because such activity could prove disruptive to established arrangements. Those opposed to the IWC's proposal objected to deleting language referring to a "written agreement or understanding voluntarily arrived at" from the current regulation, protections not found in the FLSA. On June 29, 1993, the IWC adopted its original proposal regarding the 14-day work period because it provided for a more stable working environment by clarifying how 14-day work periods would be consistently calculated and because it confirmed the IWC's intention that the California standard parallels the federal standard. Finally, the WIC stated its intent that flexible work arrangements, such as allowing employees to work up to 12 hours a day without overtime, and 14-day work periods, were mutually exclusive of one another and thus cannot be used simultaneously for the same employees.

Testimony supported the petitioner's claims that DLSE's interpretations regarding the flexible scheduling rules adopted in 1986 and 1988 limited desirable options for employees and frustrated the IWC's intent of more, not less, flexibility. Many at a "reduced rate of pay," with overtime after eight hours a day. Although this practice is permissible, it sometimes adversely affected their benefits and pensions-in order to cope with DLSE's overly "restrictive" policies. Other employees said they preferred to "mix days off" and working the same days each week was an "unrealistic" practice. The revised language clarifies the IWC's original intent to maximize flexibility in scheduling so that the days and hours of work can vary. While some employees argued part-time employees who have flexible work arrangements should be paid premium wages when asked to work beyond their normal part-time arrangements, by the end of the public hearings, most employees agreed requiring premium wages for part-time or temporary employees who work less than 12 hours a day or 40 hours a week is unfair to full-time workers in the same work unit who earn straight time pay for the same daily and weekly hours. While a few employees suggested the "secret ballot election process" allowed under the IWC orders was "flawed" due to "lack of oversight," the Labor Commissioner testified DLSE had received few, if any, complaints regarding the election process.

After evaluating all the evidence, on June 29, 1993, the

IWC adopted its proposal to amend flexible scheduling rules so that an individual employee in the healthcare industry could agree with his or her employer to work on any days any number of hours a day under certain protective conditions. The new language allowing flexible work arrangements

permits employers and employees maximum daily and weekly scheduling flexibility, including but not limited to allowing employees to work overtime on a regular basis, as long as the appropriate premium wages are paid for work after twelve (12) hours a day, or in the case of weekly overtime, forty (40) hours a workweek. Moreover, the final language clarified only one meeting regarding disclosure need be held when not more than one meeting is necessary. The IWC intended the same overtime standards to apply to all employees in a work unit regardless of full-time, part-time, on-call, replacement, permanent, or temporary status. The new rules do not invalidate any arrangement that was implemented prior to their effective date.
With respect to allowing employees in the health care industry to make up work time lost as a result of personal obligations, the IWC proposed and eventually adopted the petitioner's suggested language. The IWC agreed the request was reasonable and balanced the needs of employees and employers. Moreover, the language provided flexibility on an as needed basis without requiring a group vote or long-term schedule change.

MEAL PERIODS

The petitioner requested the IWC to allow employees in the health care industry who work sifts in excess of eight (8) total hours in a workday to waive their right to "any" meal period or meal periods as long as certain protective conditions were met. The vast majority of employees testifying at public hearings supported the IWC's proposal with respect to such a waiver, but only insofar as waiving "a" meal period or "one" meal period, not "any" meal period. Since the waiver of one meal period allows employees freedom of choice combined with the protection of at least one meal period on a long shift, on June 29 1993, the IWC adopted language which permits employees waive a second meal period provided the waiver is documented in a written agreement voluntarily signed by both the employee and the employer, and the waiver is revocable by the employee at any time by providing the employer at least one day's notice.

INDUSTRIAL WELFARE COMMISSION

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is **BLANK ROME LLP**, 2029 Century Park East, 6th Floor, Los Angeles, California 90067.

On **January 10, 2014**, I served the foregoing document(s): **DEFENDANTS/CROSS-COMPLAINANTS/APPELLANTS/ PETITIONERS' MOTION FOR JUDICIAL NOTICE; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION; PROPOSED ORDER** on the interested parties in this action addressed and sent as follows:

SEE ATTACHED SERVICE LIST

☒ **BY ENVELOPE:** by placing ☐ the original ☒ a true copy thereof enclosed in sealed envelope(s) addressed as indicated and delivering such envelope(s):

☒ **BY MAIL:** I caused such envelope(s) to be deposited in the mail at Los Angeles, California with postage thereon fully prepaid to the office or home of the addressee(s) as indicated. I am "readily familiar" with this firm's practice of collection and processing documents for mailing. It is deposited with the U.S. Postal Service on that same day, with postage fully prepaid, in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.

☒ **FEDERAL:** I declare that I am employed in the office of a member of the bar of this court at whose direction service was made.

Executed on **January 10, 2014**, at Los Angeles, California.

Michelle Grams

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