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Re: "Hours of Work" for Public Transit Employees Required to Start and End Their Shifts at Different Locations

Dear Mr. Flynn and Ms. Itelson:

Please accept my apologies for our delay in responding to your letters of March 9, 2001, and March 21, 2001, concerning the above-referenced issue. Under the facts presented, bus and light rail vehicle operators employed by the Sacramento Regional Transit District ("RTD") are represented by a union, Local 256 of the Amalgamated Transit Union ("ATU"), and are covered by a collective bargaining agreement ("CBA") between the RTD and ATU. These operators are either required to begin their shifts at a particular bus or rail yard, or at a relief point somewhere along the route. Operators who start their shifts at a bus or rail yard typically end their shifts at a relief point, where the relief driver starts his or her shift. Relief drivers typically end their shifts at a bus or rail yard. The relief points and the bus or rail yards are geographically separate, in some cases more than 30 minutes apart. RTD does not pay part-time operators for the time spent traveling from the locations where they end their shifts ("end-shift locations") to the locations where they started their shifts ("start-shift locations")[1]. RTD pays its full-time operators a negotiated amount, set out in the CBA, for

[1] Relieved operators are given free transportation on RTD vehicles so that they may ride on a bus or light rail vehicle to return to the locations where they started their shifts.

time spent traveling from end-shift locations to start-shift locations. However, according to the facts presented, these amounts are based on "imputed," rather than "actual" travel time.

Operators whose shifts begin in the early morning cannot get to work using public transportation, as the system does not operate all night. These operators commute to the start-shift locations using their own vehicles, so they must first travel after their shift ends from their end-shift locations (where they are relieved by the relief drivers) to their start-shift locations in order to get back home. Likewise, relief operators whose shifts end near or at the time the system shuts down must commute to the end-shift location using their own vehicles, so that when their shifts end, they are able to return home. Consequently, those relief drivers must travel, before their shift starts, from the end-shift location where they leave their cars to their start-shift location.

We have been asked whether, since January 1, 2001, under the circumstances described above, time spent by relieved operators as riders traveling from end-shift locations to start-shift locations, constitutes "hours worked" within the meaning of Industrial Welfare Commission ("IWC") Order 9-2001, so as to entitle these operators to compensation for all such time at their regular rates of pay.

Prior to January 1, 2001, IWC Order 9, which regulates wages, hours and working conditions in the transportation industry, did not apply to any public employees. RTD employees were therefore not covered by any part of Order 9 prior to January 1, 2001. With the IWC's adoption of the 2001 wage orders, this changed, and effective January 1, 2001, section 1(B) of Order 9-2001 read: "Except as provided in Sections 1, 2, 4, 10, and 20, the provisions of this order shall not apply to any employees directly employed by the State or any political subdivision thereof, including any city, county, or special district." Thus, these enumerated sections of the wage order now apply to RTD employees[2].

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[2] Neither Labor Code §220(b) nor §514 exempt RTD from these provisions of IWC Order 9-2001. Pursuant to Section 220(b), Labor Code sections 200-211, and 215-219, do not apply to the payment of wages of RTD employees. But the obligations created by the applicable sections of Order 9-2001 are not founded upon any of the statutes listed in Labor Code §220(b). Section 514, which was added to the Labor Code by AB60, took effect on January 1, 2000, and provided: "This chapter [sections 500-558] does not apply to an employee covered by a valid collective bargaining agreement if the agreement expressly provides for the wages, hours and working conditions of the employees, and if the agreement provides premium wage rates for all overtime hours worked and a regular hourly rate of pay for those employees of not less than 30 percent more than the state minimum wage."

Section 2(G) of Order 9-2001 defines "hours worked" as "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." In *Morillion v. Royal Packing Company* (2000) 22 Cal.4th 575, 582, the Supreme Court construed identical language in IWC Order 14, and held that the two phrases -- "time during which an employee is subject to the control of an employer" and "time the employee is suffered or permitted to work, whether or not required to do so" -- are "independent factors, each of which defines whether certain time spent is compensable as 'hours worked'." Thus, the Supreme Court concluded that the , "an employee who is subject to an employer's control does not have to be working during that time to be compensated under Wage Order No. 14-80." *Ibid.*

Applying this analysis, the Supreme Court held that agricultural employees who were required by their employer to report at a specified time to a pick-up point, and to travel on a company bus from that pick-up point to the fields where they performed their tasks, and who at the end of the day were transported back from the fields to the original pick-up point, were subject to the employer's control, and entitled to compensation, for all time spent from the time they were required to be at the pick-up point until they were dropped off there at the end of the day, including all time spent riding on the company bus to and from the fields, notwithstanding the fact that as bus passengers, the employees were free to read, nap, or engage in other personal pursuits. In rejecting the reasoning behind the Court of Appeal decision that found such time to be non-compensable, the Supreme Court held that the federal statutory scheme -- namely, the Portal-to-Portal Act and regulations issued thereunder -- "differs substantially from the state scheme" and "should be given no deference" in construing

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This collective bargaining opt-out notwithstanding, the IWC retained the authority, under Labor Code §§1171, et seq., to adopt regulations governing the wages, hours and working conditions of employees covered by collective bargaining agreements. The IWC wage orders, including Order 9, provide for a collective bargaining opt-out from overtime requirements found in section 3, "Hours and Days of Work." This limited opt-out provides that except for certain subsections, "this section shall not apply" to any employee covered by a CBA that meets the prerequisites set out at Labor Code §514. None of the other sections of Order 9 are subject to the collective bargaining opt-out. Highlighting the limited nature of the collective bargaining opt-out, the recent enactment of Senate Bill 1208 amended Labor Code §514 to now provide: "Sections 510 and 511 do not apply to an employee covered" by a CBA that meets the prerequisites. The rest of that chapter of the Labor Code thus would apply to such employees. SB 1208 expressly states that this amendment of section 514 is "declarative of existing law and shall not be deemed to alter, modify, or otherwise affect any provision of any wage order of the Industrial Welfare Commission."

the meaning of "hours worked" under the IWC orders. *Ibid, at 588.*

The Portal-to-Portal Act, which amended the Fair Labor Standards Act ("FLSA"), provides that employers are not obligated to compensate employees for time spent: "walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform," or while engaged in "activities which are preliminary or postliminary to said principal activity or activities" where such travel or activities "occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." 29 USC §254(a). Federal law thus generally limits compensable travel time to that travel time that is "part of [an employee's] principal activity." 29 CFR §785.38. State law, however, does not follow a "principal activity" test, and does not contain an express exemption for travel time similar to that of the Portal-to-Portal Act. Thus, in *Morillion,* the Supreme Court concluded that "time during which the employee is subject to the control of an employer," which is compensable under the IWC orders, may encompass so-called "preliminary and postliminary activities" and "travel time," which is not compensable under the Portal-to-Portal Act. *Ibid, at 591.*

In a lawsuit filed under the FLSA, a federal court held that time that city bus drivers spent traveling on city provided shuttles, which transported the drivers to or from the city garage/bus yard and the relief points where they started their first run of the day or where they ended their last run of the day, was excluded from compensable time under the Portal-to-Portal Act. *United Transportation Union Local 1745 v. City of Albuquerque* (10th Cir. 1999) 178 F.3d 1109. However, the court ruled that under the FLSA, time that the drivers spent traveling on these shuttles to and from different relief points at the beginning or end of a split shift was compensable, in that such time falls under 29 CFR §785.38, which provides, "Time spent by an employee in travel as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked." In contrast, the time that the court found non-compensable was deemed subject to 29 CFR §785.35, which provides, "An employee who travels from home before his regular workday and returns to his home at the end of the workday is engaged in ordinary home to work travel which is a normal incident of employment. *This is true whether he works at a fixed location or at different job sites.* Normal travel from home to work is not compensable." (Emphasis added.) Based upon this regulation, the court held that "the fact that a driver may end

his workday at a relief point where his own vehicle is unavailable, does not transform what would otherwise be a simple work-to-home commute into compensable hours worked." *United Transportation Union, supra,* 178 F.3d at 1120-1121.

The potential harshness of 29 CFR §785.35 is starkly revealed by the decision in *Kavanagh v. Grand Union Co.* (2nd Cir. 1999) 192 F.3d 269, an FLSA lawsuit filed by a mechanic whose job duties consisted of traveling over a wide geographic area (the greater New York metropolitan area, including all of Long Island, New York City's five boroughs, suburbs to the north of New York City, and suburbs in New Jersey) in order to make repairs at various stores owned by his employer. The court held that this regulation implementing the Portal-to-Portal Act precluded the recovery of compensation for travel to or from a distant store at the beginning or end of his workday, regardless of the distance that he was required to travel from his home to the first assignment and to his home from the last assignment.

One might ask what result would follow, under the FLSA (or at least these judicial constructions of the FLSA), if the facts of *United Transportation Union* were mixed with those of *Kavanagh*, with the result that a bus driver, who commutes from her home to a dispatch yard where he starts his first run of the day, is relieved at the end of her last run at a location 60 miles away from the start of his first run. Would time spent while the driver is traveling back to the dispatch yard, to pick up her automobile so that she could then drive home, be construed as a "ordinary home to work travel" so as to be non-compensable under the Portal-to-Portal Act? This is not an idle question -- there are many transit districts with bus lines that extend at least that distance. But whatever the answer might be under the FLSA, for purposes of a case governed by the IWC's definition of "hours worked," when an employer exercises control over an employee to require the employee to end her shift in a location that is different from where she started her shift, the time that the employee must spend traveling back to the location where the shift started, in order to pick up her automobile so that she can start her normal commute back home, constitutes compensable "hours worked."

To be sure, the nature of the "control" exercised by the RTD differs from that exercised by Royal Packing in *Morillion*. Royal Packing "*required* plaintiffs to ride its buses to get to and from the fields, subjecting them to control for purposes of the 'hours worked' definition." *Morillion, supra,* 22 Cal.4th at 594 (emphasis in original). "[B]y requiring employees to take certain transportation to a work site, employers thereby subject those employees to its control by determining when, where, and

how they are to travel. *Ibid*, at 588. But, "employers do not risk paying employees for their travel time merely by providing them transportation. Time employees spend traveling on transportation that an employer provides but does not require its employees to use may not be compensable as 'hours worked.'" *Ibid.* The Supreme Court cautioned that it was not holding that all travel time to and from work is compensable.

However, *Morillion* does not stand for the proposition that the *only circumstances* under which travel time will be found to be compensable under state law is when the employer controls when, where and how the employee must travel. The requisite degree of control may be present under other circumstances that were not addressed by the Supreme Court in its decision. The facts presented herein -- employees ending their shifts at different locations (in some cases, more than 30 minutes away) from the locations where they are required to start working their shifts -- were simply not before the Court in *Morillion*. And the federal regulations and court decisions like *Kavanagh* and *United Transportation Union*, founded upon the Portal-to-Portal Act, are entitled to no deference in determining whether the RTD operators' time spent traveling from their end-shift locations to their start-shift locations, either following the conclusion or preceding the start of their shifts, constitutes compensable "hours worked" within the meaning of IWC Order 9-2001.

There is no doubt that an ordinary commute between the employee's home and the initial location where the employee must report to work is not compensable under state law. Likewise, if the employee's shift ends at that same location, the ordinary commute from work back home is not compensable. But if, as a result of following the employer's directions or carrying out the employee's assigned work, the employee finishes his or her shift at a location other than the location where the shift began, the employee must generally travel back to the start-shift location following the conclusion of the work shift in order to commence his or her "ordinary commute" back home (or, with respect to the RTD's relief drivers, must undertake this travel from the end-shift location to the start-shift location before the work shift begins). The employee is put in this position precisely because the employee "is subject to the control of an employer," i.e., absent the employer's control, the employee would undoubtedly not have chosen to end his or her shift at a location different from that where it began. We believe this form of employer control is sufficient to conclude that under California law, the time the operator spends traveling from the end-shift to the start-shift location, following the conclusion (or, in the case of the relief drivers, prior to the start) of the work shift, constitutes "hours worked" within the meaning of Order 9-2001, even though

the RTD does not require the operator to ride on an RTD vehicle in order to get from the end-shift location to the start-shift location, and even though the RTD does not require the operator to punch in, or punch out, or attend any sort of meeting or appear anywhere, prior to the start or subsequent to the end of the work shift.[3]

The fact that the operator ends his or her shift at a different location than that where the shift began is purely for the benefit of the RTD, in that it is apparently easier or somehow preferable for the RTD to schedule shifts in this manner. The operator's "freedom" to use some other form of transportation other than an RTD bus or light rail vehicle is illusory, at best. The relief point is located at a bus or rail stop. Other transportation options are likely to entail an unreasonable expenditure of money (calling a taxi cab), of time (walking several miles from the relief point back to the yard), or of someone else's time and money (relying on a friend or relative for a ride from the relief point back to the division yard). And even if the employee is free to engage in personal pursuits once his or her shift is over (e.g., by going shopping at a mall that may be located at the relief point), the employer's decision to have the shift end at a different location than where it started forces the employee to spend some fixed amount of time traveling between the end-shift and start-shift locations. For these reasons, we conclude that the operator's time spent traveling from the relief point back to the start-shift location following the end of the work shift (and the relief operator's time spent traveling from the end-shift location to the relief point prior to the start of the work shift) constitutes "hours worked" so as to be compensable under IWC Order 9-2001, to the extent that such time represents no more than the minimum amount of time it would take the operator to travel between the start-shift and end-shift locations walking and/or using the most direct bus or light rail routes, whichever method is quicker. Thus, "hours worked" would not include any time that the operator chooses to use for personal matters which have the effect of lengthening the time that is required to travel between the end-shift and start-shift locations.

Section 4 of Order 9-2001 requires employers to pay "*not less*" than the minimum wage for "all hours worked." Are the RTD operators therefore entitled to *no more* than the minimum wage, or

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[3] There is, of course, no question that if the RTD were to require its operators to report to the bus or rail yard prior to the start, and subsequent to the end of any work shift, time spent traveling between the yard and the relief point would be time during which the operator is subject to the employer's control.

is each operator entitled to be paid at his or her regular rate of pay for "hours worked" traveling between the relief point and the start-shift or end-shift location? The answer to this question depends on the provisions of the applicable collective bargaining agreement. If the CBA between the RTD[4] and the ATU does no more than specify a rate for work performed (e.g., part-time drivers will be paid $20 an hour), then that is the rate that DLSE will enforce for *all* hours worked, including time spent traveling between the relief point and the start or end-shift location. DLSE is authorized to enforce this rate by virtue of Labor Code §1195.5, which authorizes the Division to examine contracts to determine "whether the wages of employees which exceed the minimum wages fixed by the [industrial welfare] commission have been correctly computed and paid," and to "enforce the payment of any sums found, upon examination, to be due and unpaid to the employees."

The RTD, like any other employer, can specify separate regular rates for different types of work, provided that all established rates must equal or exceed the minimum wage, and that all applicable rates must be established before the hours are worked. Thus, if the CBA expressly provides for an hourly rate of pay for hours worked traveling between the relief point and the start-shift or end-shift location that is lower than the established rate of pay for driving a bus or operating an LRV, the DLSE will enforce this lower travel rate as long as it compensates the operators for all time spent traveling at not less than the minimum wage. However, if the CBA purports to compensate operators for this travel time by, say, "imputing" an extra 15 minutes of pay at the operator's regular rate to cover this time, we would conclude that a portion of this time is completely unpaid under the CBA, to the extent that the "imputed" time is less than the actual minimum time that it would take an operator to travel between these locations, as explained above. The operator would then be entitled to payment of his or her regular rate of pay for the difference between the actual minimum time and the "imputed" time.

CBA provisions that purport to explicitly establish a rate of pay below the minimum wage, including those that purport to characterize time that constitutes "hours worked" under state law as unpaid, non-work time under the CBA, cannot defeat the

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[4] The Regional Transit District is not covered by the National Labor Relations Act or Labor Management Relations Act, in that under the NLRA, the definition of "employer" does not include any State or political subdivision thereof. 29 USC §152(2). The RTD is subject to the provisions of California's Meyers- Milias-Brown Act ("MMBA", Govt. Code §3500, et seq.). State wage and hour laws, and IWC regulations, are obviously not preempted by the MMBA.

employee's right to payment of no less than the minimum wage for all time that constitutes "hours worked" under the IWC orders. The IWC definition of "hours worked" and the requirement that all such hours be paid at no less than the minimum wage are minimum labor standards, and are not subject to any sort of collective bargaining agreement opt-out. As the Supreme Court explained in *Barrentine v. Arkansas-Best Freight System, Inc.* (1981) 450 U.S. 728, 740-741:

> This Court's decisions interpreting the FLSA have frequently emphasized the nonwaivable nature of an individual employee's right to a minimum wage and overtime pay under the Act. Thus, we have held that FLSA rights cannot be abridged by contract or otherwise waived because this would "nullify the purposes" of the statute and thwart the legislative policies it was designed to effectuate. [cites omitted] Moreover, we have held that congressionally granted FLSA rights take precedence over conflicting provisions in a collectively bargained compensation arrangement. [cites omitted] As we stated in *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944) ... "The Fair Labor Standards Act was not intended to codify or perpetuate [industry] customs and contracts.... [A]n agreement to pay less than the minimum wage requirements cannot be utilized to deprive employees of their statutory rights."

California law parallels the FLSA in this regard. Labor Code §1197 provides: "The minimum wage for employees fixed by the commission is the minimum wage to be paid to employees, and the payment of a less wage than the minimum so fixed is unlawful." And Labor Code §1194 provides: "Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation. . . ."

This then leads to the question of whether an employee who is entitled to payment of the minimum wage for *all* hours worked, notwithstanding a CBA that explicitly purports to pay nothing, or less than the minimum wage, for certain activities that constitute "hours worked" under state law, is entitled to the unpaid balance of the minimum wage for each and every hour standing alone, or whether the determination as to whether minimum wages are owed is made by comparing the total compensation received during the pay period with the total "hours worked" during the pay period. Is the obligation to pay no less

than the minimum wage satisfied by determining whether the employee's total compensation for the payroll period equals or exceeds the minimum wage multiplied by the total number of hours worked, or must the employer pay the minimum wage for each and every separate hour (and each and every part of every hour) worked?

The IWC wage orders provide that: "Every employer shall pay to each employee, on the established payday for the period involved, not less than the applicable minimum wage for all hours worked in the payroll period, whether the remuneration is measured by time, piece, commission or otherwise." (See, e.g., Order 9-2001, sect. 4(B).) Our question cannot be answered by the plain language of the orders, as this provision is equally susceptible to two divergent readings: 1)that the obligation to pay minimum wages attaches to each and every separate hour worked during the payroll period, and that payment must be made for all such hours on the established payday, or 2) that the obligation to pay minimum wages for the total number of hours worked in the pay period is determined "backwards" from the date that payment is due, without considering any hour (or part of any hour) in isolation. Federal courts, in construing minimum wage obligations under the FLSA, have consistently followed the latter approach. The FLSA merely requires that each employee receive, each pay period, an amount not less than the minimum wage for the total number of hours worked. As a general rule, an employee cannot succeed on a claim under the FLSA if his average wage for a pay period in which he works no overtime exceeds the minimum wage. *Blankenship v Thurston Motor Lines* (4th Cir. 1969) 415 F.2d 1193, 1198; *United States v. Klinghoffer Bros. Realty Corp.* (2nd Cir. 1960) 285 F.2d 487, 490; *Dove v. Coupe* (D.C. Cir. 1985) 759 F.2d 167, 171; *Hershey v. MacMillan Bloedel Containers* (8th Cir. 1986) 786 F.2d 353, 357.

State law, however, differs dramatically from the FLSA in a crucial way -- the FLSA does not provide a mechanism for the enforcement of non-overtime, contract based wages which exceed the minimum wage, while California law provides a statutory basis, under the Labor Code, for the enforcement of non-overtime contract based wage claims in excess of the minimum wage. California law explicitly prohibits employers from paying employees less than the wages required under any statute or less than the wages required under any contract or CBA.

Labor Code §221 provides: "It shall be unlawful for any employer to collect or receive from an employee any part of the wages theretofore paid by said employer to said employee." Section 222 provides: "It shall be unlawful, in case of any wage agreement arrived at through collective bargaining, either

wilfully or unlawfully with intent to defraud an employee, a competitor, or any other person, to withhold from said employee any part of the wage agreed upon." Finally, section 223 provides: "Where any statute or contract requires an employer to maintain the designated wage scale, it shall be unlawful to secretly pay a lower wage while purporting to pay the wage designated by statute or contract."

These statutes prevent the RTD[5], or any other employer that might be covered by a CBA or other contract that expressly pays employees less than the minimum wage for certain activities that constitute "hours worked" within the meaning of state law, from using any part of the wage payments that are required under that CBA or other contract for activities that are compensated in an amount that equals or exceeds the minimum wage, as a credit for satisfying minimum wage obligations for those activities that are compensated at less than the minimum wage under the CBA or contract. Instead, all hours for which the employees are entitled to an amount equal or greater than the minimum wage pursuant to the provisions of the CBA or other contract must be compensated precisely in accordance with the provisions of the CBA or contract; and all other hours (or parts of hours) which the CBA or contract explicitly states will be paid at less than the minimum wage, but which constitute "hours worked" under state law, must be compensated at the minimum wage. Averaging of all wages paid under a CBA or other contract, within a particular pay period, in order to determine whether the employer complied with its minimum wage obligations is not permitted under these circumstances, for to do so would result in the employer paying the employees less than the contract rate for those activities which the CBA or contract requires payment of a specified amount equal to or greater than the minimum wage, in violation of Labor Code sections 221-223.

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[5] Labor Code sections 221-223 apply to all employers, including public employers. Section 220(b) makes sections 200-211, and 215-219, inapplicable to employees "directly employed by any county, incorporated city, or town, or other municipal corporation." Special districts, including transit districts such as the RTD, come within this exclusion. (*Division of Labor Law Enforcement v. El Camino Hospital District* (1970) 8 Cal.App.3d Supp. 30) But this exclusion does not make sections 221-223 inapplicable to public employers. Quite the opposite --- section 220 is part of Division 2, Part 1, Chapter 1 of the Labor Code, which includes sections 200-243. The fact that the Legislature expressly excluded these public employers from certain sections contained within this Chapter of the Code indicates an intent to make the remaining sections of the Chapter applicable to such public employers, unless the specific section provides an express exemption therefrom.

Thank you for your interest in California wage and hour law. Feel free to contact us with any other questions.

Sincerely,

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AS/mel

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