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DEPARTMENT OF INDUSTRIAL RELATIONS

INDUSTRIAL WELFARE COMMISSION

Public Hearing

June 30, 2000

State capitol, Room 4202

Sacramento, California

P A R T I C I P A N T S

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Industrial Welfare Commission

BILL DOMBROWSKI, Chair

BARRY BROAD

LESLEE COLEMAN

DOUG BOSCO

HAROLD ROSE

Staff

ANDREW R. BARON, Executive Officer

MARGUERITE STRICKLIN, Legal Counsel

RANDALL BORCHERDING, Legal Counsel

MICHAEL MORENO, Principal Analyst

DONNA SCOTTI, Administrative Analyst

NIKKI VERRETT, Analyst

I N D E X

INDEX (Continued) Page

INDEX (Continued) Page

P R O C E E D I N G S

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(Time noted: 10:18 a.m.)

COMMISSIONER DOMBROWSKI: I'd like to call the meeting to order, please.

I'd like the record to show that we have all five commissioners in attendance and move to Item 1, approval of the minutes for the meeting that was held on -- where's my date?

MR. BARON: May 26.

COMMISSIONER DOMBROWSKI: May 26th.

COMMISSIONER BROAD: We have to take roll.

COMMISSIONER DOMBROWSKI: I just said the record will show that we're all here.

COMMISSIONER BROAD: Oh, okay.

COMMISSIONER DOMBROWSKI: Commissioners have reviewed the minutes. Can I hear a motion for approval?

COMMISSIONER BOSCO: I move we approve the minutes.

COMMISSIONER DOMBROWSKI: Second?

COMMISSIONER COLEMAN: Second.

COMMISSIONER DOMBROWSKI: All in favor, say "aye."

(Chorus of "ayes")

COMMISSIONER DOMBROWSKI: I would like to make a brief comment for the record that there was contention after the last meeting about the Commission following proper procedures on some of the items on the agenda, that the Attorney General's Office reviewed those procedures and said verbally that we followed the proper steps and were within our boundaries.

Let's go to Agenda Item Number 2, consideration of the proposed amendments to Wages 1 through 13 and 15, from the Interim Wage Order. And I would ask Mr. Baron to comment on that.

MR. BARON: Basically, what Item 2 is, is other than the issues in Item 3 that relate particularly to the healthcare industry, but in those couple of areas that would be expanded to affect the other orders, basically all that Item 2 is, is the -- kind of the -- a lot of the core backbone of what was in AB 60 that we -- if you -- even if you look at the headings on the notice, "Definitions," "Daily Overtime," "Collective Bargaining Agreements," "Make-up Time," "Meal Periods," "Minors," and "Penalties" are taken -- were taken directly from AB 60 and put into the Interim Wage Order. And now, today, we're basically going through a process of fanning out those provisions from the Interim Wage Order into -- so

that they will now sit into all of the orders.

COMMISSIONER DOMBROWSKI: Okay. I have -- it doesn't -- I believe there are four people -- I'm not sure if they want to talk about this item or if they were related to healthcare -- Barbara Blake, United Nurses Association; Michael Zackos; Rebecca Motlagh; or Allen Davenport.

MR. DAVENPORT: (Not using microphone) Healthcare.

MR. BARON: They all want health.

COMMISSIONER DOMBROWSKI: Healthcare? Okay.

COMMISSIONER BROAD: Mr. Chairman, can I just ask a question --

COMMISSIONER DOMBROWSKI: Um-hmm.

COMMISSIONER BROAD: -- of Mr. Baron?

Under Item 2, there's a reference to two issues involving the collective bargaining and the meal period in Order 12. We are -- that is included in what is in the noticed thing that we are voting on. Is that correct?

MR. BARON: The -- no. The issue on -- you know, I would suggest that you -- those were items that were sent out to the commissioners.

COMMISSIONER BROAD: Okay.

MR. BARON: I would say that you should formally offer those as amendments.

COMMISSIONER BROAD: Okay. I will formally --

COMMISSIONER DOMBROWSKI: Can you just read them into the record?

MR. BARON: As to the -- as to the -- in the "Collective Bargaining" section, basically what we're doing is, where it makes mention in the notice of "pertinent collective bargaining subsection," the amendment would actually delineate the specific subsections. And so, it would start off by saying, "Except as provided in subsections" -- and the applicable subsections as to where they fit in the wage orders themselves. We have situations where the same language can be sitting in different subsections. So, it doesn't -- you have to make allowance for that as we fan it out.

So, in the "Collective Bargaining," it would start out by saying, "Except as provided in Subsection (C)," which deals with overtime for minors 16 or 17 years of age; "(D), 'Availability of Place to Eat for Workers on a Night Shift'; and (G), 'Limit on Work over 72 Hours,' the provisions of this order," meaning that if you have a collective bargaining agreement, "shall not apply," and then it continues on.

COMMISSIONER BROAD: The provisions of the overtime section of the order, right, not all of the order?

MR. BARON: Right.

COMMISSIONER BROAD: That's the --

MR. BARON: Because it's still --

COMMISSIONER BROAD: Right. Section 3, in most of the wage orders.

MR. BARON: Right, right. I mean, it's still going into Section 3 as it's -- as it's put in the notice.

Then as to the -- as to the meal periods -- and again, this is apart from -- there's a section on meal periods in Item 3 relative to the healthcare industry -- but what is basically sitting now is to meal periods in the -- in the language that's in the notice, is direct language from AB 60. And the other amendment would say that -- that "This section, however, shall not apply to Wage Order 12," which is the motion picture industry, and that the language in Order 12 which provides for a meal period after six hours, as opposed to after five hours, would continue to apply.

COMMISSIONER BROAD: Okay. Mr. Chairman, I would move those two items. However, I would ask that

the record reflect, on the second one dealing with meal periods in the movie industry, that it show me as abstaining on that. So, two motions.

COMMISSIONER DOMBROWSKI: All right.

COMMISSIONER BROAD: The first one and the second one, with me abstaining on the second one.

COMMISSIONER DOMBROWSKI: Okay.

COMMISSIONER BROAD: Thank you.

COMMISSIONER DOMBROWSKI: Do I need to do a roll or just -- okay. We have a motion. We have -- all in favor, say "aye."

(Chorus of "ayes")

MR. BARON: With an abstention on the second.

COMMISSIONER DOMBROWSKI: With an abstention from Commissioner Broad on the second one.

With that said, I need a motion for approval of the language in Item 2.

COMMISSIONER BROAD: So moved.

COMMISSIONER ROSE: Second.

COMMISSIONER DOMBROWSKI: Second. Let's call the roll.

MR. BARON: Dombrowski.

COMMISSIONER DOMBROWSKI: Aye.

MR. BARON: Bosco.

COMMISSIONER BOSCO: Aye.

MR. BARON: Broad.

COMMISSIONER BROAD: Aye.

MR. BARON: Coleman.

COMMISSIONER COLEMAN: Aye.

MR. BARON: Rose.

COMMISSIONER ROSE: Aye.

COMMISSIONER DOMBROWSKI: That item is adopted, five to zero.

Let's go to Item 3, which is the review of the language adopted at the May 26 public hearing on the healthcare industry.

I would like to point out that we have -- I believe there are still copies at the desk of an alternative compromise that the industry and its participants and labor have reached. I think it demonstrates very good faith on the part of both sides on some very difficult issues. It does provide for a further refinement of the definition of the healthcare industry and which industry employees are eligible for a 12-hour shift. It addresses the issue of mandatory overtime after 12 hours and what conditions would dictate that. It provides for some restrictions in terms of after 16 hours, and the employee having to -- can only be

-- volunteer to work overtime, no mandatory overtime after 16 hours. And in other areas, it provides for other disclosures in other items that we -- that we were addressing.

Commissioner Broad, I don't know you want to make any other comments.

COMMISSIONER BROAD: Yes. I'd just like to say that Chairman Dombrowski and I were present at some of the negotiations which occurred. It was an example of how the various interests involved in these issues can get together and negotiate something that works for everyone. And I -- it's the way the process should go forward.

So, I support this amended draft of Attachment A and would urge my fellow commissioners to support it as well.

COMMISSIONER DOMBROWSKI: Commissioner Bosco?

COMMISSIONER BOSCO: Mr. Chairman, I also want to reflect what Commissioner Broad has just said. I think, if you look back at our last meeting and the contentiousness that we faced then and see now that almost all these issues are resolved, I think it is to the credit of you, Mr. Chairman, and Mr. Broad, and the representatives from management and organized labor that

we can be here today in relative quietude on this matter.

Having said that, though, I may disrupt things a bit because I do want to offer an amendment. I don't know if the chair wants to entertain it at this time or --

COMMISSIONER DOMBROWSKI: Yes.

COMMISSIONER BOSCO: Okay. And I noted that in the agreement that had been reached, veterinary care and veterinary establishments had been left out. I haven't made a lifetime of animal rights or that type of thing. I do love pets and I kind of unwittingly stepped into this issue, thanks to local veterinarians contacting me. But I do think it's important that those clinics that want to keep 24-hour emergency service, as many of them do now in each community, be able to adjust their work hours accordingly. And although all of us, I think, view human healthcare issues as perhaps more important, I don't think we should forget that there are healthcare needs out there for animals through these veterinary clinics.

And so, I would like to make an amendment to the draft that we have before us, and that be a new amendment, Item 1(B)(4), that "licensed veterinarians, registered veterinary technicians, and registered animal

health technicians providing patient care" be included in the healthcare industry coverage, and furthermore, that the Statement as to Basis be amended to say that within the meaning of Business and Professions Code Section 4825 through 4857.

COMMISSIONER DOMBROWSKI: Let me just -- I was -- I was going -- we have people who want to testify, so before we take the motion -- I wanted to have it on the table so everybody understands what we're going to be voting on -- but now let's call up the people to testify.

COMMISSIONER BOSCO: Okay. Do we have a second to that or --

COMMISSIONER DOMBROWSKI: Well, we will, I think.

COMMISSIONER BOSCO: Okay.

COMMISSIONER DOMBROWSKI: After the testimony, we'll recognize the motion and then ask for a second.

COMMISSIONER BOSCO: Okay.

COMMISSIONER DOMBROWSKI: But I felt we should have that on the table before we --

COMMISSIONER BOSCO: All right.

COMMISSIONER DOMBROWSKI: Let's see. I'd like to have Mr. Rankin, Mr. Camp, Mr. Davenport. I believe you want -- did Mr. Camp want to talk on this issue?

MR. CAMP: (Not using microphone) On Item 7, on the ski industry.

COMMISSIONER DOMBROWSKI: I'm sorry. I'm sorry.

Barbara Blake, Mr. Maddy, Michael -- I'm sorry -- Zackos, Mr. Sponseller, Rebecca Motlagh, Mr. Richard Holober.

Did I miss anyone?

Go ahead, Mr. Rankin.

MR. RANKIN: Tom Rankin, California Labor Federation.

We, after many meetings and a lot of time and a lot of support from a lot of people, have reached an agreement on the proposal that you have before you. I would like to just point out -- we support this agreement, but I would like to point out, because I heard some moans in the audience when you characterized the agreement, it does provide for no mandatory overtime except in cases of emergency.

COMMISSIONER DOMBROWSKI: Oh, I'm sorry. You're --

MR. RANKIN: And the 16 hours had to do with a voluntary agreement in the case of an emergency only.

COMMISSIONER DOMBROWSKI: Right.

MR. RANKIN: It also -- so, that was the --

that's -- I wanted to make that clear. And it also, in a concession to the hospitals, does allow for a 13-hour period of work in certain circumstances where an employee scheduled to relieve the other employee does not report for duty and doesn't inform the employer more than two hours before the employee is scheduled to report. And this is designed to give a one-hour period to find someone else to do that work.

So, both sides made some concessions here. We worked hard, and we think this is an agreement that you should approve.

Just one comment on the issue that was just raised. We really don't believe that animal care falls within the definition of healthcare.

COMMISSIONER DOMBROWSKI: Mr. Davenport?

MR. DAVENPORT: Mr. Chairman, Allen Davenport, with the Service Employees International Union, the largest union of healthcare workers in California and in the nation.

We're very pleased that Mr. Broad and yourself were able to bring us together with the management side of the operation and that we were able to create an agreement that I think accomplishes our major goals, in terms of a prohibition on mandatory overtime and in

creating fairness in the election process. We didn't achieve everything that we asked for, but I think we're satisfied that this is a much improved version over the current state of affairs. There will be more fairness in the elections. There will be a prohibition on mandatory overtime.

And we're very grateful to you and Mr. Broad for the work that you put into doing this.

We would also say that animal care is not healthcare. And while there may be an interest in this industry in doing this, the appropriate way to do that is not by calling it healthcare, but by creating a wage board and going -- and going through the same kind of exercise that we all went through here, as people in the healthcare industry. And that's -- that's the course of action I'd recommend to Mr. Bosco and the people who are appealing to him.

MS. BLAKE: Barbara Blake, United Nurses Associations of California, AFSCME.

We urge the Commission to accept the amendments as they're written. This took a lot of time, patience, hard work on everyone's part. And we're pleased, as Allen said, with the amendments as written, and we would appreciate approval of this.

Thank you.

MR. HOLOBER: Richard Holober, California Nurses Association.

And, you know, we respect and appreciate all the work and effort that went into this; however, we do not support the language on the mandatory overtime, for several reasons that, you know, we have tried to enunciate. First is that this leaves the vast majority of registered nurses in California without any overtime protection. Approximately half or more of the registered nurses are not working alternative 12-hour work shifts. So while this would appear to provide some protection after 12 hours to that individual, it provides no protection to an 8- or 10-hour shift nurse, who still can be compelled to work 16 or 24 hours, as does sometimes occur.

And the language regarding what would constitute an emergency will still really remain completely in the discretion of the hospital administrator. When the hospital administrator determines that there is an emergency, there is an emergency. It is not subject to review by any external or objective source, and there are no penalties for violation of those declarations of an emergency.

So, given those shortcomings, we respectfully do not support that language.

We also do appreciate, you know, all the work that was put into this. We recognize that in some of the election procedures, there are some improvements. But we do believe that the language regarding mandatory overtime falls short of protection for our nurses.

Thank you.

MR. MADDY: Mr. Chairman and members, Don Maddy, representing the California Healthcare Association.

We were also a party to the compromise. We think this is a good balance between the goals the Legislature and the Governor had with respect to AB 60 and patient care issues. We brought a lot of patient care issues to the table.

With respect to the mandatory overtime issue, we wanted to have some triggers in there that would protect in the case of emergency so patients aren't left without care. That was the goal of both sides, and I think that we -- and both sides wanted to make sure patients were protected as well as having some employees and management have some flexibility and some -- some way to work out problems among themselves, as opposed to going to outside parties and third parties for every single dispute.

So I think this is a very good compromise that's been reached. I think it is very fair with respect to election procedures, gives some remedies when employers are not operating properly with respect to the goals of the legislation. And I think it also is a testament to where cooperation can take you.

Your help, Mr. Chairman, and Mr. Broad's, since you sat through the meetings, were particularly helpful to us. This is a -- this was a tough road. It was a tough road for us to go down. We didn't have -- we didn't really have a good understanding of each other's needs at the beginning, and I think at the last meeting it kind of showed that. There was a lot of misunderstandings. And I think we reached some understandings through last month that are going to be very productive and helpful to all concerned.

I also want to thank Mr. Baron for his participation, because he was a good person to bounce things off of and to also help communicate between the sides during this process.

So, we support it and we appreciate your help.

Thank you.

COMMISSIONER BROAD: Mr. Chairman?

COMMISSIONER DOMBROWSKI: Barry.

COMMISSIONER BROAD: Mr. Maddy, I just wanted to particularly express my appreciation for your role in this process. You showed tremendous leadership. And as someone who's a professional advocate myself, I sort of admire -- I very much admire the way you handled yourself in this process. Thank you.

MR. MADDY: Thank you very much.

COMMISSIONER DOMBROWSKI: And I'd like to echo the compliments to the staff and Mr. Baron for the work they did on this. It was -- it was very, very helpful.

Any other comments?

(No response)

COMMISSIONER DOMBROWSKI: Okay. I believe we have a motion on the table from Commissioner Bosco. Do we have a second?

COMMISSIONER COLEMAN: I'll second that.

I've thought about this quite a bit and we have received, I think, more correspondence on this topic than just about anything else. But I think the key thing to keep in mind is the flexibility that this affords not only, I think, helps the industry, but it is flexibility for the -- for the workforce to be able to do this. So, I think this is a human issue, not just an issue about service to the animals that are being served through the

industry.

COMMISSIONER DOMBROWSKI: Mr. Broad.

COMMISSIONER BROAD: Very quickly, with all due respect to Mr. Bosco, I feel like the intent of the Legislature in passing AB 60 was to restore -- or give us the authority to maintain 12-hour days in the healthcare industry as they existed prior to the 1998 wage orders. And I do not believe the veterinary industry was ever included previously. So just -- everyone should understand that what we're doing here is expanding something that was never there prior to 1998.

So, I must respectfully vote no on this particular issue.

Thank you.

COMMISSIONER DOMBROWSKI: Any other comments?

(No response)

COMMISSIONER DOMBROWSKI: Okay. Let's call the roll.

MR. BARON: On the amendment, right?

COMMISSIONER BROAD: On the amendment.

COMMISSIONER DOMBROWSKI: On the amendment.

MR. BARON: Dombrowski.

COMMISSIONER DOMBROWSKI: Aye.

MR. BARON: Bosco.

COMMISSIONER BOSCO: Aye.

MR. BARON: Broad.

COMMISSIONER BROAD: No.

MR. BARON: Coleman.

COMMISSIONER COLEMAN: Aye.

MR. BARON: Rose.

COMMISSIONER ROSE: No.

MR. BARON: Three to two.

COMMISSIONER DOMBROWSKI: Yeah. And we need a motion on the overall --

COMMISSIONER BROAD: I'd like to move the overall.

COMMISSIONER DOMBROWSKI: Second?

COMMISSIONER ROSE: Second.

COMMISSIONER DOMBROWSKI: Okay. Call the roll.

MR. BARON: Dombrowski.

COMMISSIONER DOMBROWSKI: Aye.

MR. BARON: Bosco.

COMMISSIONER BOSCO: Aye.

MR. BARON: Broad.

COMMISSIONER BROAD: Aye.

MR. BARON: Coleman.

COMMISSIONER COLEMAN: Aye.

MR. BARON: Rose.

COMMISSIONER ROSE: Aye.

COMMISSIONER DOMBROWSKI: Five to nothing. That is adopted.

Let's go to Item 4. Commissioner Broad has circulated language concerning meal periods and rest periods for Orders 1 through 13 and 15. Would you like to --

COMMISSIONER BROAD: Yes, Mr. Chairman. This is a rather -- a relatively small issue, but I think a significant one, and that is we received testimony that despite the fact that employees are entitled to a meal period or rest period, that there really is no incentive as we establish it, for example, in overtime or other areas, for employers to ensure that people are given their rights to a meal period and rest period. At this point, if they are not giving a meal period or rest period, the only remedy is an injunction against the employer or -- saying they must give them.

And what I wanted to do, and I'd to sort of amend the language that's in there to make it clearer, that what it would require is that on any day that an employer does not provide a meal period or rest period in accordance with our regulations, that it shall pay the employee one hour -- one additional hour of pay at the

employee's regular rate of compensation for each workday that the meal or rest period is not provided.

I believe that this will ensure that people do get proper meal periods and rest periods. And I would --

COMMISSIONER DOMBROWSKI: Let me ask a question. If you're an employer and you provide for a 30-minute meal period a day, and your employee misses that meal period or eats while working through that meal period, I believe you get paid, correct? It's a paid -- it would then be a paid meal period.

COMMISSIONER BROAD: Yes, it would be a paid meal period.

COMMISSIONER DOMBROWSKI: Right.

COMMISSIONER BROAD: I mean, assuming they pay you for it. I mean --

COMMISSIONER DOMBROWSKI: Assuming that -- well, okay. Does this say, then, if you had a 30-minute meal period as your standard procedure, you would get -- and you missed that, you get an hour's worth of pay? Is that what I'm -- additional -- an hour additional pay.

COMMISSIONER BROAD: If your employer did not let you have your meal period, I think, is what it says. So it's -- it doesn't involve, you know, waivers of a meal period or time off or anything of that sort. And

rest periods, of course, are somewhat different. Employers are obligated to provide rest periods --

COMMISSIONER DOMBROWSKI: Correct.

COMMISSIONER BROAD: -- duty-free and must pay for them. So if you don't provide a rest period, then the -- you know, the employee gets their day's pay, but they don't get the rest, and so that's -- with respect to a meal period, it doesn't have to be compensated.

COMMISSIONER DOMBROWSKI: Okay.

COMMISSIONER BROAD: So it's particularly egregious with regard to rest periods.

COMMISSIONER DOMBROWSKI: Okay. I don't -- does anyone wish to testify on this item?

MR. RANKIN: Tom Rankin, California Labor Federation.

I would like to express our support for Commissioner Broad's proposal. As he stated, the problem exists right now that there is no remedy for a missed meal period or a missed rest period. And what his proposal does is provide a remedy.

And the purpose of the rest period and the meal period is, in the case of rest periods, to have a rest break where an employee is relieved from work duties. The same is true for meal periods, to provide a break

where people can partake of a meal. It is not sufficient that they -- if they don't get their meal period, they simply get paid for that half hour. Sure they do; they're working that half hour. I would hope they would.

This provision of Mr. Broad's at least provides a minor disincentive for employers not to deny employees their rights to rest and meal breaks.

MS. BROYLES: Good morning, commissioners. Julianne Broyles, from the California Chamber of Commerce.

We had not been apprised, of course, of this particular provision early on. Otherwise we probably would have had more extensive comments on it.

I guess I would have to, first of all, raise the issue of the authority to establish a new crime, which basically this is doing. Additionally, we would also point out that if the employee has missed a meal period, they are going to be paid for the meal period in almost all instances. In terms of setting up a new penalty and a crime for basically missing a rest period, as far as I know there is no statute that would permit that to be done. And we would oppose this particular amendment.

MR. ABRAMS: Thank you, Mr. Chairman, members of the Commission. My name is Jim Abrams. I'm with the

California Hotel and Motel Association.

And two issues: first of all, we also question the legislative authority of the Commission to, in essence, adopt and impose new penalties with respect to violations of what is, in essence, a statute, and then the statute picking up the regulations of the Industrial Welfare Commission. So, we object to and question the authority of the IWC to adopt this particular provision.

If, however -- and not conceding the point -- if, however, this type of language is adopted, I have several questions.

First of all, Commissioner Broad, is it your intent that the hour of pay that you reference here would be treated as an hour worked for purposes of calculating daily or weekly overtime?

COMMISSIONER BROAD: No.

MR. ABRAMS: I think -- and again, not conceding that the Commission has any authority to adopt any such provision as this, but if you decide to do so, I would suggest to you that you need to make that clear.

Secondly, I -- I'm not sure I understood your comments with regard to on-duty -- agreed upon on-duty meal periods. I -- I think, in reading the language here, my understanding was that it was intended that an

agreed upon on-duty meal period, for which the employee is, in fact, paid for the half hour that he or she is working, in essence, does not enter into this equation at all. But you made a comment a moment ago that quite -- with all due respect, confused me. I just want to clarify that.

COMMISSIONER BROAD: The employer who, under our regulations, lawfully establishes an on-duty meal period would not be affected if the employee then takes the on-duty meal period. This is an employer who says, "You do not get lunch today, you do not get your rest break, you must work now." That is -- that is the intent.

Let me respond, if I may. Clearly, I don't intend this to be an hour counted towards hours worked any more than the overtime penalty. And, of course, the courts have long construed overtime as a penalty, in effect, on employers for working people more than full -- you know, that is how it's been construed, as more than the -- the daily normal workday. It is viewed as a penalty and a disincentive in order to encourage employers not to. So, it is in the same authority that we provide overtime pay that we provide this extra hour of pay. And that --

So, now, with regard to creating a new crime, I

guess you could argue that anything we do that changes something creates a new crime to the extent that things -- that there are certain aspects of our wage orders that, if violated, can be prosecuted criminally. But I don't believe we have the authority to establish a new crime in the sense that we could say if you -- if you deny someone their meal period or rest period, that you shall spend six months in jail or a year in jail or it will be a felony and so forth. No, we cannot establish new crimes. The Legislature, however, can establish crimes for violations of our wage orders, which is their prerogative, not ours.

MR. ABRAMS: Understood. I -- and on that note, I would -- we -- the California Hotel and Motel Association objects to the proposal on the ground that the -- we submit the Commission does not have the legal authority to adopt such a penalty, also on the ground that if -- to any extent that an employer is required to pay this one hour of pay for a meal period missed, that that has to be offset against whatever penalties the Legislature has established for violation of the Commission's wage orders. Otherwise you are basically saying to an employer, "You are going to be punished twice."

So we object to the proposed amendment.

MS. BROYLES: Mr. Commissioner, can I make one final point?

If this is something that the Commission would like to move forward on and put over -- or at least put out notice so --

COMMISSIONER DOMBROWSKI: It was noticed. It was in the notice.

COMMISSIONER BROAD: It has been in our notice for a month. I mean, we did --

MS. BROYLES: In terms of the full penalty, the hour penalty?

COMMISSIONER BROAD: No. The language that's proposed to be adopted has been out there. I think --

MS. BROYLES: Right.

COMMISSIONER BROAD: -- you may agree with that substantively --

MS. BROYLES: The amendment of Mr. -- of Commissioner Broad.

COMMISSIONER BROAD: -- but there's no last-minute aspect to this at all.

MS. KAHN: Spike Kahn, AFSCME Council 57.

I represent quite a few workers in the hospital industry at UCSF that -- just in policy, the clinics are

always understaffed and they just never have enough staffing to let that person come out on a break. It's not every day, it just happens that people, because the clinics are full, the patients are coming, you have to keep the flow going because you don't want your patients to be waiting while you go out. And day after day, people don't get a break.

And I would like to support this amendment and explain that, by having it on the books, it would give us quite a bit of incentive to our employers that they would just start following the contracts and following the laws that are already down there, that you have to have a break, just by having it on the books. I don't think it would come up that often, in the same way that they don't usually violate any of the -- the overtime laws. It's just a matter of they would be encouraged much more to not keep on working us through our breaks and our lunch times if it were there.

So we're in support of that.

COMMISSIONER DOMBROWSKI: Thank you.

Ms. Stricklin, regarding the legal question?

MS. STRICKLIN: You were asking whether there was any legal impediment to such a penalty. And 516 of the Labor Code allows the Commission to adopt or amend

working condition orders with respect to break periods, meal periods, and days of rest.

And then again, if you look at Section 558, the last section says that civil penalties provided in 558 are in addition to any other civil or criminal penalty provided by law, so that a regulation which sets forth a penalty would just be an additional penalty, which the IWC has the power to do.

COMMISSIONER DOMBROWSKI: Any other questions from the commissioners?

(No response)

COMMISSIONER DOMBROWSKI: Okay. Commissioner Broad, I believe you want to make a motion?

COMMISSIONER BROAD: Yeah. I'll move it.

COMMISSIONER DOMBROWSKI: Is there a second?

COMMISSIONER ROSE: Second.

COMMISSIONER DOMBROWSKI: Okay. Call the roll.

MR. BARON: Dombrowski.

COMMISSIONER DOMBROWSKI: No.

MR. BARON: Bosco.

COMMISSIONER BOSCO: Aye.

MR. BARON: Broad.

COMMISSIONER BROAD: Aye.

MR. BARON: Coleman.

COMMISSIONER COLEMAN: No.

MR. BARON: Rose.

COMMISSIONER ROSE: Aye.

MR. BARON: Three to two.

(Applause)

COMMISSIONER DOMBROWSKI: Okay. I'd like to move to Item 5, consideration of --

COMMISSIONER BOSCO: How about a round of applause for the veterinary?

COMMISSIONER BROAD: Take care of the dogs and cats right now.

(Laughter)

COMMISSIONER DOMBROWSKI: Here we are, moving along so well.

Item 5, consideration of amendment to Wage Order 5 concerning personal attendants.

I'd ask Mr. Baron to brief us.

MR. BARON: This is an overall issue that has been discussed previously. The background to this is that there had been language in the earlier version of the wage orders, in 5-93, that, when we went -- going back to that -- had been changed in '98, but then when we went back to, now, the earlier versions, referenced a 54-hour workday (sic) for these categories of employees.

That violates the federal regs, the Fair Labor Standards Act.

So, what has been done here is basically reduce that 54 hours to the 40 hours and otherwise keeps in the -- otherwise keeps the exemptions in place.

COMMISSIONER DOMBROWSKI: Okay. Any questions from the commissioners?

COMMISSIONER BROAD: Mr. Chairman, I have a -- there is in my mind, you know, a policy issue about these 40-hour-per-week -- whether these people should be covered by daily overtime. However, we received no testimony opposing these exemptions as they existed in the prior wage order, and I think AB 60 clearly permits the Commission to retain exemptions that were in effect prior to 1998. And that is what is occurring here.

If employees affected -- in these affected occupations are aggrieved by these conditions, then they should, I think, come forward to the Commission and petition the Commission to change the rules. But at this point, I am supportive of this particular issue, and I would move it, the amended -- right -- that's in our packet.

COMMISSIONER BOSCO: Second.

COMMISSIONER DOMBROWSKI: I want to ask if

there's any public testimony.

(No response)

COMMISSIONER DOMBROWSKI: Okay. A motion's been made, and I hear a second. Can we call the roll for the adoption of the amended version?

MR. BARON: Dombrowski.

COMMISSIONER DOMBROWSKI: Aye.

MR. BARON: Bosco.

COMMISSIONER BOSCO: Aye.

MR. BARON: Broad.

COMMISSIONER BROAD: Aye.

MR. BARON: Coleman.

COMMISSIONER COLEMAN: Aye.

MR. BARON: Rose.

COMMISSIONER ROSE: Aye.

COMMISSIONER DOMBROWSKI: That measure is adopted, five to nothing.

Okay. Item Number 6 is, pursuant to Labor Code 517(b), consideration of language proposed by Commissioner Broad regarding the commercial fishing industry. Yeah, there are certain amendments. They're in your packet.

And I'd ask Commissioner Broad to give us an overview.

COMMISSIONER BROAD: Mr. Chairman and members, I met extensively and had discussions extensively with representatives of both sectors of the commercial fishing industry. And let me explain for your benefit and others, we're dealing with two industries here. One is the commercial sportfishing industry, known colloquially as party boats, in which people go out and fish from a boat for the day. That is essentially a part of the amusement and recreation industry, Order 10. Then there is commercial fishing in the sense of harvesting fish for sale, what we generally view as commercial fishing, which is Order -- would be under Order 14.

With respect to Order 10, the commercial sportfishing industry representatives met with me and requested that we create a formula which would allow them to continue the bookkeeping system that they do now with regard to paying their crew, which is essentially divided into half-day trips, three-quarter-day trips, full-day trips, and overnight trips. And what this would permit them to do would be to pay them for a one-half-day trip. It was noticed as five hours; they came back and wanted to make it six hours. They would pay them six times the minimum wage for a half-day trip, and ten times the minimum wage for a three-quarter-day trip, twelve times

the minimum wage for a full-day trip, or -- and then there would be a requirement for an overnight trip.

This is an option for them. It is not mandated upon them. And it does not eliminate their minimum wage obligation. That is to say they have to pay minimum wage for all hours worked. So, in some circumstances, as the industry representatives explained to me, they would -- you know, a half-day trip may come back a little sooner, and for bookkeeping reasons, they're going to pay someone a flat rate for that day.

With respect to both industries, we will continue this -- if adopted -- will continue the overtime exemption that was in the Labor Code and was repealed, but we were given the authority to continue it. We received no testimony opposing that, and there are -- traditionally, both sectors have been exempt from overtime because of the particular nature of the industry -- you know, they're chasing fish, basically, and they never know whether they're there or not there.

And there's also language attached with regard to the Statement of the Basis.

And then, also, the other change is that with respect to the commercial sportfishing industry, there is the -- representatives met with me and indicated that on

an overnight trip, that a crew member would receive no less than 8 hours off-duty time during a 24-hour period. With that, I --

COMMISSIONER DOMBROWSKI: Okay. We have not received any cards and testimony. Does anyone wish to testify on it?

(No response)

COMMISSIONER DOMBROWSKI: Any questions from the commissioners?

(No response)

COMMISSIONER DOMBROWSKI: I'd ask for a motion.

COMMISSIONER ROSE: So moved.

COMMISSIONER DOMBROWSKI: Second?

COMMISSIONER BOSCO: Second.

COMMISSIONER DOMBROWSKI: Call the roll.

MR. BARON: Dombrowski.

COMMISSIONER DOMBROWSKI: Aye.

MR. BARON: Bosco.

COMMISSIONER BOSCO: Aye.

MR. BARON: Broad.

COMMISSIONER BROAD: Aye.

MR. BARON: Coleman.

COMMISSIONER COLEMAN: Aye.

MR. BARON: Rose.

COMMISSIONER ROSE: Aye.

MR. BARON: Five to nothing.

COMMISSIONER DOMBROWSKI: All right. Item Number 7 is consideration of the proposed language that I circulated with the notice of the meeting, regarding the ski industry. I'd like to keep this to ten minutes on both sides, if we can.

COMMISSIONER BOSCO: Can I ask what you're referring to?

MR. BARON: It's Item 7 in your notice.

COMMISSIONER DOMBROWSKI: In your notice.

COMMISSIONER BROAD: It's in the notice. It's not in the tab.

MR. BARON: It's in the notice itself.

COMMISSIONER DOMBROWSKI: It's the proposal that the industry goes to a 48-hour week, 10-hour day, during the season.

Mr. Camp, Pamela Mitchell, Bob Roberts, Patty Gates, and Marcie Berman, and Mr. Rankin.

MR. RANKIN: Tom Rankin, California Labor Federation.

COMMISSIONER DOMBROWSKI: Excuse me, Tom.

A point of order. If you haven't signed a card for the specific item, we need you to, just for our

record-keeping, to take one of the cards on the table and fill it out, that you testified on that issue.

Okay.

I think, Tom, I need you to have it filled out.

MR. RANKIN: Yeah. I think I did, maybe a little late, but I have.

COMMISSIONER DOMBROWSKI: All right.

MR. RANKIN: We oppose this proposal. What we currently have in the ski industry, which is about to expire on the 1st of July, is the ability to work employees 54 hours a week without overtime. You held a hearing on this issue down in Los Angeles. I know a couple of commissioners, unfortunately, were not able to be at that hearing, so we want to say some of the things that you -- some of you have already heard.

But we don't find any justification for treating the ski industry differently from any other industry which is subject to the 8-hour day and subject to alternative workweeks, given a vote of the employees in that industry.

The other states, I might point out, the two other states that do have daily overtime, Nevada and Alaska, which have skiing, both of them, happen to cover their employees with daily overtime. They don't have an

exception for the ski industry. Canada, which is a competitor for skiers and business in that industry, the three provinces of British Columbia, Alberta, and Manitoba all have daily overtime and do not exempt the ski industry. We find no good reason for exempting the ski industry in the wage order of the future.

And we have Pam Mitchell, who's a worker in the ski industry at Mammoth Mountain, who has testified before you in Los Angeles, and she can best speak to the conditions in this industry. It would be, I think you'll find, prejudicial to the health of the workers -- health and safety and -- and general good working conditions of the workers in this industry to subject them to a 48-hour week and a 10-hour day without a vote, without a vote. And you should know that the intent of AB 60 clearly was to provide employees with a choice of alternative workweeks. And your proposal does not allow them to make that choice.

Pam Mitchell.

MS. MITCHELL: My name is Pam Mitchell, and I'm a Mammoth Mountain ski area employee. I've worked in three departments at Mammoth Mountain ski area on and off during the last nine years. I've worked in transportation, housekeeping, and retail sports shop.

I am speaking representing approximately 200 employees in support of 40 hours a week and in support of 8 hours a day, unless there is an employee vote for four 10's.

People who work at the ski resort need and deserve the same protection as other California employees. The state law established by AB 60 establishes this basic 8-hour standard.

The owners of ski resorts, including who owns the ski resort that I work for, whether they're huge corporations or whether they're a family-owned business, can operate successfully without denying employees overtime pay. Denying overtime pay is, in effect, a subsidy from their employees. And that's really what these exemptions are all about, allowing employers to unreasonably demand from workers overtime work without overtime pay.

This proposed exemption, it mentions snow-making and grooming activities, but, in effect, this will deny overtime to anyone working for a ski resort and the businesses that the ski resort owns, because included in this, the way it has been going on now and the way it will continue to go in, and with this wording, "together with all operations and facilities related thereto,"

there are not just -- this does not simply apply to lift operators and ski instructors, ski patrol, people working during -- specifically related to skiing. This also goes to people working in housekeeping and people working as clerks, people working as hotel and restaurant employees, construction workers who are building at the time that the ski resort's exemption is in effect. This applies to a couple thousand people.

And the intent of this overtime bill is to ensure that workers are not exploited. This is particularly necessary in the ski industry and other industries where there is no union representation, and there has basically been no representation at all.

I can assure you that when the ski industry had the 56-hour workweek, they worked us at least 56 hours a week. And if you let them work us 48 hours a week without -- and they can do any variations of this 48-hour week -- they will work us 48 hours a week. Very few will understand that this is wrong, and most people --

COMMISSIONER DOMBROWSKI: I'm going to enforce the time period.

MS. MITCHELL: Thank you very much.

COMMISSIONER DOMBROWSKI: We have four minutes left here, please.

MR. CAMP: Chairman Dombrowski, my name is Bill Camp. I'm executive secretary of the Sacramento Labor Council. Our jurisdiction covers the ski resorts in the Sierra mountains in California.

These are workers. These are bus drivers, these are cooks, these are people who work for a living. The original purpose of passing the Industrial Welfare Commission was to protect workers from exploitation, particularly women, particularly children, and now all workers. We made this a state policy.

And what we have is an industry that's on a growth, that's benefiting from this gigantic explosion of wealth at the top of the pyramid. We have people all over this state now becoming millionaires. They're going up there and skiing, and they're exploiting these people who work for wages. This is purely exploitation of wage workers by people who use an industry that's phenomenally built around providing a service to the richest people in this state.

To say to us that those workers --

(Applause)

COMMISSIONER DOMBROWSKI: Sergeant? Sergeant, I want it noticed that if we continue to have outbursts, we are going to clear it.

Go ahead, Mr. Camp.

MR. CAMP: Mr. Chairman, we're asking that this board vote against this exception, that these workers are working people in this state, just like everybody else. To exclude them, particularly in an industry which is dominated by this affluent class and serviced by these -- when we talk about the economy of this state, it is the rural parts that are left behind the economic growth. It's because we create laws that suppress the wages in those rural economies. To say to those counties, those mountain counties in this state, "We're going to lower your wage standard," is contrary to what this Governor and this state believes in, which is this economic growth should be shared by all. Everybody should participate as this tide comes in.

This rule denies those workers in those counties the chance to participate in the rising tide of this economy. It's wrong. We oppose it, and we ask you to vote no.

(Applause)

MS. BERMAN: My name is -- am I on?

My name is Marcie Berman, and I'm here as a representative of the California Employment Lawyers Association. I already spoke at the Van Nuys hearing, so

I'll be really brief.

I just don't understand how you're going to be able to write the Statement of Basis to support this. There's no justification for treating this industry any different than any other industry. Moreover, in this particular industry, there was testimony at the Van Nuys hearing that the companies routinely lay off these employees during days and weeks when business is bad. So now they're going to still be able to do that. And yet, when business is great, and therefore they need people to work more hours, they're not going to share the up-side benefit of that great business and pay people the overtime that's due to all other workers in the state. I just -- I don't see any justification for making a distinction between this industry and any other. And I just -- I cannot envision how you could possibly draft a Statement of Basis to support this.

MS. GATES: My name is Patty Gates, and I'm an attorney with the law offices of Van Bourg, Weinberg, Roger and Rosenfeld. Our office represents thousands of unions and working people in the State of California.

And I'm here to testify that while this Commission has broad powers and broad authority to investigate the health, the safety, and the welfare of

California working people, this Commission's authority is circumscribed when it comes to adopting any amendments that change the basic standard of the 8-hour day. Under Labor Code Section 515, the IWC's authority to exempt workers from overtime is confined to those circumstances where you're able to make a finding that that exemption will forward and benefit the welfare of working people. I don't think you can make that finding here.

COMMISSIONER BROAD: Mr. Chairman, are there any proponents for this proposal?

COMMISSIONER DOMBROWSKI: Yes, and he's coming up right now.

(Laughter)

COMMISSIONER DOMBROWSKI: Mr. Roberts.

I also would point out, in response to the last testimony, if you go to AB 60, Section 11, 517, Clause (b), "Prior to July 1, 2000, the IWC shall" -- -- and I will abbreviate --

> "shall conduct a review of wages, hours, and working conditions in the ski industry, commercial fishing . . . healthcare . . . stables. Notwithstanding subsection (a) and Sections 510 and 511, and consistent with its duty to protect the health . . . and welfare of

workers . . . the commission may, based upon . . . review, convene a public hearing to adopt or modify regulations."

And then, also, in Section 16, the Legislature in AB 60 did reaffirm the existing ski industry exemption of 56 hours and says that we -- this will remain in effect until July 1st, 2000, and as of that date, repealed unless a later-enacted statute is enacted before it is extended or if this Commission acts.

Mr. Roberts.

MR. ROBERTS: Good morning, Mr. Chairman and members of the Commission. My name is Bob Roberts. I am the executive director of the California Ski Industry. And as I have testified on a number of other occasions and in my communications, I think I can safely stay within your ten-minute limit.

First of all, our industry historically has been exempted under the Fair Labor Standards recreational -- seasonal recreational exemptions. And that applies to a number of our competitors. The largest competitors are not in Nevada and in Alaska. They are in Colorado and in Utah. And these are states which have exempted, in different forms, their ski industry. So, this is not an unusual exemption.

And the reason is quite clear. We are heavily dependent upon weather. This last season is a case in point. We dropped from about 7 million visits down to 6.5 million because we missed Christmas. It just didn't happen.

The other dimension that is very unique to our industry and, I think, does set us apart is the fact that we have our public, five to ten thousand people, showing up on our doorstep each day. And that's quite different from a number of other industries. We have a public safety component.

What we have done, and what I have outlined in my letter to you, is tried to reach what we think is a compromise that is fair in terms of the economics. We are not a growing industry. There may be a lot of wealth in this state, but they seem to find other things besides skiing to do with their wealth. We have, nationally, a loss of skier visits. They have been around 50 million; they're dropping down to about 47, 48 million this past year. We in California have to compete with not only other states, other countries, we also have to compete with other things to do in the winter. We're winter sports, and so people have tremendous discretion, and they don't have to come to the mountains. We have lots

of infrastructure concerns and issues that we have to confront here in California that make it even more difficult. So, our economics are not as they have been painted, as something glorious and growing. To the contrary, we are very challenged at this point. We see small areas on the brink of going under. The larger areas, hopefully, have a 5 to 10 percent operating return in a good year. These are the -- these are the simple facts. This is a small industry.

And the fact that really dominates us is the fact that of our 16,000 employees, 14,500 are seasonal. And so, the question of having a vote is very difficult when you know that 14,500 of your employees may or may not be showing up at the beginning of the season. And we have a high turnover because so many of them are students, and they're going back at the end of the quarter, or if they are even -- we have people who come from other countries because they simply want to ski. So, we find ourselves in a situation where we have a core of very dedicated employees, and we try to deal with these -- all of our employees fairly. But the seasonality makes the vote issue very, very difficult and tenuous to organize for -- on any kind of a basis.

These are the -- these are the dimensions. We

feel that we have made a very honest compromise, from the 56-hour week that we and our primary competitors enjoy to something that will fit the operating schedules, will allow for the public safety, and, at the same time, provide us with some measure of economic stability. We cannot pick up our industries and move to another state. We're here, we intend to stay here, and we'd certainly like to be -- continue to be the economic engine for our mountain communities.

Thank you very much.

COMMISSIONER DOMBROWSKI: Any questions?

COMMISSIONER BOSCO: Prior to the reinstatement of the 8-hour workday, did the ski industry -- or let me put it a different way. For what period of time did the ski industry typically have a 54- or 56-hour week?

MR. ROBERTS: It really varied, because all the resorts have varying competitive stances amongst themselves, particularly at Tahoe. We have some resorts that had been at a 48-hour week for a number of seasons. We have others that had not. But really, there was no uniform -- this is the way it is. I know that Northstar, for example, had, I think -- I believe, a 48-hour week, as did Alpine Meadows.

COMMISSIONER BOSCO: In what period of time?

Are you talking about ten years?

MR. ROBERTS: Oh, I'm talking about over the last four -- four years, four seasons, four or five seasons.

COMMISSIONER BOSCO: If you were to go back ten years, would it be typical that these ski resorts would have a 56-, 54-hour week, or would it be a 40-hour week or somewhere in between?

MR. ROBERTS: Well, it would -- it would really vary, depending upon the weather, because if you really look at it, our resorts aren't working people the 56 hours maximum. What they're trying to do is literally make snow while the snow is made available, or work the snow while it's made available. And that has been the underlying basis, so that it's hard, if you go back and you look at the records, to simply demonstrate that, "Yes, this has been the case." It hasn't been the case. The work rules have been for 56 hours, but the resorts have altered the rules, lowered the rules, on those occasions when we haven't had that much work.

COMMISSIONER BOSCO: But, say, ten years ago, were you able to work someone 54 hours a week without violating any of the --

MR. ROBERTS: Oh, absolutely. No, that's been

since the -- since -- we had legislation passed during the Jerry Brown administration, as I recall, in '84, exempting our industry specifically -- this was in statute -- exempting the ski industry from the state daily overtime requirements.

COMMISSIONER BOSCO: So if we were to adopt a 48-hour week today, it would be less than what you've enjoyed in the past.

MR. ROBERTS: Oh, absolutely. And a 10-hour day -- we had not had a daily requirement. And what we are proposing is a 10-hour day because we feel we can fit our activities within a 10-hour day, for avalanche control and clean-up and everything we have to do.

COMMISSIONER BOSCO: Now, after a 10-hour day, as I understand it, you'd have to pay time and a half --

MR. ROBERTS: That's correct.

COMMISSIONER BOSCO: -- under the proposal we have here. What about after a 12-hour day? Would you still be paying time and a half? Say if somebody was out on ski patrol for --

MR. ROBERTS: Yes. The overtime would kick in after 10 hours in a day, so --

COMMISSIONER BOSCO: But there would be no limit to how long it could go at simply time and a half. Is

that true?

MR. ROBERTS: Well, no. The next day, assumingly -- I mean, my understanding of the law --

COMMISSIONER BOSCO: Well --

MR. ROBERTS: -- is that each day is a 10-hour limit. And so --

COMMISSIONER BOSCO: But if someone worked 14 hours in a day, they would just get 4 hours of time and a half, with no gradation at all during that time.

MR. ROBERTS: Not under the present language.

COMMISSIONER BOSCO: Thank you.

COMMISSIONER BROAD: Mr. Roberts, do you -- what I noticed that's missing, leaving aside the 10 hours and 48 hours, is double time after 12, which applies everywhere else. Do you have an objection to that?

(Laughter)

MR. ROBERTS: Do I have an objection?

COMMISSIONER BROAD: Yes.

MR. ROBERTS: The objection only comes in cases of storms, because a storm sets in, or a search-and-rescue operation sets in, these hours -- we have no way of controlling. And so, for those -- for those activities, I think we would have a concern. For the other activities and the resort, probably not.

COMMISSIONER BROAD: So, for everything except related to emergency rescue and that sort of thing?

MR. ROBERTS: Well, no. All of our outdoor activities. For example, we have to groom all night. We have -- we have avalanche control, but -- which will generally start very early in the morning. All of the outside activities which have to do with -- with the safety of the slopes and the mountain, maintaining the mountain safety, because, as your previous people have testified, they have been concerned about some of the other occupations. Well, you know, a resort is a large -- can be a large, integrated kind of operation. But it's the outside activities that are the primary concern.

COMMISSIONER BROAD: I see. I'd like for you to focus on the language that says at the bottom -- what you'd kind of generally call, in this business, the kicker -- "together with all operations and facilities related thereto." Does that mean, in your mind, that everything that is co-owned by the ski facility?

MR. ROBERTS: Not at all. That means those things that are on the mountain that are a result --

COMMISSIONER BROAD: Okay.

MR. ROBERTS: If they have a lodge, it may be outside the boundary issue or something, but usually

that's a definition between the Forest Service -- our use permit -- and sometimes the functional operation. But I'm -- if you're talking about something downtown, something in some other part of the universe, I don't think we're asking for that kind of broad reach.

COMMISSIONER DOMBROWSKI: The other point Barry just brought up, that is the -- that language was actually pulled out of the statute when it was --

MR. ROBERTS: Yeah, this language is what was in the original statute.

COMMISSIONER BROAD: Right. But it's repealed tomorrow, so, you know, that doesn't mean we can't question it.

So, let me -- then let me focus on the actual situation. We have a hotel that's free-standing, a resort hotel in a mountain area, 20 yards away from a hotel on your property. And the employer in that hotel during the season is obligated to pay daily overtime after 8, double time after 12, overtime after 40 hours in a week, a dime and a half after -- in the first 8 hours of the seventh consecutive day of work. Does that -- and you don't have to do any of that stuff. Does not that place those employers, subject to all the same weather conditions and seasonality and so forth, at a significant

disadvantage to your facility, your hotel, which is just a hotel?

MR. ROBERTS: No, because they're not operating the lifts. They're not providing all of the ancillary services.

(Audience murmuring)

COMMISSIONER BROAD: And are there ever people that stay at your hotels that don't ski?

MR. ROBERTS: That stay in our hotels that don't ski?

COMMISSIONER BROAD: Yeah.

MR. ROBERTS: I'm sure there are.

COMMISSIONER BROAD: Do you think those two hotels, or your restaurant and the other restaurants in the community, do they compete?

MR. ROBERTS: They compete, but we have always had this -- this definition in place, and somehow the harmony in those mountain communities works, because it's the attractions of the lifts and slopes that brings people. Absent the operation of the ski resort, we would not have the economic vitality in the community.

COMMISSIONER BROAD: I guess I can understand -- I don't necessarily agree with it, but I can understand some argument about employees who are directly and

closely related to the actual skiing operation where weather conditions, you know, dominate everything they do. I don't quite understand restaurant employees or janitors or hotel maids or others, who are doing the same job as people down the street. It's exactly the same job, and really, their job is unrelated entirely to snow or emergencies or making snow, or whether it's snowing or raining or sunny out. And I -- so I have a great deal of difficulty seeing what -- why we would deny them the basic protections of overtime that all other workers in similar jobs in the same communities receive.

MR. ROBERTS: Well, first off, very few of the resorts own their own accommodations. The accommodation business in the mountains is a particularly risky enterprise with the shoulder seasons. It's very difficult to -- if you find the major hotels, the Hyatts and so on, those are located a long -- fairly far away from our resorts. The resorts themselves see themselves in the uphill transportation business.

Yes, we provide food service for people at our base lodges and at our mid-stations, and perhaps the top of the mountain, depending upon the resort, and we do have some retail operations and certainly rental operations that are part and parcel -- and instruction,

ski instruction -- to the operation of the resort. But for the most part, we are not in the hotel business. We have -- Mammoth has a property. I'm trying to think of how many really do. Very -- very few actually own their own hotels. And so, this has not been a major issue or divisive point in our communities.

COMMISSIONER BROAD: So, then, it probably wouldn't be a major issue for you to eliminate that from this.

(Applause)

MR. ROBERTS: What we're trying not to do is to create two categories of workers within the ski resort. We don't want to have a dual system. You work for the resort
-- you work with the resort. We work with -- as not a tiered kind of tenure. It's a -- one employee.

COMMISSIONER BROAD: Well, let me just leave you with this comment. I think your retention issues, in terms of employees, would be solved by paying them overtime.

(Applause and cheering)

COMMISSIONER DOMBROWSKI: Any other questions?

(No response)

COMMISSIONER DOMBROWSKI: I'm going to make a

motion for adoption of the language as circulated. Do I have a second?

COMMISSIONER COLEMAN: Second.

COMMISSIONER DOMBROWSKI: Call the roll.

MR. BARON: Dombrowski.

COMMISSIONER DOMBROWSKI: Aye.

MR. BARON: Bosco.

COMMISSIONER BOSCO: Aye.

MR. BARON: Broad.

COMMISSIONER BROAD: No.

MR. BARON: Coleman.

COMMISSIONER COLEMAN: Aye.

MR. BARON: Rose.

COMMISSIONER ROSE: No.

MR. BARON: Three to two.

COMMISSIONER DOMBROWSKI: Item Number 8, consideration of the types of executive, administrative, and professional duties that meet the test of the exemption.

COMMISSIONER BROAD: Mr. Chairman, might it not be appropriate at this moment, since we're coming up to a long and contentious issue, to perhaps take a 15-minute break and then go on?

COMMISSIONER DOMBROWSKI: It's fine with me.

Okay, we will reconvene at 11:45.

(Thereupon, a short recess was taken.)

COMMISSIONER DOMBROWSKI: I'd like to reconvene the hearing.

We're on Item Number 8, consideration of the types of executive, administrative, and professional duties that meet the test of the exemption. We discussed this subject a number of times over the last six months. We've looked at various proposals that I've crafted. This is related to Section 9 of the bill, 515, where the bill said,

> "The Commission shall conduct a review of the duties which meet the test of the exemption, and the Commission may, based upon this review, convene a public hearing to adopt or modify regulation at that hearing pertaining to duties which meet the test of the exemption without convening wage boards."

We've circulated this morning a duties test for overtime exemptions that we have -- that I have prepared, which, in essence, goes to, in my opinion, the actions that were discussed when that language was inserted into AB 60. We had a discussion in Senator Burton's office that we talked about trying to identify when a manager

would be doing incidental tasks, that it didn't make him any less of a manager, and how could we come to some language clarifying that.

I think, if you look at the proposal we have today, it addresses the concerns that these actions go around the "primarily engaged." We have tried to make sure that it's clear that we are recognizing the 50 percent rule. And in essence, what we are trying to get recognized is that there is a set of federal regulations which relate to duties that we think should be consistently applied, not just at the federal level, but the California level, particularly the issue of the federal level recognizing that duties that are closely and directly related to managing should be recognized as managerial time, and also the federal regulations related to "closely and directly related," which is occasional time.

I've asked Lynn Thompson and Bruce Young to give a more specific overview. I'd like to restrict your comments to fifteen minutes. I would then like to have the opponents come up -- I believe we have formed a panel -- Mr. Pulaski, Mr. Rankin -- so we can keep this to some orderly fashion. They will have fifteen minutes. Then I would like to open it up for questions from the

commissioners for either side. And obviously, those questions will go as long as commissioners feel it's necessary. And then we'll proceed from there.

COMMISSIONER BROAD: Mr. Chairman, I'd like to note that I have passed out a modification of your proposal that, in my opinion, removes the illegal parts and which I would like to have considered.

Also, I think what we should do is probably question the panelists at the conclusion of their statements rather than -- otherwise we're going to have everybody up here at once.

COMMISSIONER DOMBROWSKI: I don't mind. I just don't want the panelists interrupting while they're presenting the question. I want to be able to --

COMMISSIONER BROAD: That's fair.

COMMISSIONER DOMBROWSKI: Okay.

MR. YOUNG: Mr. Chairman, members, Bruce Young, on behalf of the California Retailers Association.

Let me just briefly give at least an historical point, from our standpoint. First off, we were one of only two business organizations that supported AB 60. There were considerable considerations and concessions that we made, including doubling -- and putting in the statute for the first doubling of the minimum salary even

to meet the statutory test to be a manager. That was, again, doubled and codified. And also, there were other language that was inserted in there that previously had just been a matter of practice or actions by the Department of -- DLSE's standards that we now allowed to be codified.

In return, one of the things that we asked for was the opportunity to try to define the duties of a manager. We think we've done that in this language. We've tried to make it as narrow as possible. We tried to parallel the federal test.

But the most important thing is that when we -- when we argued for this language in Senator Burton's office -- there were four other people besides myself in the room

-- the one thing that we tried to indicate is we're not talking about redefining the manager. We put the 50 percent test, for the first time, in the law, that certainly 50 -- more than 50 percent of their time has to be spent doing a manager -- being a manager. But certainly -- and let me use the retail setting as an example -- in real life, if -- and during a busy time when we're trying to deal with the public, when there is a clean-up on Aisle 4 and every -- every member of that

store staff is busy trying to service the customer, it is the manager who -- he or she grabs the broom and goes down and cleans it up. Or, during a holiday season when it's busy and the store staff is overwhelmed, it's the manager who, in that brief occasion, grabs the register and helps out. It's certainly not an everyday occurrence, and it's not a matter of regular practice, but there are the occasions. And when you're dealing with the public, you deal with ebbs and flows. And in those ebbs and flows, you have to be able to respond. And it's those occasional response times that we're trying to at least allow some consideration for.

And as we -- I laid that same example out in Senator Burton's office, and there was an objection raised at that time. And Senator Burton thundered back that when he worked at UPS, the chairman of UPS came down and worked the delivery line during the holidays. And he rhetorically said, "Did that make him any less the chairman of UPS? No, it didn't."

And our challenge has been now trying to meet that narrow -- that narrow test that we felt that, when we asked Senator Burton for this amendment and it was inserted in the bill, and that's what we believe, in the amendments before you, we've tried to do, just deal with

those occasional exceptions.

And for that, I will turn it over to Lynn now to at least go through the explanation of what's within our proposal.

MS. THOMPSON: Lynn Thompson, and I'm with the law firm of Bryan Cave, LLP, and I'm here speaking on behalf of the California Retailers Association.

First of all, I'd like to remind the Commission, for the record, that the Legislature delegated to the IWC the responsibility to define the duties that meet the test of the exemption. I think we all clearly understand that the statutory rule is that an exempt employee must spend more than half their time engaged in exempt duties. But the question that has been delegated to you is what constitutes exempt duties. And that question exists under all of the three basic white-collar exemptions, and that's why you have all three of the exemptions and proposed language on them in front of you today.

Now, this proposal, I can assure you, has been very carefully drafted and is mindful of the statutory requirement to be "primarily engaged." But it also attempts to address several basic objectives. One is for the IWC to clearly and explicitly state what the elements of the exemption should be. This is an area where we've

had a void in California because the wage orders are so vague. And we've had the DLSE jumping into the breach to try to provide some guidance. And frankly, the interpretations have tended to shift a bit with the winds of administration and have created some uncertainty for employers attempting to apply the test in California.

Another objective here is to provide, therefore, some definitive tools and resources that can be consulted to answer questions about the application of the test, the duties test. And the way we've chosen to go about achieving those objectives here is to rely very heavily on elements of the federal long test. And I laid this out when I was here a month ago for you, all of the different elements that exist under the federal long test that we have incorporated. And many of them have historically been presumed by the DLSE to be incorporated historically. But to some extent, there has been a little cherry-picking and back-and-forth activity on which parts should be interpreted to be included and which parts shouldn't. And we think that is what needs to be clarified.

I think it's important to emphasize that we're not talking about the qualitative test, which is the federal short test. It is a test for exemption that does

not care what you are doing, in terms of the tasks that you are engaged in, you know, and whether or not they satisfy -- they are exempt or nonexempt. It does not require an analysis, a task-by-task analysis. It requires only an evaluation of what your primary duty is. And we've tried to be very careful and to be absolutely clear that we are not attempting to supplant the California quantitative 50 percent test with a qualitative requirement. And I think we've accomplished that in this -- in this regulation.

But as I've said, we've attempted to conform it as closely as possible to the elements of the federal long test, and then refer to the particular sections of the regulations under federal law that contain elaborate, in some cases lots of examples of the application of these tests. And it's a very helpful resource.

The other thing that's helpful, I think, to the employer community about the way we've laid this out is that many employers nowadays operate in more states than just California. Certainly, a lot of the employers that I work with do. And they face a problem when they come into California of having to come to grips with California's unique requirements. It is a lot more -- it's a lot easier for them to understand if they can be

dealing with a framework that permits them to satisfy both the federal test and the California test in the same analysis. If they can march down the elements of the analysis and say, "Oh, yeah, okay, we know that one's met because, you know, we've met it everywhere, we know that one's met, that one's met. Now we get to this element which is a California unique element. Now let's look carefully at that to make sure that the people that we have here in this state have been properly classified in light of that element." And, I think, to provide a framework that is as close as possible, while maintaining conformity with the 50 percent requirement in California, is very helpful to compliance-oriented businesses that are just trying to figure out how they're supposed to classify people and whether they have to change the way they're classifying people in California or not.

Now, one of the key ways in which I think we've accomplished the objective that was talked about in Senator Burton's office was to include a recognition that exempt work, in all of the three categories, includes work which is directly and closely related to the performance of the exempt tasks and responsibilities. And there are a series of federal regulations that explore the concept of "directly and closely related" in

the context of each of those exemptions. Some of those federal regulations appear to be non-controversial in the sense that they are included in both Mr. Broad's rendition and in our rendition. There are a few elements that appear to be the subject of controversy, and presumably the focus of what you're really trying to come to grips with here this morning.

One of them is this issue of occasional tasks, which you heard mentioned. Now, this is one of a series of regulations that arises under the executive exemption only under federal law. And it's only a couple of paragraphs, and it explains, I think, in ways that are very -- very limited that what it is talking about is, quote, "another type of work which may be considered directly and closely related to the performance of managerial duties." And it says:

> "In many establishments, the proper management of a department requires the performance of a variety of occasional, infrequently recurring tasks which can not practicably be performed by the production workers and are usually performed by the executive. These small tasks, when viewed separately without regard to their relationship

to the executive's overall functions, might appear to constitute nonexempt work. In reality, they are the means of properly carrying out the employee's management functions and responsibilities in connection with men, materiel, and production. The particular tasks are not specifically assigned to the executive, but are performed by him in his discretion. It might be possible for the executive to take one of his subordinates away from his usual tasks, instruct and direct him in the work to be done, and wait for him to finish it. It would certainly not be practicable, however, to manage a department in this fashion. With respect to such occasional and relatively inconsequential tasks, it is the practice in industry generally for the executive to perform them rather than delegate them to other persons. When any one of these tasks is done frequently, however, it takes on the character of a regular production function which could be performed by a nonexempt employee and must be counted as nonexempt work.

"In determining whether such work is directly and closely related to the performance

of the management duties, consideration should be given to whether it is 1) the same as the work performed by any of the subordinates of the executive, or 2) a specifically assigned task of the executive employees, or 3) practicably delegable to nonexempt employees in the establishment, or 4) repetitive and frequently recurring."

So, that's what it says.

Now, I was asked, can I come up with some examples of that, and I've thought of a few things. And, you know, I'm not -- I've never actually had occasion to have to apply this particular section of the regulations, I will confess, but it seems to me that the following examples may capture what this regulation is trying to get at, in different kinds of contexts.

One example might be the manager of a finance department, where the employees in the finance department -- excuse me -- where the corporate management turns to that chief financial officer and says, "We need you to run some numbers" on something that is a unique thing that they don't normally maintain in the course of their regular bookkeeping operations. "We need you to compile these statistics in terms of our receivables and get them

to the parent corporation as soon as possible." Now, that is not a task that is a regular part of the chief financial officer's job, but it's also not a regular part of the job of any of the subordinates in the department, the non-managerial subordinates. It's a unique assignment that calls for somebody to pull together some data. It's also assumed a non- -- a repetitive and non-frequently recurring instruction. And the CFO makes the decision that it's not practical to pull his staff away from their normal bookkeeping duties, and instead, he's going to do that himself. It seems to me that that might be an example of an occasional task that should properly be deemed as exempt because it represents a means of properly carrying out the management functions and responsibility in connection with men, materiel, and production.

Another example might be a production foreman who is in charge of a machine shop, and occasionally there is the need to recalibrate a machine because of a unique product specification. The manager decides to do it himself rather than call -- rather than pull away a production worker from some task operating the machine and have him do that job. Assuming it meets all of the other requirements of this exemption, it might be

appropriate to deem that task to be a proper extension of managerial function.

A third -- the final and third example that I thought might be illustrative is, assume in a retail environment that you have a display case that contains glassware, and a customer inadvertently knocks off the top shelf and everything falls to the floor and breaks. Rather than the manager interrupting the sales staff to take them away from the line of customers to have them sweep up the glass on the floor, the manager decides to exercise her discretion to go pick up the glass so that nobody cuts themselves. Assuming again that this is not a regular part of the subordinates' job, that it's not a regular part of the manager's job, that it's infrequent, that it's small, et cetera, it seems to me it might fit within this exemption.

I do not see this occasional work issue being something that's a catch-all. I don't see it as being some loophole that you're doing to drive a truck through. Nobody is going to swing the balance on whether somebody's exempt or nonexempt through the performance of such occasional work. But I think it simply represents part of the overall federal regulatory explanation of what constitutes duties that might be properly recognized

as directly and closely related to the performance of the exempt work. And it's proper to recognize it, along with all of the other sections that elaborate on the meaning of that term.

So that -- with respect to that point of contention, I think it's proper that we not delete it. I think it would be confusing to start picking away at elements of this federal definition, and I would urge that you adopt it all.

There has been some question about the proposed modification of the professional exemption, I understand. And I would say to you that right now the DLSE manual adopts every one of the sections of the federal regulation that we've referred to here. It is specifically references in the DLSE -- the current DLSE manual as being a tool for their interpretation of the learned or artistic professional exemption. Now, I do not believe that restating the professional exemption in a manner that clearly lays out for everyone to understand what the elements are of the exemption is going to materially change the operation of the exemption in the State of California.

I believe that it's very important for the IWC to provide business with some workable tools to answer

some of the difficult questions and some of the controversial questions that are -- that are ongoing in this area of the law, and to recognize that the whole facts and circumstance associated with the performance of work needs to be examined in determining what the character of the work is, and that, unfortunately, resorting to simple formulas is not always going to be easy, the easy way of answering the question. I think these federal regulations in their entirety provide those tools and that's why we've -- and I would urge you not to wordsmith them or to monkey around with them or to substitute words here and there for what's in the federal regulations, because I think that, again, creates uncertainty, it creates vagueness, it creates an opportunity for somebody to try to figure out why you've changed that wording and why you've reorganized the sections and why you're referring to different regulations in connection with some exemptions than relate to them under the federal regulations.

I think we should strive for as clear and straightforward an adoption of these relevant federal rules as we possibly can.

COMMISSIONER DOMBROWSKI: Okay. We're --

MR. YOUNG: Right. Just in closing, I just want

to add one footnote, that in keeping with promises we made, this does not include construction or building trades.

So --

COMMISSIONER DOMBROWSKI: All right.

Okay. You want to open it to questions?

COMMISSIONER BROAD: Mr. Young, I do appreciate that you've managed to moderate this proposal since its first inception six months ago. And maybe if we had another six months, we might get there. In any event, I think it's gone down from 100 percent illegal to only in the 90 percent -- you know, it's --

(Laughter)

COMMISSIONER BROAD: No, it's probably 10 percent illegal.

Anyway, let me ask you a couple questions, then I'll ask Ms. Thompson.

Is it your intention here to change California law?

MR. YOUNG: No.

COMMISSIONER BROAD: So, no fewer workers that are entitled to overtime will be exempted than exist now as the law is enforced.

MS. THOMPSON: Well, I can't speak to how the

law is enforced.

COMMISSIONER BROAD: I was asking Mr. Young.

MR. YOUNG: No fewer workers would be exempt?

COMMISSIONER BROAD: Yeah, we're not -- in other words, there are not going to be any more workers or classes of workers who are going to be exempted from overtime.

MR. YOUNG: That they're entitled to, no. I mean, what this will do -- one thing -- one thing that's happened is, because of this, there have been many -- in fact, I think this has worked -- the current situation has worked to the disadvantage of many workers in California because those -- many of them who have been managers have now been reclassified hourly, lost some of the prerequisites that go with the managerial status, so they've lost some -- some of the extended benefits and some of the extended options that they've had because employers have been concerned about the clarification of what a manager is. This will allow those people to gain back the benefits that they lost and the opportunities they lost.

Now, so -- as far as -- so, the answer to your question, anybody who is entitled to overtime under -- nothing in our proposal will prevent them from getting

that, however, will allow workers who are truly managers to be clearly reclassified as that and be able to operate and to function as that.

COMMISSIONER BROAD: So there will be an opportunity to reclassify workers who are now classified as nonexempt.

MR. YOUNG: Not reclassified. I misspoke. It will give the people -- again, it will give those managers who now have been -- who, in some cases, have been given -- now been shifted to hourly, this will then give employers a clarity and a definition of what a manager is. And many of the employers, certainly in the retail setting, have been waiting for the IWC to act in response to what they felt the opportunity of clarity with AB 60.

COMMISSIONER BROAD: I believe that -- oh, let me say, by the way, I -- since your famous meeting with Senator Burton, his thunderous support for your position has been notably silent. I mean, he could be in here now yelling at us all --

MR. YOUNG: Right.

COMMISSIONER BROAD: -- to take care of your problem, but I don't see that.

MR. YOUNG: Well, but I don't -- but I don't

think that was the -- I mean, if you -- if you -- but --

COMMISSIONER DOMBROWSKI: He's not here thundering at us not to, either.

MR. YOUNG: Right.

Commissioner Broad, I mean, if you're finished cueing the audience, I'll respond. I mean --

(Laughter)

MR. YOUNG: That was -- I mean, certainly, if you want to invite Senator Burton to come in and speak on his intent, all I was trying to give you is a capsulation of what occurred.

COMMISSIONER BROAD: I understand.

MR. YOUNG: And that was his response to an objection that had been raised, much as yours have been raised. And so, we never asked him to come in. We think that the law is clear this Commission has the authority to do what we propose.

COMMISSIONER BROAD: Now, let me ask you this question. We seem to -- we have a strict --

MR. YOUNG: Can I get a lifeline someplace?

(Laughter)

COMMISSIONER BROAD: We have a strictly -- we have a strictly quantitative -- we have a strictly quantitative test in California, correct? That's the

"primarily engaged" test. That is what we've always done.

MR. YOUNG: Pardon?

COMMISSIONER BROAD: That is our test. That's what we codified. It requires that exempt duties -- you have to do exempt duties, perform exempt duties more than 50 percent of the time in order to be exempt. Is that correct?

MR. YOUNG: Right.

COMMISSIONER BROAD: Okay.

MR. YOUNG: It's my understanding that's exactly what the law says. And --

COMMISSIONER BROAD: So, now, that's your intent here.

MR. YOUNG: -- that was -- and that was, for the first time, codified in AB 60.

COMMISSIONER BROAD: Correct.

MR. YOUNG: And that was part of, again, what was agreed to in Senator Burton's office.

COMMISSIONER BROAD: I understand.

MR. YOUNG: Right, okay. Okay. I just want to clarify.

COMMISSIONER BROAD: And -- although it was in the bill from the very outset.

MR. YOUNG: Absolutely.

COMMISSIONER BROAD: I understand.

MR. YOUNG: And we -- and we had opposed it until -- until there was an understanding, again, that the Commission would be given authority to try to clarify this, the duties.

COMMISSIONER BROAD: Right, the definition of duties.

MR. YOUNG: Right.

COMMISSIONER BROAD: Okay. So, what -- the question, then, I would have is, we have exempt duties and we have nonexempt duties. And we have a class of duties called occasional duties that you've discussed, and we have a class of duties that are closely related duties. In any situation, is it your intent that if you add those three kinds of duties up, if you perform them more than 50 percent of the time, you can be considered exempt?

MR. YOUNG: Well, since this is mirroring the federal law, I would like to let Lynn Thompson answer that because she's more familiar with how the federal law is actually applied. It's our understanding that in the federal law, there has been very little -- I mean, there has been no controversy and it hasn't -- the definition

of occasional tasks hasn't been an issue. But I'll let Lynn respond to that question.

MS. THOMPSON: The definition of an exempt -- of exempt work, for purposes of determining whether the quantitative limitation under federal law and if you adopt this state law, is met, includes work that is directly and closely related.

COMMISSIONER BROAD: And occasional.

MS. THOMPSON: Occasional is one subspecies of directly and closely related work, as it says repeatedly in the sections that I read to you.

COMMISSIONER BROAD: But it's not -- it's not exempt work. It's not the exempt duties. It's exempt duties -- it's other duties that are related to exempt duties that aren't exempt duties.

MS. THOMPSON: It's other duties that are directly and closely related to exempt duties.

COMMISSIONER BROAD: Okay. So they're not exempt duties. That's why they need a separate definition. Is that right?

MS. THOMPSON: They are duties that are directly and closely related to exempt duties. They are exempt duties if you recognize that exempt duties -- that the definition of what are exempt duties includes duties that

are directly and closely related.

COMMISSIONER BROAD: Okay. So, let's take -- let's take your example of the person who cleans up the broken glass.

MS. THOMPSON: Um-hmm.

COMMISSIONER BROAD: That's -- that, in your opinion, is an occasional duty. They're an executive of a corporation, in the normal sense, and they clean up broken glass. Are you telling me, if they spend half their time cleaning up broken glass, they are -- they are still exempt?

MS. THOMPSON: No, because as this regulation clearly states, when any one of these tasks is done frequently, however, it takes on the character of a regular production function which could be performed by a nonexempt employee and thus be counted as nonexempt. The regulation also repeatedly uses terms like "infrequently recurring," "occasional," and "small," so I think --

COMMISSIONER BROAD: Aha! So, it's -- then, basically, it should fit within our 50 percent test. In other words, what's the problem? If you do occasional -- this is what I don't understand about this. I mean, if you do occasional duties that are not exempt, as long as they don't reach 50 percent of the time, then why would -

- what's the problem?

MS. THOMPSON: What this is saying is that it is recognizing that that kind of occasional work that is a means of properly carrying out the employee's management functions and responsibilities is properly viewed as an extension of the managerial role. It is not an -- it is not the kind of nonexempt duty that is customarily performed by subordinates.

So, if your -- if your question is trying to assume that there are some employees in the store whose customary duty includes the picking up of broken glass, then this -- you know, I think you would -- you would certainly look at this section and say, "Well, that doesn't appear to meet the four criteria in here."

COMMISSIONER BROAD: Well, that was your example, not mine. It would seem to me in every store there's someone assigned to customarily pick up glass.

MS. THOMPSON: That may not be true. You know, you --

COMMISSIONER DOMBROWSKI: But the point -- let me -- let me remind you, we are trying with this proposal to get consistent interpretation of the duties. And --

COMMISSIONER BROAD: Well --

COMMISSIONER DOMBROWSKI: -- as she just said --

MS. THOMPSON: Right.

COMMISSIONER DOMBROWSKI: -- if someone takes any shape or form of doing occasional duties on any kind of frequent basis, they are not going to meet the 50 percent test. It by definition is --

COMMISSIONER BROAD: Well, you can't have it both ways. Either they meet the 50 percent test or they don't. What you're saying is they could meet -- they can do nonexempt duties 50 percent of the time and occasional duties 10 percent of the time and closely related duties 20 percent of time --

COMMISSIONER DOMBROWSKI: No.

COMMISSIONER BROAD: -- and still be exempted.

COMMISSIONER DOMBROWSKI: No.

COMMISSIONER BROAD: No or yes?

COMMISSIONER DOMBROWSKI: No.

COMMISSIONER BROAD: No? Okay. So, then when you add the three of them together, they have to equal no more than 50 percent. Is that right?

COMMISSIONER DOMBROWSKI: What we're saying is that, from a categorization viewpoint, there is nothing wrong with taking the duties that are recognized at the federal level and making them consistent to be the duties that satisfy the 50 percent test.

COMMISSIONER BROAD: Okay. Let me then ask that in another way. The federal test says they have to be occasional. How occasional? How much time? How much time is it? We have a quantitative test. How much time doing nonexempt duties can you do?

And now, if you're simply saying you're going to classify nonexempt duties as exempt duties and call them occasional, but say you can't do them too much, but you can do them more than 50 percent of the time, it clearly violates California law, does it not?

MS. THOMPSON: I think this makes it pretty clear that you're not talking about nonexempt duties, number one, you know. It -- I mean, I think where you're going wrong is that you are assuming that the occasional duties are nonexempt.

COMMISSIONER BROAD: Yeah. No --

MS. THOMPSON: And what this is trying is capture is a different idea.

COMMISSIONER BROAD: No, you're trying to bootstrap -- you're trying to bootstrap nonexempt duties as exempt duties.

All right. Let's move on.

(Applause)

COMMISSIONER BROAD: No. No, no, no, no, no,

no. No, no.

All right. Let's talk about -- let me just ask a very general question. With regard to the executive exemption in your proposal, what are the exempt duties? Is that Items (1) through (4)?

MS. THOMPSON: Exempt duties under our proposal are all of those duties that are described in the federal regulations, which are cited, which include the duties that are specifically mentioned in (1) through (4), but also include a whole list of duties that encompass other things in addition to those duties. It's all laid out in glorious detail.

COMMISSIONER BROAD: Okay.

MS. THOMPSON: And the duties that are directly and closely related thereto.

COMMISSIONER BROAD: Uh-huh. And you've got to do -- okay.

Now, what is -- on Number 1, it says, "Whose duties" -- "A person employed in an executive capacity means any employee whose duties and responsibilities involve the management." What does "involve" mean, and where is that in the federal regulations?

MS. THOMPSON: Well, as you know, Mr. Broad -- you want me to talk about why that change was made? We

were negotiating with you --

COMMISSIONER BROAD: Um-hmm.

MS. THOMPSON: -- who were -- you were concerned that what we -- what we originally had stated was the first -- was the first element of the federal long test.

COMMISSIONER BROAD: Right, which was the primarily -- primary duty test.

MS. THOMPSON: Which was primary duty. And we tried and tried to make you understand that by saying in the first element that you have to -- have to have as your primary duty management, we were not modifying the obligation in Part (5) that you spend more than half your time engaged in management tasks.

COMMISSIONER BROAD: Yes, but what I suggested to you is that you had to be --

MS. THOMPSON: And so -- let me go -- let me just finish.

COMMISSIONER BROAD: I'm sorry. Go ahead.

MS. THOMPSON: So -- but to try to eliminate any possible confusion that we were attempting to somehow substitute a qualitative test for the -- in the California standard, we, at your request, eliminated that verbiage. But -- and -- but we still have to talk about what kind of animal we're dealing with here. So we --

all A really does at this point is, in each of the exemptions, is kind of describe generally the kind of animal that this is, that in A, this is somebody who is involved in the management of the in the enterprise --

COMMISSIONER BROAD: Right.

MS. THOMPSON: -- or who participates in it. You could use one of a number of terms.

COMMISSIONER BROAD: Uh-huh.

MS. THOMPSON: But the effort is to tell the reader at the outset, "This is the kind of person we're talking about." Now we have to talk about what do they do. They have to hire and fire, they have to responsibly direct, they have to regularly exercise discretion, and they have to spend more than half their time engaged in exempt managerial duties, as those duties are defined in the law.

COMMISSIONER BROAD: So these things in (1) through (4) aren't their duties.

MS. THOMPSON: Sure. They're partly -- I mean, you will see that --

COMMISSIONER BROAD: So you've got part of their duties there and part of them are in federal law somewhere?

MS. THOMPSON: No. I mean, all of this comes

out of federal law. As you know, this is the federal long test.

COMMISSIONER BROAD: No, no. But I mean if an employer wants to figure out what this means, they go read this and then they go read the federal regulations, and then they try to figure out, adding them together, what the duties are? I just -- I'm just curious.

MS. THOMPSON: Well, you know the answer, so you're not curious. But as you know --

COMMISSIONER BROAD: Well, I don't know.

MS. THOMPSON: -- Section 541.102 --

COMMISSIONER BROAD: You might surprise me.

MS. THOMPSON: 541.102 of the federal regulation states, in two long paragraphs, which takes up about a third of the page, a list of duties. You remember when this proposal first became before the Commission, what was tried at that point was to try to do this, let's list out all of the duties that we consider to be exempt. And that became very controversial, so --

COMMISSIONER BROAD: Right. Now, here's the problem with it, though. If you look at your draft and you look at as it's modified in mine, the difference is that it says they're primarily engaged in the management of the enterprise, not they're involved somehow in

management. That is -- and that's the -- yeah, you took it out and you put something else in there that's unusual.

MS. THOMPSON: Well --

COMMISSIONER BROAD: I don't understand why we just don't say they're primarily engaged as managers. What's the objection to doing that?

MS. THOMPSON: The reason that I thought that was confusing was as follows. I think that it is confusing to start talking about the same legal requirement, which is "primarily engaged in," in two separate sections and then try to figure out were they saying that it's some sort of a different requirement in A than it is in -- or in (1) than it is in (5)? Or is it the same?

And -- and the other reason was that we're trying to really help employers go down the list of duties and try to model themselves against -- if they're operating in 50 states, they know that they're going to have to satisfy (1) through (4) everywhere else, and they're going to have to satisfy, in addition, (5) in California. And it's a very understandable framework --

COMMISSIONER BROAD: That's right. They have to --

MS. THOMPSON: -- for employers.

COMMISSIONER BROAD: That's right. They have to satisfy (5), (6), (7), through (100), if that's California law.

MS. THOMPSON: Right.

COMMISSIONER BROAD: And they have to pay the state minimum wage, whether -- you know, even though they satisfy the federal minimum wage. And that's the basic constitutional nature of our government.

Now, why, in Number (4) do you change our existing test, and the test for the administrative and professional exemption, from "exercising discretion and independent judgment" to "exercising discretionary powers"? That is a

-- that's a total change from how the law that's been here since 1947. Why did you change that, just for the executive?

MS. THOMPSON: Well, it -- the only -- because, under federal law, the way the exemption is worded is "discretion and independent judgment," and there -- there's a federal reg that talks about what that means.

COMMISSIONER BROAD: And you don't want that for executives.

MS. THOMPSON: No, that's -- well, that's what I

think -- that's -- I'm talking about administrative. For executives, under federal law, the test is termed slightly differently. And we would like -- we feel there's a real advantage to maintaining conformity. The difference seems to me to be a fairly small one, "who regularly exercises discretionary powers." Now -- you know, and there is a federal regulation that talks about that in the context of the executive exemption.

Again, for purposes of trying to help people comply with California law, you know, there -- I don't see that -- I -- I think that the value of having a standard that achieves consistency, for the IWC to say, "When we look at defining duties for the exemption, let's look at defining them in a way that is consistent with the way they're going to be defined in the other 49 states," to the extent we can -- and clearly, on this element you can -- you can define it using exactly the same words, and you can loop right into that federal regulation for the executive exemption, and let's make it clear and consistent and not have an additional bell or whistle, and that somebody other than you guys is going to try to figure out, "What does that mean?"

COMMISSIONER BROAD: Well, we've had that in California law since 1947. Are you trying to say that

executives of companies shouldn't be required to use independent judgment as a condition of exercising those duties? Why would we change that?

MS. THOMPSON: I'm not saying anything. I'm saying that I think that using the federal language -- using the federal language is -- achieves every purpose that you would reasonably need to achieve. By requiring the regular exercise of discretion, it seems to me that any small distinction that you get with the words "independent judgment" is very small. I don't know what -- I don't know really what that would add. Maybe you do.

COMMISSIONER BROAD: Oh. Well, then, you don't have any objection to put it back.

MS. THOMPSON: Like I said, I do, because I think we should try to standardize the requirements as much as possible to make them more easily complied with and understandable, and not have embellishment on words like "independent judgment" elsewhere.

COMMISSIONER BROAD: But you acknowledge that it's a change in California law that we've had since 1947.

MS. THOMPSON: I acknowledge that the wording is different.

COMMISSIONER BROAD: Well, I mean, it says "discretionary powers" in this one and "discretion and independent judgment" in the others. And it used to say "discretion and independent judgment" for this class of exemption as well. So, it's a change in the law. Please, you can acknowledge that. What you think it means or doesn't mean is another question.

You're taking the Fifth?

MS. THOMPSON: Sure.

(Laughter)

COMMISSIONER DOMBROWSKI: Let me go back to --

COMMISSIONER BROAD: Wait. Excuse me. You can do the resurrection part in a minute.

(Laughter)

COMMISSIONER BROAD: Let me just continue.

Down in Paragraph (5), there's this unusual statement:

> "The work actually performed by the employee during the course of the work week must, first and foremost, be examined and the amount of time the employee spends on such work, together with the employer's realistic expectations and the realistic requirements of the job, shall be considered in determining whether the employee

satisfies this requirement."

What does that mean?

MS. THOMPSON: Well, as you know, Mr. Broad, that comes right out of a California Supreme Court decision that was issued --

COMMISSIONER BROAD: Um-hmm.

MS. THOMPSON: -- and which we intend to refer to in the Statement of Basis, to make it clear that that's what we're talking about.

This is an area where we're looking for guidance.

COMMISSIONER BROAD: I believe you mean the *Ramirez* decision of the California Supreme Court, correct?

MS. THOMPSON: *Ramirez v. Yosemite Water*.

COMMISSIONER BROAD: So, you believe this is a correct statement of the law in *Ramirez*?

MS. THOMPSON: I believe that it is a correct reference to the law. It doesn't quote *Ramirez*, which goes on for a long time on this subject.

COMMISSIONER BROAD: It certainly does.

MS. THOMPSON: But I believe it is an accurate reference to *Ramirez* in what it says. And I think that if you have any concerns about that, Mr. Broad, we can

make it abundantly clear in the regulations that, by referring to *Ramirez*, we don't intend to modify anything that the Supreme Court said, nor do you intend to disagree with any other sections that aren't referenced.

COMMISSIONER BROAD: Well, I take particular exception to this little number here, because it's really quite intellectually dishonest, what you've done here.

The *Ramirez* decision dealt with the outside sales exemption. It did not deal with the executive exemption. The issue was a very narrow issue in *Ramirez* that had to do with whether an employer -- it was an evidentiary issue within the case in which the employer had said that the outside salesperson, what was just a -- who was a truck driver, was just a bad salesperson, and therefore they should -- they could classify him as an outside salesperson.

You quote the court, in effect, in the first sentence, but you leave out the rest. And the rest is a very significant further elucidation of the Supreme Court's view of the outside sales exemption. The -- and it -- what it says is that whether the employer disciplined the person for not performing those duties is relevant to the consideration, and you have to look at the realistic expectations in light of that, and you have

to look at whether there's a concrete expression of employer displeasure over the employee's so-called substandard performance, and whether the employer's expressions of displeasure were themselves realistic, given the actual overall requirements of the job.

So, this particular thing doesn't belong here at all and misquotes the California Supreme Court. And it's particularly inappropriate to do that, in my view.

MS. THOMPSON: Okay. Well, I don't think it does. And I also would say that what -- what you're talking about were the Supreme Court's suggestion of factual information that might be relevant to determining whether these things were realistic expectations and requirements of the job. The question of -- if an employer is asserting that there are certain realistic expectations and requirements -- the whole context of this is to say that an employee should not be able to render himself nonexempt by doing something that is inconsistent with what the employer tells him to do. That -- that's the narrow question that the Supreme Court is addressing in this section of *Ramirez* that -- the Supreme Court's recognizing it isn't really fair if you just look at what the employee is doing and not recognizing that the employer's realistic expectation

should also play a role in determining whether the employee is exempt. Otherwise people could sort of work themselves out of the exemption by --

COMMISSIONER BROAD: Actually, that's 180 degrees --

MS. THOMPSON: -- by fiat.

COMMISSIONER BROAD: -- backwards from what the Supreme Court said --

MS. THOMPSON: Can I finish, please?

COMMISSIONER BROAD: -- in *Ramirez*.

MS. THOMPSON: Can I finish, please?

That's the point the Supreme Court's addressing. And what the court says is that so it is appropriate to look at the employer's expectations. But in evaluating what the realistic expectations are, you might also want to know did the employer ever discipline the employee for failing to do what the employer is saying he wasn't doing. If the employer is trying to rely on that argument, there are issues of proof and evidence that can be relevant to considering the issue of what are realistic expectations: What does the job description say? Did the employer ever discipline?

I don't think all of that is appropriate to put

in the wage order. I would be perfectly --

COMMISSIONER BROAD: Well --

MS. THOMPSON: -- in agreement with you to say that referring to all of the Supreme Court's statements and making it clear that one should refer to the whole text of the court's decisions is appropriate. And that can be clarified in the Statement of Basis.

COMMISSIONER BROAD: Well, you know, the Supreme Court sort of refers to itself.

Let's get at what you're really talking about here. You mean to say that if the employer has a reasonable expectation that the employee will be engaged in managerial duties, and rank-and-file employees are absent and they take it upon themselves to fill in and do non-managerial work, and they never told them to do that, that then that non-managerial work is counted as exempt?

MS. THOMPSON: No, I'm not saying that.

COMMISSIONER BROAD: So what's the relevance of the consideration of the expectation of the employer? I thought you said it was that what the job description was and what -- I'm very confused by this. I don't -- I don't get it.

MS. THOMPSON: I would just recommend that you read *Ramirez*, and it's pretty clear.

COMMISSIONER BROAD: No, I have. I was very pleased when it came out. It was a victory for workers, although you wouldn't know it from here.

(Laughter and applause)

COMMISSIONER BROAD: I'd like to know what you're talking about here. How is this relevant to determining whether someone is spending more than 50 percent of their time engaged in exempt duties?

MS. THOMPSON: The Supreme Court said it was relevant, under the --

COMMISSIONER BROAD: No, how do --

MS. THOMPSON: -- quantitative standard of the outside sales exemption.

COMMISSIONER BROAD: Well, how is it enforced? How is it applied? You look at their -- you look at what the employer told them their job was, and if they did a different job, which was nonexempt duties, it's counted as exempt?

MS. THOMPSON: No.

COMMISSIONER BROAD: The employer -- well, I thought you said the employer wouldn't be, quote, "punished" if the employee did what they weren't supposed to do.

MS. THOMPSON: I'm just saying that the Supreme

Court was addressing -- was postulating that question. And I don't have *Ramirez* in front of you or I would read you the entire paragraph, because I -- you know -- but I don't know how fruitful this debate's going to be. You know, I think you can read *Ramirez*. I'm telling you this is a reference to *Ramirez*. I think you can make it absolutely clear in the Statement as to Basis what it is, and that should prevent a problem with it being misconstrued.

COMMISSIONER BROAD: Well, I believe it's taking *Ramirez* entirely out of context.

Moving on to the professional exemption, why did you eliminate California's long-standing and very clear automatic exemption of professional employees who are licensed and certified by the State of California and are in certain occupations, attorneys, doctors, and so forth?

MS. THOMPSON: I don't think I have. Those individuals are clearly exempt under the federal standard. What you have, as you know, in the evolution of California law, was that we started with enumerated -- limited enumerated professions qualifying for the executive exemption. And so, the exemption was limited to those enumerated professions. Then we had a broadening of the exemption to include the learned and

artistic professions. And it is in the learned and artistic category that the DLSE started referring to all of these federal regs. Those federal regs, in defining what the learned professions are, clearly encompass the professions that the IWC had previously identified as being exempt. In fact, the distinction under federal law is that if you're a licensed professional, you're exempt from the salary requirements under federal law. Now, that apparently is not true in California, in light of AB 60, which makes the salary requirements applicable to professionals. But clearly, under federal law, those licensed occupations are exempt.

COMMISSIONER BROAD: Well, here's what I think it does, and I don't know why -- what the motivation here -- is I think what it makes is unlicensed professionals, law school graduates who have not yet been licensed and so forth, accountants who have not yet been licensed, are -- would then, I think, be subject, arguably, to exemption when they are not now.

MS. THOMPSON: Well, I will assure you that the Department of Labor and the courts that have construed the Fair Labor Standards Act have clearly said that that's not the case. And in fact, the DLSE has specifically incorporated some opinions to that effect,

dealing with accountants, by the way. Those are actually specifically incorporated and referred to in DLSE enforcement policy, making it clear that the learned profession definition in California, as under federal law, does not include people who perform a great deal of routine work, even though they're called accountants, you know, that it is limited -- clearly, CPA's are going to satisfy the requirement, but other -- other accountants who are not CPA's might, depending upon the level at which they are practicing. And it's a question of whether they're a learned professional.

So, I don't think we're going to have a wholesale alteration, or really any alteration at all, under California law, because those are currently the rules.

COMMISSIONER BROAD: Are you aware of any employers who've come forward to ask that the professional exemption be changed, other than yourselves?

MS. THOMPSON: Like I said, I would not concede that we're changing it. I think that what the IWC is doing is it is articulating the standards that right now are articulated in the form of DLSE enforcement policy, an entity that has no authority to regulate. I think the IWC has been asked to do this by the Legislature. It

should do it comprehensively. There's no reason not to address the professional exemption and to continue to leave that in this kind of vague thing, where the DLSE is actually making the law in this area.

COMMISSIONER BROAD: So, you've mentioned several times the DLSE, and you mentioned that there were winds of political change. Is it your sense that you would like to lock in things as they were? Or -- what is the -- I mean, what -- what is your criticism of the Davis administration with regard to enforcement of these laws? That's the State Labor Commissioner, as an appointee of the Governor, Mr. Lujan. What has he done here that is so bad in interpreting the law?

MS. THOMPSON: Well, let me give you one example. There's material that's in the DLSE enforcement manual that people will stand up and tell you is illegal. And, you know, it's out there published. If you go right now and you go down to the DLSE and say, "Can I have a copy of your enforcement manual?," you will get stuff that -- that if you try to rely upon and use, people will tell you, "No, that's illegal."

Now, that -- and I can -- I can -- believe me, I can give you a number of examples, because I've been practicing for twenty years in this area, of -- where

these definitions change over time. And I think that's the reason --

COMMISSIONER DOMBROWSKI: I think that gets to the heart of what we're talking about here, is we're -- Barry, we're trying to get something set by the Commission in its powers to direct --

COMMISSIONER BROAD: No, and I -- and I -- and I agree with that. I'm just -- I just -- this vilifying of -- of the administration --

COMMISSIONER DOMBROWSKI: We're not trying to criticize -- it was not -- we're not out to criticize anybody.

MR. YOUNG: First off, Commissioner Lujan was just appointed. We're talking, in essence, of -- as the administration's gone over the past, you know, three or four decades. But it's not a particular criticism of any administration, and most particularly, this one.

So, as we continue to get the -- pick the fly specks out of the fly paper, we want to be, I mean, at least, in -- make sure that that wasn't our intent.

COMMISSIONER BROAD: Thank you.

COMMISSIONER DOMBROWSKI: Commissioner Bosco.

COMMISSIONER BOSCO: Well, I think the previous

discussion has mostly been about words, and they are important when making law. But let me try to pick your brain about the general overview of this whole subject.

I know that you've given us a few examples of who might now still be able to be considered a management employee, even though they do occasional other things, a manager that cleans up glass that's spilt by a customer, a CFO that does a few accounting things on the side. I can't believe that that has been the whole concern of the retailers or anyone else in doing this, because --

MS. THOMPSON: I'm sure --

COMMISSIONER BOSCO: -- I don't think anybody in this room cares if a manager cleans up glass, and nobody in the room thinks that that person should somehow be reclassified.

But what I'm concerned about are people that may be out there now who will be reclassified when this language gets approved, if it does, or, you know, people whose lives will change because of what we did here. Now, in your wildest imagination, Ms. Thompson -- I know you've practiced, as you say, for twenty years -- and say if I am taking the average department -- say Macy's -- I won't even say average -- say Macy's, and you look on the broad spectrum of people that are working there,

managers, sales clerks, stocking people, or whatever, is there going to be any change at all in how any of these people are classified after we've passed this regulation, if we do?

MS. THOMPSON: I don't think there should be. I think this -- I think we should be prepared to say -- you may want to say in the Statement of Basis that you believe that this is consistent with the current law.

COMMISSIONER BOSCO: Well, I -- no, I'm asking for you to --

MS. THOMPSON: Yeah.

COMMISSIONER BOSCO: -- go crazy and just think of any --

MS. THOMPSON: I don't think so. I mean, I can't speak to how Macy's has classified their managers, but --

COMMISSIONER BOSCO: Well, let me ask you another question. And this -- I know you're an attorney and you have a right to confidentially deal with your clients -- but in the many discussions, the hours of discussions that you and others have had on this subject -- I know you weren't just there worrying about cleaning up glass -- was there anything way down deep that you were thinking that maybe somebody's going to be able to

get paid less once this thing goes into effect, or the work hours are going to be able to be changed so management will be able to shave off and make a few -- more profit? Was that ever a consideration?

MS. THOMPSON: Absolutely not.

(Laughter)

COMMISSIONER BOSCO: No, no, I'm -- no, go ahead. No, I'm not badgering you. I just --

MS. THOMPSON: Yeah. No.

COMMISSIONER BOSCO: So, in other words, you can truthfully say that your main intent here is to make state law uniform with federal law, make it easier for people to go do business in the 50 states, and that they're -- whether -- what about Burger King or the hamburger -- will there be anybody flipping burgers now that will suddenly get classified as a manager?

MS. THOMPSON: Absolutely not. I don't see there's any argument that flipping a burger is directly and closely related to managing Burger King. I -- you know, I think that is a red herring. And no one is going to contend that that is manager work.

I think this is a realistic, reasonable framework that should place into the record what is and should be -- what is now, or at least should be now, were

we all to understand it. I think this helps us understand.

COMMISSIONER BOSCO: And so you can't give me a single example of someone now working in the workforce and not classified as a manager that would be reclassified under this and thus become exempt from overtime.

MS. THOMPSON: Correct. I mean, I can tell you that I -- I personally will not be calling up my clients and saying, "Now let's go through your workforce, and we now have tools to reclassify your people." I -- I don't --

COMMISSIONER BOSCO: There won't be any bulletins put out from your law firm that --

MS. THOMPSON: I don't -- I don't think anybody is going to contend that, I really don't. I -- you know, that isn't what this does.

COMMISSIONER BOSCO: Okay. Thank you.

I'm going to ask the next panel the same questions, so I'm not just asking you.

COMMISSIONER DOMBROWSKI: Commissioner Rose.

MS. THOMPSON: Yeah.

COMMISSIONER BOSCO: Thank you.

COMMISSIONER ROSE: Yes, just briefly, and it

was already touched on. My concern is the lower paid people such as 7-11's, fast foods, gas stations, things like that. How do you envision this affecting them?

MS. THOMPSON: The lower paid people in the 7-11's and -- I'm sorry. Who are you --

COMMISSIONER ROSE: Like -- to me, the managers, the --

MS. THOMPSON: Oh, the managers. Well, I don't know. I mean, it depends on -- I would think, in most 7-11's, that they're not going to be spending more than half their time engaged in exempt work, because, when I go in there, there doesn't seem to be more than one person in the store. So, you know, but I don't know. I mean, I -- I would not think that the fact that you're in a small environment like that would help, under this standard, establish you as exempt. I think you would -- you know, it sounds like you're going to be performing too much nonexempt work. And if you do, you're not going to be swept into the exemption by having a title or a set of responsibilities. I think it's -- that's very clear that none of that's changing.

COMMISSIONER ROSE: Thank you.

COMMISSIONER DOMBROWSKI: Any other questions?

(No response)

COMMISSIONER DOMBROWSKI: Thank you.

Mr. Rankin and Mr. Pulaski.

(Pause)

COMMISSIONER DOMBROWSKI: Whenever you're ready.

MR. PULASKI: Thank you. Chairman, members of the Commission, Art Pulaski, from the California Labor Federation.

With me on this panel is Tom Rankin, also with the California Labor Federation; Judy Perez, who's with the Communication Workers; Michael Zackos, from AFSCME, who is not in the room at the moment but here in the building and expected to come back; Marcie Berman, from the California Employment Lawyers Association; Patty Gates, from the Van Bourg law firm; and Laura Ho, from Saperstein law firm.

And we've asked some lawyers to come up because, obviously, this has gotten a little complicated in discussion here. And so they're going to give you some perspective on that as well.

If I may, I just will give some introductory comments and say that we are not the only working people in the room, on this panel here today. California workers have traveled today from around the state so that we can watch the watchdog agency that's charged with

protecting their interests.

We're here again because we have fought other proposals in these few short months that have come before this Commission, proposals with the intention to dismantle the protections of daily overtime that we fought so hard to reinstate through AB 60.

Let me just tell you that this was a rally cry for workers some two years ago when we began this fight to protect daily overtime when a previous governor took it away. It was a rally cry for us for the elections of November of 1998, where workers mobilized to go to the polling places. And a primary issue on their mind across this state was the protection and the reinstatement of their daily overtime.

As a candidate, Governor Gray Davis -- candidate then -- Gray Davis met with groups and groups of workers and established his commitment to assure that no workers who previously had daily overtime protections would be taken away. He must have made that commitment a hundred -- five hundred times. Yet the Commission that he appointed sits here seriously considering a proposal that, in fact, will do just that, take away the protection of daily overtime from what we might guess -- and we can go back and do the research -- thousands upon

thousands, if not ten thousands, of workers.

And I must tell you that the proposal that I was given this morning to look at that was before you ended up

-- and I'm glad that we took a 15-minute break an hour and a half ago, because I learned then that the proposal I was given this morning was no longer the proposal before us. And so, we didn't even have, until the break an hour ago, what the real proposal was that you are considering before you now. And that's why we have these --

COMMISSIONER DOMBROWSKI: Well, wait. Excuse me. We put the proposal on the table first thing this morning. It's been there.

MR. PULASKI: Okay. Well, we -- Chairman, when we got together with the attorneys, we had the wrong document, because we assumed the document we were given earlier in the day was, in fact, the most recent one. So, something happened, perhaps overnight.

Oh, you ran out.

COMMISSIONER DOMBROWSKI: There's only one document.

MR. PULASKI: I guess there weren't any there when we went for the documents when we got here this

morning.

In any case, let me share with you, if I may, the law under AB 60, which says -- Paragraph (e) -- "For the purposes of this" law, quote, "`primarily' means more than one half of the employee's work time." This is very simple language.

And I must tell you that the debate that happened over the last hour by presumed learned people showed us how confusing this becomes for workers in the workplace whose purpose would be to try to protect and defend their interests, how hard it would be for them to try to debate with their managers over what rights they had and who was exempt and who was not, based on the kind of legal discussion that happened here today. If you pass this kind of Dombrowski proposal before you, you will violate the interests of protecting those workers in understanding how these exemptions affect them or do not affect them, because it will be so open -- so complicated that they will never be able to debate or stand up for their rights before their employers.

I just want to share with you one thing that so quickly came to my attention, because I didn't even have a chance to read the whole thing, and it is on -- halfway down Page 1, where it says -- it refers to the exemption

as "who are customarily and regularly exercising" -- "exercises discretionary powers." And this was brought up earlier by Commissioner Broad. The language in the past that we had was "discretionary" -- "exercising of discretionary powers and independent judgment." We have many, many workers in this state who understand that they are told by their employers that they don't get the wages of a manager because they aren't allowed to utilize independent judgment. That's why you're relegated to be a worker. And that's why, as a worker, you're entitled to daily overtime.

However, interestingly enough, the language referring to independent judgment, language that's so often used to relegate workers to non-management status for lower wages suddenly disappears, in terms of the protection of their interests, of daily overtime.

So, I've got some other comments but I realize that I've probably gone over what should be introductory comments in terms of time. And let me just conclude my introduction by saying that this proposal before us violates our understanding of a commitment of our governor, it violates the full intention of AB 60 and our new law, it violates our sensibilities as workers, and it violates our trust in the responsibilities of the

administration of this state to implement the law based on its commitment and the law based on its language.

Thank you very much.

(Applause)

MR. RANKIN: Tom Rankin, California Labor Federation.

I was one of the participants in what now is becoming the infamous meeting in John Burton's office. I think his name has been taken in vain I don't know how many times here.

My understanding of that meeting was not that the results of putting the language that was agreed to be put in the statute, which was, "The Commission shall conduct a review of the duties which may meet the test of" -- "which meet the test of the exemption. The Commission may, based upon this review," et cetera, et cetera. You're not required to do anything. And quite frankly, we'd be very happy to live with the law and what was in the wage orders that corresponds with that law, rather than trying to somehow "clarify." You're just -- you're not clarifying; you're confusing what has been a practice for many years in this state.

You've got to look at that language in conjunction -- in the context of what was done in AB 60.

In AB 60, you strengthened the protections -- the Legislature strengthened the protections in this area. They increased the requirement -- the salary requirement to be a manager. You now have to make a whole two times the minimum wage, which is not -- we originally had three times, and that was part of the negotiations. We went down to two times from three times. We put in the "primarily engaged in" phrase into the law. Before, it had only been in the IWC orders. It seems pretty clear that what the Legislature wanted and the Governor signed was to further employee rights in this area, not to denigrate them and lessen them.

We have no problem if you can come up with language that clarifies this whole issue of who's a manager and who isn't within the framework of the law. But that's not what you're talking about doing here. You're really trying -- it's very clear from the testimony here you're trying to import federal standards. Some federal standards are used by the Labor Commissioner in California. And I wish the Labor Commissioner would be allowed to come up here and testify to that. But you are not to import federal standards that lessen protections of workers.

We fought off the employers on this issue for

sixteen years of Republicans. And are we going to lose it now with this Industrial Welfare Commission? I hope not.

We have some attorneys here who can testify to the details of this proposal.

MR. PULASKI: Chairman, we have the author of AB 60, who has asked to come forward. And I would -- he has a short period of time, so we would ask that we allow him an opportunity to say a few words.

Assemblyman Wally Knox.

(Applause)

ASSEMBLYMAN KNOX: Thank you, Mr. Chairman. Thank you, members, for affording me the courtesy of making some brief comments. I apologize for coming late. We've been attending the Governor's signing ceremony for the state budget, and it threw my schedule quite off.

And I must apologize also for not being able to completely address myself to the proposal because I've not been able to review some of the relevant federal regulations and statutes. But it's quite important for me to come here today and to give you the perspective of the author of the bill.

And let me quickly say that this is a bill that had quite a history to it. This is a single bill,

presented to Governor Gray Davis at close to the end of the first year he was in office, that had a five-year genesis. This is a bill that was conceived and discussed and worked on by myself and Tom Rankin and others throughout the State of California over many, many years. Its provisions were not lightly drawn. And when we came to the point of, prior to the tenure of Governor Davis, bringing a bill to the desk of the prior governor, we put in a full year of work on the text of that bill as well.

So, what you see before you in the form of AB 60 is quite a document indeed. It is not one of those bills that is assembled in the last 30 or 60 or 90 days of the legislative session. It was vetted and thought out quite carefully.

And I must strongly second my good friend Tom Rankin's general observations on the thrust of the bill, in particular with regard to the "primarily engaged" language. What we very clearly wanted to do was to elevate to the statutory level what had been primarily regulatory prior to that time.

And let me impress on this body how important that was, for a reason that may be a little bit difficult to explain. And it is this: in the original drafts of the bill, we attempted to import a great deal of

regulatory language into the statute itself. And in the course of the legislative process, much of that regulatory language did not make it into the text of AB 60. Now, if I were a good labor attorney, I would argue that that has a certain bearing on the intent of the legislation.

But what I'd point out to you is the "primarily engaged" language, some of the most significant language ever to appear in regulatory context, survived that entire process, was embraced by the Governor of the State of California, and is part of the document in front of you today. It was the intent of the author, in fashioning that legislation, very clearly to say we are, in this legislative document, the statutory document itself, accommodating the whole question of what work is exempt and what work is not exempt in the instance where a worker is engaged in work that is both exempt and not exempt. And our accommodation, statutorily embraced, is the "primarily engaged" definition. That was the keystone compromise in that area.

The philosophy underlying that, then, would be to say that to further dilute that, in any one of a number of different mechanisms, would fly against the intent of the legislation, the accommodation was struck

in the statute, and that to further dilute the "primarily engaged" definition could severely undercut what the Legislature and the Governor saw as the way to erect a wall between clearly fully exempt occupations and those which were not.

What this means to me is, without reviewing in detail the federal legislation and in detail what the mechanisms are there, to predicate exempt status on those federal -- on those federal pieces of regulation could jeopardize the accommodation we thought we had made in the final bill itself. That is why I am here today in support of Commissioner Broad's language, which I believe does a much better job of addressing what the intent of the Legislature was with regard to how to handle the managerial exemption in general, and the "primarily engaged" definition in itself, which is one of the most crucial.

And that's the primary message I came here today to deliver. I have a little bit of time available.

COMMISSIONER DOMBROWSKI: Any questions?

(No response)

COMMISSIONER DOMBROWSKI: Thank you.

ASSEMBLYMAN KNOX: Okay. I want to thank the Commission. I want to apologize again for arriving late

and leaving early. It's a way of life that I don't particularly enjoy, but --

COMMISSIONER DOMBROWSKI: There's a couple other people in the room who would like to be able to do what you're doing too.

(Laughter)

ASSEMBLYMAN KNOX: It's a pleasure being before this body.

(Applause)

MS. PEREZ: Yeah. I am Judy Perez, with the Communication Workers of America. I spoke at one of your previous meetings. So as not to be redundant, I'll be very brief.

We are opposed to any changes in the 8-hour day and opposed to any changes in employee status that can result in a loss of their overtime pay. Our members are not managers at the companies. If they were, I would not be here today. And therefore, they should not be exempted from overtime pay for their hours worked.

Our 75,000 membership are outraged that this issue that continually attacks their overtime is ongoing. I urge you to vote down the Dombrowski language and support the Broad language.

Thank you.

MS. BERMAN: My name is Marcie Berman, and I'm here on behalf of the California Employment Lawyers Association.

I'm just going to go through the Dombrowski proposal and try to quickly explain the things about it that I think are illegal or not a good idea, even if they're not illegal. I want to say that about 90 percent of it is fine, and those parts of it, that 90 percent of it that's fine, are the parts of it that are identical to the Broad proposal, which is 100 percent fine.

Here's the first problem. If you look at the first sentence of A(1), defining the executive exemption, it says: "A person employed in an executive capacity means any employee whose duties and responsibilities involve the management of the enterprise." Well, "involve," I guess, could mean that you spend 5 percent doing it and the -- rest of the 95 percent of your time sweeping the floors. That's not okay. That violates the "primarily engaged" standard.

Now, I realize that once you go all the way down to Number (5), it talks about "primarily engaged in duties which meet the test of the exemption." Well, if I'm either an employer or an employee reading this thing on a poster in the lunchroom, I'm going to be real

confused. And there's no policy reason or logical reason to do it this way. The reasonable and logical way to do it is to have, in Number (1), say, "Whose duties and responsibilities are such that that the person is primarily engaged in the management of the enterprise." So, I'm wondering why it is this way. It's patently confusing, at best.

Moving on. Number (4), A(4), "Who customarily and regularly exercises discretionary powers." Now, we've already had discussion about the fact that this is a change from what the IWC has had in all of its wage orders since 1947. And last time I was here, I even brought you guys copies of all the Wage Order 4's from 1947 having that language. So, you've got that in your record.

Now, let me tell you what the -- you know, I understand that the retail industry's ostensible objective is to provide clarity. And it's true that the federal regulations provide a lot of verbiage, and it is helpful to everybody involved to know what things mean. So, let me tell you what the federal regulations say about that language: "A person whose work is so completely routinized that he has no discretion does not qualify for the exemption." But it doesn't tell you what

"discretion" means; it's a circular definition. That's it, that one sentence.

Let me tell you -- let me just show you how much verbiage there is in the federal regulations about discretion and independent judgment, which is what all the IWC orders since 1947 have always used for the executive exemption. It starts here, goes for almost an entire page in minuscule print, goes for another entire page in minuscule print, and another column. It's a huge definition. It's extremely helpful. It's very evenly balanced. And I don't see any policy reason to change that to something which has a one-sentence circular definition in the federal regs and is a change from what's always been done.

Okay. Here's my next problem. In A, Subsection (5), there's a list of federal regulations that are to be used to construe the executive exemption. In and amongst that list is Section 541.110. And that's the section dealing with occasional duties. Now, it seems to me patently clear that just because you sweep the floors occasionally doesn't mean that what you're doing isn't sweeping floors. Sweeping floors is a nonexempt activity. And the fact that you do it once in a while doesn't make it exempt. You know, an elephant is not a

giraffe. And just because a giraffe cruises through the forest only once a week or once a month doesn't convert that giraffe into an elephant. It's illegal. It violates AB 60. I just think it's as clear as can be.

I also want to say that if it were something that only comes up once in a while, it wouldn't -- there's no reason why it would be that important to the retail industry. But the fact that is so important, I think, is significant here. I think that something could be done once in a while, and another thing could be done once in a while, and another thing can be done once in a while, and you add all those things up that are done once in a while, and bingo, that person is suddenly exempt. You know, Monday the person could be spending 5 hours cleaning glass; Tuesday that person could be spending 5 hours cleaning inventory; Wednesday that person could be spending 5 hours checking off a bill of lading, counting up all the stuff that came in the boxes to make sure it's consistent with what was supposed to be delivered; Thursday that person could be unloading that stock for 5 hours; Friday that person could be going through the compost heap and making sure that the workers didn't throw away bananas that could still be sold. You add it up, you've got a person who's exempt all of the sudden,

because each of those things is only done once a week, so maybe that means that they're only occasional.

And I did actually do computer research to see what the courts have said that that section means. And lo and behold, there's not a single reported case that's ever interpreted it. So, I think it is subject to abuse, in just the way that I've said.

And I'm really not exaggerating, because I personally am aware of a case, a class action lawsuit against a big supermarket chain, involving produce department managers, where one of the arguments that the employer made was that an exempt duty, one of the litany of exempt duties, was, quote, "analyzing compost." And employers will make whatever arguments they can to try and bootstrap patently nonexempt duties to add up to more than 50 percent.

I just want to echo what Commissioner Broad said about this language in the *Ramirez* case. This is not faithful to the language and it's inappropriate. That language in *Ramirez* dealt with an evidentiary issue that was a narrow issue in that case. It's not something that's appropriate to even put in the regulation. And this misrepresents what the Supreme Court said. And it is what it is; it's the law. The Supreme Court made a

ruling, it's a published decision. There's no reason for the IWC to have to put that in its wage order. You're not creating law here. It exists independently from what you do. So, it's unnecessary, in any event.

With respect to the administrative exemption, other than the repeating boilerplate that I've already addressed, I don't have any comments about.

With respect to the professional exemption, I just -- I'm very concerned that the list of enumerated licensed professions that's been in California law for as long as I'm aware of is now gone.

And a statement was made that the DLSE's manual relies on these same provisions of the federal regulations that are listed in here. And that's actually not accurate. There are -- I'm just going to cite to it -- Page 104 of the Division of Labor Standards Enforcement "Policies and Interpretations Manual" of October, 1998, does list a few prescribed provisions of the federal regulations, but certainly not all the ones that are listed here. And there are some bad ones; in particular, 541.301(e), (f), and (g) talk about various kinds of workers that would absolutely not be considered exempt under current California law but are potentially exempt under the federal regulations. So, that would be

a big change, and it would be exacerbated if you take out the list of enumerated licensed professions that you have now.

And lastly, there's some language in the middle of Page 3, under Subsection (4), that I think -- well, I would say is preempted by federal law. It says that the work shall include, for example, "all work that is directly and closely related to exempt work." Actually, the federal law, in Section 541.307 of the regulations, says that for professional employees, it has to be work, quote, "essential" -- that is, quote, "an essential part of and necessarily incident to" the exempt work. And because California law is not allowed to go below the floor of federal law, under Section 218(a) of the FLSA, this would violate that. It would be preempted by federal law.

You know, I think it's a -- to say that it's confusing to pick away at the federal definition and just take some and not take all of it is -- I don't know why that would be so. Even Mr. Dombrowski's proposal takes just some, but not all. And I think here there's no reason on earth why you can't omit the federal -- the particular federal regulations that violate California law.

And that's it.

MS. HO: My name is Laura Ho. I'm from the law firm of Saperstein, Goldstein, Demchak, and Baller. We're a public interest class action law firm, and in the last few years we've been involved in many cases representing workers seeking overtime compensation. These are all misclassification cases, where the employer has improperly classified them as managerial or administrative employees when, in fact, under California law, they should be paid overtime because they are nonexempt.

I agree with everything that Marcie has said about the illegality of many of these provisions. I want to just point out two other things.

In -- under the executive exemption, A(5), there just is completely unnecessary and confusing language listed after the regulations that says, "All work that is directly and closely related to exempt work" -- that's -- I'm not saying that is -- right after that, it says, "properly viewed as a means for carrying out exempt functions." There's no reason for that language, and it's completely confusing. What does that mean, and what can it sweep in? It's just not -- not necessary, and it's not part of federal law, much less state law.

And then, under the administrative exemption, (1)B, again, that's "the performance of functions in administration of a school system or educational establishment or institution," and it goes on, "and work directly related to the academic instruction or training carried on therein." It sounds like a teacher to me. I don't know why a teacher would be exempt under the administrative exemption.

The other thing that I just want to address is the question of who would become -- who might become or who employers will try to make into managers. Like I was saying, the people that we represent in cases against -- in just some of the cases that we've worked on -- are classified -- were classified as assistant managers at Enterprise Rent-a-Car, Rent-a-Center, the furniture outlet, there are salespeople at First Plus Financial and the Money Store, here in Sacramento. And these assistant managers were working at the cash registers, washing cars, delivering furniture. Clearly, under either the federal or state law, they are -- they are not exempt.

But what the employers are going to get with this new, revised wage order, it's just an additional tool to argue why such people who are making $29,000, $30,000 a year and working 60 hours a week shouldn't be

paid any more for their work. Sometimes they're working even up to 70 hours, and they're making $29,000 a year.

So, I just want to emphasize that this is not about Macy's managers sweeping up glass. This could very well affect very low-paid workers who are working extremely long hours and not getting paid overtime.

MS. GATES: My name is Patty Gates, and I'm with the law offices of Van Bourg, Weinberg, Roger, and Rosenfeld.

And I've been here before the Commission before to testify, most recently in February, when this Commission had on its noticed agenda the topic and the definition of outside salesperson. At that time, I brought the *Ramirez* case to this Commission and asked the Commission to consider and drafted, in fact, language characterizing the holding in the *Ramirez* decision. And at that time, at the following -- if you all remember, at the following Commission meeting, members of the industry, industry lawyers, really, offered other language. And at that time, this Commission, even when the topic was outside salesperson, which is the topic of the Supreme Court decision in *Ramirez*, even at that time, this Commission decided adopting any lawyer's characterization of a holding of a Supreme Court case was

not a good idea. And the idea was -- and as a matter of fact, it was dropped at that time.

So, to actually consider, based on a business and industry lawyer's testimony before you, that this language that comes out of *Ramirez*, or that allegedly comes out of *Ramirez* --

> "The work actually performed by the employee during the course of the workweek must, first and foremost, be examined in the amount of time the employee spends on such work, together with the employer's realistic expectations and the realistic requirements of the job, shall be considered in determining whether the employee satisfies this requirement."

-- first of all, it makes this regulation into a lawyer's document and it adopts one, and that is a business lawyer's, point of view about what the *Ramirez* case says. And the *Ramirez* case, as Commissioner Broad has already pointed out, was on the narrow subject of the exemption for outside salesperson. So, to import the language or to even consider doing that now, when you're actually trying to elaborate on and define the "primarily engaged in" test, would be entirely inappropriate.

And that -- my concern in general about this

document, I support Commissioner Broad's proposal before this Commission, and I concur in what the other lawyers have testified on this panel about the legality of this proposed language. But more importantly, I feel very concerned that this regulation is a lawyer's document, not a people's document. I think that it is -- the language that's been added here is way too complicated. This Commission has to think in terms of a posted order in a workplace and the ability of a person working in a workplace to interpret that language.

Not only should this language concerning the dilution of the "primarily engaged in" test be deleted, and the "independent judgment" be brought back in, but this language that purports to summarize a Supreme Court case on another topic does not belong in here.

And finally, if you -- if this Commission decides to refer to federal regulations, the text of those regulations should be posted, just to honor those people in the workplace who try to understand their rights.

Thank you.

COMMISSIONER DOMBROWSKI: I would just like to say, on that sentence on the *Ramirez*, that I've worked very hard over the last 24 to 48 hours with the Attorney

General's Office trying to get it so that it is a fair representation, understanding that in our Statement of Basis we are also going to be referencing *Ramirez*. So, it's not like it's language that we haven't reviewed.

COMMISSIONER BROAD: We haven't voted yet, Mr. Chairman. I --

COMMISSIONER DOMBROWSKI: I'm just -- I'm not trying to make it sound -- I'm just trying to say about the sentence and where it was --

COMMISSIONER BOSCO: May I --

COMMISSIONER DOMBROWSKI: Sure.

COMMISSIONER BOSCO: I'm a little bit confused as to all the parties here, because I certainly understand when management comes up, and then Mr. Rankin and Mr. Pulaski, who, for a long time, have represented labor, but it seems like some of the other people here are not only lawyers who bring lawsuits on all this, but, in one case, a lawyer who represents all the other lawyers who bring lawsuits. So -- and then we get a complaint that this looks like a lawyer's document. Well, I mean, I have no doubt that whether it's Mr. Broad's rendition or Mr. Dombrowski's rendition or the existing regulations, that it will certainly be lawyers' documents no matter what we do.

But I am going to go back to the question I asked before. And I think maybe one of the attorneys could answer this.

Would you please give me an example of someone, a real person out there in the workplace right now, who will suddenly, if we enact Mr. Dombrowski's proposal, end up going from being an ordinary worker that's entitled to overtime to a manager who is not entitled to overtime? Can you tell me who that will be?

MS. BERMAN: Well, I can tell you that this language is subject to -- some of this language that's particularly vague and ambiguous is subject to interpretation that may well be used by employers and may well be, you know, then agreed upon by a court. I'm not going to tell you what the language is going to do.

But, yes, let me answer your question with that caveat. For example, this language that's in A(5) and in all the comparable sections that use that same verbiage, it says "work which is properly as a means for carrying out exempt functions." Okay. Now, at the last meeting, Ms. Thompson or Mr. Young used an example, which they said was what they were intending to address, of a manager who's drafting a legitimately managerial type policy and he's drafting it on a computer himself. Now,

if somebody who wasn't a manager was typing something that a manager had given that person to type, their typing time would be nonexempt time. But because the manager is doing the typing himself, he's merely using that typewriter or PC as an instrumentality to carry out that exempt function of drafting a legitimately managerial type policy.

COMMISSIONER DOMBROWSKI: But --

MS. BERMAN: Okay. Now, let me tell you that that's not a problem. That makes perfect sense.

But here, this language says -- is broad and vague enough so that it can go way beyond those kinds of situations. For example, I can easily see somebody from -- you know, a restaurant attorney, saying that the assistant manager who's spending 6 hours of the day going around and pouring coffee for customers and saying, "Would you like more coffee? How was your service?" could say, "Well, that 6 hours of time is a means for carrying out the exempt function of supervising.

COMMISSIONER DOMBROWSKI: Excuse me. Marcie, excuse me, please. That's related to the previous language, "all work that is directly and closely related to exempt work and work which is properly viewed as a means." It's a connecting phrase. And we've talked

about this. And the examples that we're talking about there are the manager doing the computer, is the manager driving to do the deposition or whatever it is. I mean, those are the situations that that is solely looking at.

MS. BERMAN: Well, then, they should say that. That's okay.

COMMISSIONER DOMBROWSKI: It's not looking at -- we are saying that, and we will be saying that in the Statement as to Basis. That is not -- there is no way anybody pouring coffee 6 hours is classified as a manager.

MS. BERMAN: But that's exactly what the attorneys for these restaurants are saying now, under current law, actually.

COMMISSIONER DOMBROWSKI: I don't care what the attorneys for restaurants are saying, because what I'm saying is when we do --

MS. BERMAN: Well, that's who drafted this.

COMMISSIONER DOMBROWSKI: -- when we do the Statement as to Basis, this is going to make it very clear that we're referring to examples that are directly and closely related to managing.

MS. BERMAN: Well, I answered your question.

COMMISSIONER BOSCO: Let me ask --

MR. PULASKI: Mr. Chairman, if I may, when the question was first asked, I had a couple of notes passed up to me from some people who are back in the room who would like to respond to that question. They're not lawyers, they're not attorneys. So I would ask them to come forward to begin to respond to that. And if you want more, we have a lot more people in the back of the room and we can create a line.

But let me say this first, and that is, isn't it ironic that we find that the people who opposed the reinstatement of daily -- daily labor -- daily overtime law in this state, the people who opposed that come forward with language that is different from that which we intended and is now part of the proposal before you for the implementation of daily overtime is indeed ironic to me.

I would like to bring forward those people.

COMMISSIONER DOMBROWSKI: Excuse me. Excuse me. I was in support of AB 60.

MR. PULASKI: Chairman, I meant the lawyers that came up, who were obviously responsible for the language, representing the proposal.

COMMISSIONER DOMBROWSKI: They're representing me.

COMMISSIONER BOSCO: I don't know if we need --

MR. RANKIN: Well, I think it's very important, because we will -- we will specifically answer your question, Mr. Bosco, about who is in danger of losing their overtime because of this change in definition of who is a manager, from practical, day-to-day experience.

MR. PULASKI: If you think it -- if you think it's an important question, then it's important for us to answer the question.

MS. BERMAN: Yeah.

COMMISSIONER BOSCO: Okay.

MS. BERMAN: And I can also give additional examples.

MR. PULASKI: Give examples. What examples?

MS. BERMAN: Well, first -- I'll give you a couple of examples. I've already mentioned them with respect to the professional exemption.

The federal regulation portions that are included in here, which are 541.301(f) and (g), and probably others, talk about people who, under current law, would not be exempt, but are given as examples of people who might be exempt under the federal law.

COMMISSIONER BROAD: Excuse me. I think Mr. Bosco wants a more generic answer. What types of people

are we talking about here? Not a theoretical example. I mean, we -- you know, who is the -- what is the range of concern? And I think that's a legitimate question.

COMMISSIONER BOSCO: Well, may I ask this too, maybe get this point over with, at least in my own mind? There was, as I understand it, an existing enumeration of some of the -- some of the professions that Mr. Dombrowski's rendition has eliminated, at least in terms of enumerating them. Is there any reason we can't maintain the enumeration of these professions?

COMMISSIONER DOMBROWSKI: No. If you want to, we can amend it and put that in.

COMMISSIONER BOSCO: Well, why don't we just do that? And that will at least eliminate that aspect of it.

COMMISSIONER DOMBROWSKI: Okay.

COMMISSIONER COLEMAN: And also, I think part of the question here too is sort of what's the overall impact of this. And I think that's sort of what we're hoping the witnesses will comment on. Is this -- is this zero or a lot?

COMMISSIONER BOSCO: We have two would-be managers here, I guess.

MR. BRANDEN: Okay. The business group was

talking about machinists -- oh, my name is Tom Branden. I'm a union rep for the Machinists Union, District Lodge 190.

Thank you.

You're talking about a machine shop and a manager doing bargaining unit work. Well, actually, it would be the opposite way around. The manager would have lead people do more managerial tasks and then be exempt from the law, because if they -- if lead people are doing 30 percent of managerial skills right now, they would then be forced to do 20 to -- 20 to 40, 50 percent more, and then be exempt. And that's what we're worried about, is not a manager doing bargaining unit work, but the opposite, our members having to do more managerial skills and then be exempt from the law.

COMMISSIONER DOMBROWSKI: Then you would qualify under the 50 percent rule. If you're then doing exempt work more than 50 percent of the time, you are a manager.

(Audience murmuring)

MR. BRANDEN: If -- right, and that's exactly the -- but they're going -- so you're asking how many more people would be brought into exemption.

COMMISSIONER DOMBROWSKI: How would they do that.

MR. BRANDEN: In one shop in Petaluma, California, we have 12 lead people. Okay. They do maybe 30 percent managerial jobs. If they were forced to do more by management -- I'm not saying this company would do that, but some companies may do that -- force them to work another 20 percent in managerial skills, so they would be exempt from the overtime.

COMMISSIONER BOSCO: But they would have to meet all the other criteria as well.

MR. BRANDEN: Well, they get -- they're making $22 an hour, so they're going -- they're over the two times minimum wage. That's -- they're making 10 percent above a journeyman, so that's --

COMMISSIONER BOSCO: But there's other standards in the law that they would have to meet.

MR. BRANDEN: If they were --

COMMISSIONER BOSCO: They wouldn't just simply then be doing the mechanical work. They would be doing management work.

MR. RANKIN: They are -- Mr. Bosco, I think a lot of people are already -- the real classification here is like assistant manager, lead person. They're already clearly doing some management work. What this definition allows is, where they may be doing, say, 55 percent

nonexempt work, now you have the ability to pick out, "Oh, this occasion plus this occasion plus this occasion, oh, that brings them up to 51 percent management work." That's the problem.

COMMISSIONER DOMBROWSKI: Okay.

COMMISSIONER BOSCO: Well, that isn't my understanding of it.

MR. RANKIN: That's exactly what it does.

MR. HUNSUCKER: Mr. Chairman, I'm Don Hunsucker. I'm president of the United Food and Commercial Workers Union, who represents the retail industry, represents truck drivers, represents poultry and meat division workers.

Let me tell you what -- and I'll tell you from an example, because I used to work in the retail industry as a clerk. Okay? In the retail industry in these large stores, and even small stores, everyone in the world is given a title. You have a department manager, you have a produce manager, you have a poultry manager, and all these individuals. Right now they get overtime. And the change in the law that you are going to do now, with some different interpretations, those people are going to lose their overtime. They're going to lose.

You're not talking about a few people. You're

talking about thousands of people. We have poultry plants right now that we have individuals that are called supervisors. They get overtime. They get overtime. Let me tell you what. Under the provisions, if we do not support or get Barry Broad's amendments to this, we're going to lose that overtime for those individuals. I just want you to remember that, because that's exactly what's going to happen.

COMMISSIONER DOMBROWSKI: Can I -- I want to clarify something here. I want to clarify something here. Both my proposal and, I believe, Barry's proposal recognize the "closely and related" duties aspect. Neither one is different in that regard. What we're trying to do in my proposal is to get some conformity in the duties that makes sense, since they are the duties that are listed in the federal and they have a history of interpretation. That's all we're trying to do. We are not changing the 51 percent. Neither of us, I think, are opening up some door to large, quote, "interpretation" of activities being classified as exempt. It just is -- I think that's a misrepresentation of both my proposal and, I believe, Barry's proposal.

MR. HUNSUCKER: Mr. -- I'd like to say one thing. Mr. Chairman, I believe the intent of both

individuals -- you may be right. But in the real world, out there in the stores or out there in the plants, who's going to interpret that but the supervisors or the companies who own them? And let me tell you what. I've worked with those companies. They see this as a major change that they can take away overtime for individuals. And let me tell you what. If they didn't believe that, they wouldn't be up here trying to change it.

COMMISSIONER DOMBROWSKI: I respectfully disagree. I'm sorry.

MR. RANKIN: If we didn't believe that, we wouldn't have all these people here.

(Applause and cheering)

COMMISSIONER BOSCO: Can I ask a question? I think one of the important points that's been raised is this question of occasional. And I'm going to characterize it -- can occasional be cumulative? In other words, my -- my understanding of what Mr. Dombrowski's intent is is to say occasional to mean that a manager can only do occasional nonexempt duties, otherwise lose the management characteristic of his or her job.

But what other people are saying here is that employers who want to improperly classify ordinary

workers as managers will give them an occasional job here, an occasional job there, an occasional job here, an occasional job there, and all these nonexempt occasions will add up to -- to an injustice, so to speak. How can we prevent that from happening?

COMMISSIONER BROAD: Well, Mr. Chairman, that's what -- that's what the statute does. It just says when that stuff gets to 50 percent, you're not exempt.

COMMISSIONER BOSCO: Well, if --

COMMISSIONER BROAD: And the federal test -- just let me -- the federal test is a primary duty test. So you're looking -- you're saying that the person is called a manager and their primary duty is managing. And so then they say, well, if you do an occasional non-managerial activity, as long as you don't do too much of it, you're still a manager. So they -- so they have a sort of mathematical equation, but it isn't our statutory equation.

COMMISSIONER BOSCO: But it's as long as you don't do too much of it --

COMMISSIONER BROAD: Right. And that's what our --

COMMISSIONER BOSCO: -- the cumulative effect --

COMMISSIONER BROAD: And that's what our

"primarily engaged" test encompasses. It's very simple. And that's what was codified.

COMMISSIONER BOSCO: But "primarily engaged" is included in Mr. Dombrowksi's proposal.

COMMISSIONER DOMBROWSKI: It's included. And let me again cite, in the federal regs -- I don't have the language right in front of me, but it is -- it is "occasional," "infrequent," "unscheduled," I believe.

COMMISSIONER BROAD: Well, the difference -- the difference is that the bootstrapping isn't there.

COMMISSIONER BOSCO: And how about "noncumulative"?

COMMISSIONER BROAD: Well, I mean, it doesn't matter. The question is, if you spend 49 percent of your time doing nonexempt work, and 5 percent of your time doing occasional duties, and 2 percent of your time doing this or that, and you get to 53 percent with those things, or 52 percent, under Mr. Dombrowski's proposal you're still exempt. And that violates the law.

MR. RANKIN: That is the problem with importing the federal stuff here, because the federal standard, the basic standard, is different. It is not "primarily engaged in." It's a primary duties test. And by trying to mix the two, you cause a problem.

COMMISSIONER BOSCO: Isn't there a way of saying that in meeting the 50 percent, you can't use the occasional time?

COMMISSIONER DOMBROWSKI: The problem, Doug -- the problem is -- and let me go back and read the "occasional" test, because it's related to the "directly and closely related," which is what I'm trying to get at here.

> "In addition to the type of work which, by its very nature, is readily identifiable as being directly and closely related to the performance of the supervisory and management duties, there is another type of work which may be considered directly and closely related to the performance of these duties. In many establishments, the proper management of a department requires the performance of a variety of occasional, infrequently recurring tasks which can not practicably be performed by the production workers and are usually performed by the executive. These small tasks, when viewed separately without regard to their relationship to the executive's overall functions, might appear to constitute nonexempt work. In

reality, they are the means of properly carrying out the employee's management functions and responsibilities in connection with men, materiel, and production."

COMMISSIONER BROAD: Well, Mr. Bosco, I think it would be appropriate to say that occasional nonexempt duties can't be counted towards exempt duties. I think that would be fine. That -- and I think that would be appropriate, if we wanted to do that. I just think it's simpler to say whatever you do that's nonexempt, it can't get over 50 percent. It's a much simpler -- it's a much simpler way of doing it, because what you're saying is that there are closely related duties, and those are the instrumentalities to carry out the job. In other words, typing your managerial report into your personal computer rather than handing a draft of it to a secretary clearly, under current California law, under what is proposed in Mr. Dombrowski's and what is proposed in mine, those are exempt duties.

It's this additional class that isn't closely related, isn't an instrumentality, is the sweeping up of broken glass, a janitorial function, is the -- you know, you heard the term "filling in." It's -- and that's what this is really about. I mean, let's get down to it.

What this is really about is the person in these retail establishments that's called an assistant manager that works there with -- alone or one or two people, and when somebody -- and we had them testify here on one of the previous iterations of this thing that when somebody's absent, one of the line workers is absent, they go fill in for them. And that's their job, to run the cash register. As Mr. Young said, when Christmas season comes and they don't want to hire extra work, it's the person who runs the cash register for, actually, 40 hours a week during Christmas. It's -- it's those people. That's what all the litigation about -- is about here, and that's what all the enforcement actions of DLSE are about, and that's what all -- this is not about class action suits and lawyers. It's about ordinary workers going to the DLSE with their claims, to try to get their overtime.

It's not about chief financial officers, it's not about CEO's that go and, you know, type something for five minutes. It's about that middle class of supervisors, lead persons, quote-unquote, "working managers" who are earning the princely sum of $1900 a month and are working 60, 70, 80 hours a week and who -- they want to figure out some way to muck up the law, make

it vague, make it unclear, cause a whole big litigation problem, so that they can reclassify those workers. That's what this is about, and that's the essential difference between Mr. Dombrowski's proposal and mine.

(Applause)

COMMISSIONER DOMBROWSKI: And I, again, respectfully disagree. All I'm trying to do is get some conformity on the duties, which is what we were starting out this.

COMMISSIONER BROAD: Mr. Chairman, what I'd like to ask at this point, if we're done with the testimony, is --

MR. RANKIN: We have one more.

COMMISSIONER BROAD: Oh, okay.

MR. JOHNSON: Well, it's an honor and a privilege to participate in this intellectual discussion.

(Laughter)

COMMISSIONER DOMBROWSKI: Give your name and organization.

MR. JOHNSON: And when the word Macy's was mentioned, of course, it touched the memory button in my brain, if there is such a thing.

MR. RANKIN: Walter Johnson. This is Walter Johnson, the executive secretary-treasurer of the San

Francisco Labor Council.

MR. JOHNSON: Oh. I was so excited about participating, I forgot to say who I was.

(Laughter and applause)

MR. JOHNSON: And as I was saying before I was interrupted --

(Laughter)

MR. JOHNSON: -- that the Macy word, of course -- for about 27 years, I represented people working at Macy's, and I very well understand all of this discussion about an executive. And, in fact, if I knew it was taking place today in this manner, I would have brought up my great brilliant piece I wrote on that subject several years ago. But I will be -- make sure that you get copies of it in there.

The real thing goes back in here, number one -- and I'm not an attorney, so I'll be brief -- and that is --

(Laughter)

MR. JOHNSON: -- in this situation, the real thing involved in this is a definition of words, and involved in this -- and as Humpty-Dumpty said -- and I wasn't there when he said it, but he said, "A word is what I choose it to mean, nothing more or nothing less.

When I say 'nice,' it means what I mean it to be." And that is the trouble with the word "executive." People try to define "executive" in a convenient manner and that can be used in a situation that becomes an obstruction to the employee's right to have overtime. And it isn't just overtime over 8 hours or something like that. It's overtime at night, when they get the premium pay, and different things of that nature that are involved, because it is an abuse of the employees' basic rights to perform their duties and to be paid and compensated on a basis that is appropriate with what they were told they were going to get when they got there and what -- fortunately, we have contracts in San Francisco that takes care of that. But you still have to get involved in that whole situation.

So, I think what you need to do -- and I could give you records of this -- to realize what is the definition of "executive" and what is the definition of "casual" and all of that, so that you get down to the issue. And as Mr. Broad has very -- pointed out in a very clear and concise manner, we're talking about making sure something's in there in a clear manner that the workers can understand too what their rights are.

That's what we're talking about here, because

what really has bothered me -- and I might take another minute or two, although Pulaski gave me a look in there -- what really has bothered me in attending these meetings is the separation of people within our society. A little while ago, we were talking about up in the snow country, which I thought, in my own words, was a snow job. But --

(Laughter)

MR. JOHNSON: -- they get involved in this situation here, and they separate the people out and say, "Well, they're this and they're this," and they're all people. And this is what your responsibility is when you're looking here, is not to try to manipulate the language and the words, but to say how are we going to take care of those people so they'll have a life that has some meaning. That is the basic reason for your being on this Commission.

(Applause)

MR. PULASKI: Mr. Chairman, final -- final words.

MR. JOHNSON: Let me go on.

COMMISSIONER DOMBROWSKI: Mr. Pulaski.

MR. PULASKI: Final words.

COMMISSIONER DOMBROWSKI: All right.

MR. JOHNSON: I'm not through yet.

(Laughter)

MR. JOHNSON: Excuse me, Art. I'm not through yet.

But the final thing is in here, that we have this basic responsibility. And they bring up 7-11, Burger King. But from my point of view, the Burger King idea does not get to the meat of the problem.

(Laughter)

MR. JOHNSON: We have to get down to the issues. And I'll be very happy to provide you with more information because I've fought the battle of executives for years. And I appreciate the fact of Mr. Broad bringing this to the point -- and bringing it to this point so it's understandable.

And I could go on more, but I'm not going to because I don't want to sound like a lawyer. And again, many thanks for being here. Thank you all for the time you're putting in. And, of course, let us hope it all comes out to suit my particular opinion.

Thank you.

(Laughter and applause)

MR. PULASKI: Final comments. The language of this proposal before us imports and imposes federal language that is weaker than the language that we have

utilized in this state in the past. It diminishes the impact, it weakens the language, and it weakens the intent of AB 60.

This proposal -- and I would suggest that you give equal discussion opportunity, which I have not heard today, to the alternative proposal by Commissioner Broad, because I consider, in the final words on behalf of workers of California, the proposal before us that you have debated is a hostile proposal to the intentions of the law and the promise of the Governor. And therefore, you ought to examine -- turn this down vigorously and examine the proposal by Commissioner Broad, which is not hostile to the intent of legislation and the promise of our Governor.

Thank you.

(Applause)

COMMISSIONER BROAD: Mr. Chairman, I think at this time it would be appropriate for the Attorney General to address the legality of your proposal and whether the Attorney General's Office believes that it is appropriate and legally defensible under our statutory obligations.

MS. STRICKLIN: Mr. Broad and commissioners, that would be -- a categorical response to whether or not

this is legal, I don't think I can give. I can give point by point on certain aspects of the proposal. Is that what you're requesting?

COMMISSIONER BROAD: Yes. That's fine. Thank you.

MS. STRICKLIN: Okay. The one point that's been discussed is the regulation 541.110. That's the "occasional" test, and that's one of the things that I would be concerned about. I don't think I can give you a definitive answer as to whether or not that would comply with AB 60 because it would depend on what task you're talking about. That regulation reads that an occasional task could very well be a directly and closely related task. In that sense, I think everyone agrees that, yes, then that particular occasional task would be something that would be considered exempt. The concern I have, though, is -- with that is that, on the other hand, occasional tasks would be way on the far side of what might be considered exempt. And the closer you get to that, you're going towards a federal standard that's a primary duties standard. And it's not a clear definition of what -- way of defining a duty. A court might very well look at that and say, "This is too vague," and for that reason throw out this portion of the regulation

because it's hard to enforce.

It might make sense -- one way you could handle that might be to put something more definitive in the Statement as to the Basis as to what you're actually talking about in terms of occasional tasks. But this is not really so descriptive as to determine whether or not it would be in compliance with AB 60 or not.

COMMISSIONER DOMBROWSKI: And let me just interject. I have no problem whatsoever with putting something into the Statement as to Basis that makes it clear that we are looking at these occasional tasks tied to "closely and directly related."

COMMISSIONER BROAD: Well, my question is, if the occasional task is a nonexempt duty, in other words, occasional task goes to time that you spend doing something, and then you call it a closely related duty, and then you call it an exempt duty, but the actual activity that you're looking at would otherwise be nonexempt.

MS. STRICKLIN: Well --

COMMISSIONER BROAD: The question is, if you do those activities, occasional activities, which, if performed at any other time, are nonexempt, and you do that in combination of other nonexempt activities more

than 50 percent of the time, do you not violate Labor Code Section 515?

MS. STRICKLIN: That's hard to answer in a vacuum because the occasional task, if it's directly and closely related -- the example given, of typing of the report -- yes, that would be exempt. And that's -- that's what --

COMMISSIONER BROAD: No, no. My question is, if it's not -- if it's not typing a report, if it's sweeping the floor.

MS. STRICKLIN: Well, I can tell you that I did some legal research too, and there's not any case that I also found out there that would -- that describes what this actually means in the real world. And so, it very well might, yes, violate 515.

COMMISSIONER DOMBROWSKI: Why is there not any case history?

MS. STRICKLIN: I don't have an answer to that.

COMMISSIONER DOMBROWSKI: Is it because -- is it because no one's ever challenged it, no one's ever used it?

MS. STRICKLIN: I would have no way of knowing that.

COMMISSIONER DOMBROWSKI: You don't know

anything.

MS. STRICKLIN: No.

COMMISSIONER BOSCO: Is there some way -- oh, go ahead. I'm sorry.

COMMISSIONER COLEMAN: Wouldn't it be true, if these nonexempt duties were performed more than 50 percent of the time, that the California statute takes care of that? Correct? If they're performing nonexempt duties more than 50 percent of the time, they're nonexempt.

MS. STRICKLIN: That's true. That's true.

COMMISSIONER COLEMAN: That's sort of the safety net, if you will, to ensuring that indeed the person is nonexempt as opposed to a manager.

MS. STRICKLIN: The problem is, when you're talking about an occasional task, I think it's a vague area. Is it exempt or isn't it exempt? Is it directly and closely related? Then, yes, it would be exempt. It's hard to -- I think the question comes up as to whether or not it would be a violation of 515(a) or not because the occasional task, in a vacuum, is hard to describe. I'm still looking for an example, really, of what an occasional task would necessarily be. If you're going to go -- take a monthly period and go back and look

to see what one employee has done over that time, and there were some occasional tasks in there, it would be easy to decide whether or not you satisfied 515(a). But prospectively, how do you know what something -- is something exempt or nonexempt if it's an occasional task? I mean, how do you determine that?

COMMISSIONER BROAD: Well, I guess the question would be along Ms. Coleman's line, that if, you know, we put something in there that in no event shall an occasional task, in combination with any other duties that are -- that could be characterized as nonexempt, may it exceed more than half the employee's work time.

COMMISSIONER BOSCO: Well, or that --

COMMISSIONER COLEMAN: Isn't that what the statute says? I mean, does that --

COMMISSIONER BOSCO: Or that occasional tasks may not accumulate to the point of --

COMMISSIONER BROAD: They don't count.

COMMISSIONER BOSCO: Right. Yeah, basically that they don't count in considering whether someone is 50 percent nonexempt.

COMMISSIONER DOMBROWSKI: The only -- the only risk you'd have there is, because we're looking at this as part of the "closely and directly related," and I --

when we -- the point is, when we get to some court case down the road, if somebody's looking at this, I want it clear that we were looking at "closely and directly related" and looking at occasional tasks as part of that "closely and directly related."

COMMISSIONER BOSCO: Well, can't we do that in the Statement of the Basis?

COMMISSIONER DOMBROWSKI: That's what I'm proposing we do in the Statement of Basis.

COMMISSIONER BROAD: Well, I don't understand what that means. That doesn't -- I don't -- I don't see what that means.

The question is, are we saying yes or no, that occasional tasks which could not -- which are activities that are not considered exempt duties, along with exempt -- with other nonexempt duties, can add up to more than 50 percent of the employee's time? Yes or no?

COMMISSIONER DOMBROWSKI: If they're directly and closely related.

COMMISSIONER BROAD: They can.

COMMISSIONER DOMBROWSKI: They would be able to.

COMMISSIONER BROAD: They would be able to. So you can --

COMMISSIONER DOMBROWSKI: But you can't have --

COMMISSIONER BROAD: Okay. So --

COMMISSIONER DOMBROWSKI: But by definition, you cannot have an occasional task be more than an occasion. It can't --

COMMISSIONER BROAD: I don't care how many occasions it is. If it adds up to 52 percent and you can characterize it as a nonexempt duty, it violates the statute on its face. I don't care what we say in the Statement of Basis.

COMMISSIONER DOMBROWSKI: Closely and directly related. And you go back to the language in there. It's managerial --

COMMISSIONER BROAD: Well, what you're saying is, you define it as closely and directly related, and therefore it automatically becomes exempt. And that's a presumption of exemption. It's all -- it's the primary duties test --

COMMISSIONER DOMBROWSKI: No, it isn't.

COMMISSIONER BROAD: -- backed right into --

COMMISSIONER DOMBROWSKI: No.

COMMISSIONER BROAD: And it's where we've been this entire time with this proposal. It is the guts of the problem.

COMMISSIONER DOMBROWSKI: Marguerite, do you

have other comments?

MS. STRICKLIN: That is -- that is a danger with the occasional task, yes. You could get there.

(Applause)

MS. STRICKLIN: But to say that -- outright whether it does or doesn't violate 515 is hard to say in a vacuum. You know, it's going to come out in a factual situation before a court, depending on what the task is. And the question is whether the IWC wants to -- wants to make a policy decision that it will allow -- it would allow the court to make that decision or whether --

COMMISSIONER BROAD: Right, whether we want to take a flyer on this one.

COMMISSIONER DOMBROWSKI: No, that's not -- Barry, that's not -- what I'm proposing is the conformity on federal. And we're arguing about "closely and directly," we're arguing about "occasional."

COMMISSIONER BROAD: I --

COMMISSIONER DOMBROWSKI: If we don't adopt it with that intention, it doesn't get challenged in a court of law ever anyway. I mean, it's a decision we then make as a policy. But as a policy matter, I think we have the obligation to do it. And if someone is going to abuse it, I am sure that the lawyers here and lawyers around

the state are going to find those employers very quickly and take them to court.

(Audience murmuring)

COMMISSIONER BROAD: So what you're saying is -- so what you're -- so what you concede, Mr. Chairman, is that your proposal invites litigation. That is the intent of it.

(Applause and cheering)

COMMISSIONER DOMBROWSKI: No. No, I am not. I am saying my proposal is trying to develop some duty conformity. Whether it brings litigation is going to be up to the situations and the specific facts.

COMMISSIONER BROAD: Okay. Mr. Chairman, what I'd like, with your indulgence, is to explain the difference between your proposal and my proposal, and then I think we should go to a vote.

COMMISSIONER DOMBROWSKI: Okay.

COMMISSIONER BROAD: My proposal and your proposal, as Ms. Thompson pointed out, a significant number of changes were made in your proposal over the last 24 hours as we intended to reach some resolution of this, and a whole lot of stuff dropped out before this morning since yesterday. And I'm very pleased about that or my proposal would differ from yours, actually, in more

than just a couple of places.

Let me just enumerate the differences, and they are few but significant.

First, in all three exemptions, it starts out by saying you must be primarily engaged in the duties which are set forth.

Second, in the executive exemption, it does not drop the exiting requirement in California law that someone exercises discretion and independent judgment. It does not go to the undefined term, just "discretionary powers."

Third, it eliminates the verbiage in the executive description coming out of *Ramirez*, or allegedly coming out of *Ramirez*, and the sort of words surrounding that that really have no place, in my view.

And it restores to the professional exemption our traditional view that, without examining the duties -- and this is actually very clear for -- it's really a very clear rule -- without examining duties, that someone who is licensed by the -- or certified by the State of California and is primarily engaged in certain enumerated professions are exempt.

And then it adds the learned -- it adds the language from the federal rules with regard to defining

the learned and artistic exemption.

COMMISSIONER DOMBROWSKI: But I agreed to amend my professional to reflect that.

COMMISSIONER BROAD: Okay. So, in other words, your professional will look like my professional.

COMMISSIONER DOMBROWSKI: Right.

COMMISSIONER BROAD: Okay. So, those are the differences, and those are the only differences.

It does include and clarifies that we are talking about directly and closely related activities. And as we've discussed, it's a rather clear rule, I think, what those kind of activities are. Those are instrumentalities that are necessary to carry out an exempt activity, typing the report, faxing something that you've just drafted, and so forth.

The differences are, in my view, narrow but very significant. And the difference is between something that invites litigation, causes an enormous amount of controversy, is removed, and we get to something that provides employers and employees clarity.

Now what I would like to commend you and your attorney on is -- and what I believe is appropriate and what I think is good about what you've done and what my work product does -- and that is it actually sets out a

definition, for the first time, of what an administrator, an executive, or a professional. We have had, since 1947, in our wage orders a description that has been interpreted but is not set out. And so this, I think, is an advantage that is worth considering, although I am perfectly pleased to just leave the wage orders exactly as they are with regard to the administrative, executive, and professional exemption. There's no particular reason to change it, because it is very settled law in this area in California. And I believe the legislative history of AB 60 would show that Section 515 was intended to codify the IWC's regulations in this area as they have evolved and been interpreted by the courts.

So, I would respectfully suggest that my fellow commissioners embrace my proposal. I believe that it's an appropriate compromise between Mr. Dombrowski's position that bridges the gap between the desire for employers for conformity of the federal -- with federal rules as they've been interpreted and working people's desire not to be exploited.

Thank you.

COMMISSIONER DOMBROWSKI: Without further comment, I'm going to make a motion for the commissioners to adopt my proposal as amended. Can I ask for a second?

COMMISSIONER COLEMAN: Second.

COMMISSIONER DOMBROWSKI: Call the roll.

MR. BARON: Dombrowski.

COMMISSIONER DOMBROWSKI: Aye.

MR. BARON: Bosco.

COMMISSIONER BOSCO: Aye.

(Audience murmuring)

MR. BARON: Broad.

COMMISSIONER BROAD: No.

MR. BARON: Coleman.

COMMISSIONER COLEMAN: Aye.

MR. BARON: Rose.

COMMISSIONER ROSE: No.

(Audience murmuring)

COMMISSIONER DOMBROWSKI: We'll move to Item 9, consideration of summaries and Statements as to the Basis for the wage orders reflecting Commission actions.

Mr. Baron.

MR. BARON: Move that language.

COMMISSIONER DOMBROWSKI: Okay. I'm going to make a motion we adopt the Item 9 language: "The IWC directs the executive officer to finalize the Statement as to the Basis and summary language in accordance with the Commission's deliberations and regulations that have

been adopted. The executive officer shall report on its completion to the Commission."

Do I have a second?

COMMISSIONER COLEMAN: Second.

COMMISSIONER DOMBROWSKI: All in favor, say "aye."

(Chorus of "ayes")

COMMISSIONER DOMBROWSKI: Anyone opposed?

COMMISSIONER BROAD: No.

COMMISSIONER DOMBROWSKI: Is that a "no" vote?

COMMISSIONER BROAD: That's a "no" vote.

MR. BARON: Item 10 is literally sitting in the notice.

COMMISSIONER DOMBROWSKI: Item 10 is consideration of whether to extend the provisions of Interim Wage Order 2000 to the effective date of proposals adopted at this hearing, pursuant to Labor Code.

Explain this thing.

MR. BARON: This is pretty much the same language that we adopted at the end of the last hearing, basically saying that our actions will take effect in -- no later than October 1, and that up until that point, that what is presently there continues in effect, other

than there were a few of the -- the references in here to (K), (L), (M), or (N) relate to some of the delineated occupations and industries, such as stables, skiing, fishing, outside sales, just to say that in any of those cases where we didn't act, that according to the terms of AB 60, that those don't continue after July 1. So that would be -- the exact language is literally sitting in your Item 10. And again, it's pretty much the same language that was adopted along with the actions the last time.

COMMISSIONER DOMBROWSKI: Do I have a motion?

COMMISSIONER BOSCO: So moved.

COMMISSIONER DOMBROWSKI: Second?

COMMISSIONER ROSE: Second.

COMMISSIONER DOMBROWSKI: All in favor, say "aye."

(Chorus of "ayes")

COMMISSIONER DOMBROWSKI: Any opposed?

(No response)

COMMISSIONER DOMBROWSKI: Adopted.

Any other business before the Commission?

Do we have a move to adjourn?

COMMISSIONER BOSCO: So moved.

COMMISSIONER DOMBROWSKI: Second?

MS. M. THOMPSON: (Not using microphone) Wait, please!

COMMISSIONER DOMBROWSKI: I'm sorry.

MS. M. THOMPSON: (Not using microphone) I just had a few things.

COMMISSIONER DOMBROWSKI: Come up, please.

MS. M. THOMPSON: My name is Mary Lou Thompson. I'm an attorney with Littler Mendelson.

COMMISSIONER DOMBROWSKI: Wait. Turn your microphone on.

MS. M. THOMPSON: I'm Mary Lou Thompson. I'm an attorney with Littler Mendelson.

I'm here representing the Turlock and Modesto irrigation districts with regard to an issue as to Wage Order 14. This is one wage order which does not include the standard exclusion of public employees that is contained in the rest of the wage orders. Everything that we know about it indicates that that was an oversight. And since you now are looking at the wage orders and adopting changes to them, we would ask that you clarify that Wage Order 14 was not -- is not intended to cover public employees, employees of special districts, municipal corporations.

MR. BARON: I guess that my -- the chair asked

me to respond. AB 60 pointedly says that the one area in Order -- the only area in Order 14 that can -- that allows us to engage in, let's say, an AB 60 process is just the issue of penalties, that, you know, anything else relative to Order 14 could not be done under this expedited process and would have to be done under a wage board process. And I must say that there was nothing -- you know, there's been no discussion of the Commission on this particular issue.

We can certainly, in the future, schedule a discussion of this issue. But I think, at this point in time, I don't think it would be -- my opinion -- I don't think it would be appropriate for the -- for the Commission to take such an action here today.

MS. M. THOMPSON: Okay. But I think my clients would be happy if you put it on the schedule to consider.

MR. BARON: Okay.

COMMISSIONER DOMBROWSKI: Commissioner Broad?

COMMISSIONER BROAD: I just -- just a quick question. These are farm workers who work for irrigation districts?

MS. M. THOMPSON: No, these -- these are the irrigation districts.

COMMISSIONER BROAD: I know, but who are the

employees you're talking about here that were -- that are somehow --

MS. M. THOMPSON: Well, there's a federal judge in Fresno who said that the employees who are involved in opening and closing the irrigation district's ditches that go through the fields that irrigate with the water provided by the irrigation district and who are employees of the district are agricultural employees who may be covered by Wage Order 14.

COMMISSIONER BROAD: So they get -- so, the irrigation districts don't want to pay them daily overtime? Is that the basic issue?

MS. M. THOMPSON: Correct. They're covered -- they're covered by collective bargaining -- memoranda of understanding, which give them overtime after 40 hours in a workweek, which is more generous than Wage Order 14 provides. But this -- the Turlock Water District was created in 1887. They have a long history of operating outside the boundaries of and uncovered by Wage Order 14. And consistently, the DLSE has said, "No, you're not; it is not the intention of the Industrial Welfare Commission." So, I would like you to make sure that your intention is clear. And my client would too.

COMMISSIONER DOMBROWSKI: Thank you.

Any other comments?

COMMISSIONER BOSCO: I feel sorry for that poor lady if she had to sit through everything that came before this, just to --

MS. M. THOMPSON: Thank you.

MR. RANKIN: Well, I'd just like to comment on this. If the employees indeed are covered by a collective bargaining agreement, I don't know why there's any problem at all. They're exempt anyway. And we always have to remember that one of the reasons employers who are covered by collective bargaining agreements don't like the Industrial Welfare Commission wage orders is because when those collective bargaining agreements expire and the employees may be on strike, under the Industrial Welfare Commission wage orders, they are obligated to continue to pay overtime.

COMMISSIONER DOMBROWSKI: Okay.

Did I hear a motion to adjourn?

COMMISSIONER ROSE: Yes, you did.

COMMISSIONER DOMBROWSKI: Did I hear a second?

COMMISSIONER ROSE: Yes, you did.

COMMISSIONER DOMBROWSKI: All in favor, say "aye."

(Chorus of "ayes")

COMMISSIONER DOMBROWSKI: All opposed?

(No response)

COMMISSIONER DOMBROWSKI: Thank you. We are adjourned.

(Thereupon, at 2:26 p.m., the public hearing was adjourned.)

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CERTIFICATE OF REPORTER/TRANSCRIBER

--o0o--

I, Cynthia M. Judy, a duly designated transcriber, do hereby declare and certify under penalty of perjury under the laws of the State of California that I transcribed the three tapes recorded at the Public Hearing of the Industrial Welfare Commission, held on June 30, 2000, in Sacramento, California, and that the foregoing pages constitute a true, accurate, and complete transcription of the aforementioned tapes, to the best of my ability.

Dated: July 7, 2000

_____

CYNTHIA M. JUDY

Reporter/Transcriber