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INDUSTRIAL WELFARE COMMISSION

Public Hearing

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State capitol, Room 4292
Sacramento, California
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Industrial Welfare Commission

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COMMISSIONER DOMBROWSKI: All right. Let’s get started here. Call the meeting to order. Industrial Welfare Commission, May 26.

If I could have a call of the roll.

MR. BARON: Bosco.

COMMISSIONER BOSCO: Here.

MR. BARON: Broad.

COMMISSIONER BROAD: Here.

MR. BARON: Coleman.

COMMISSIONER COLEMAN: Here.

MR. BARON: Dombrowski.

COMMISSIONER DOMBROWSKI: Here.

MR. BARON: And let the record show that Harold Rose is not here.

COMMISSIONER DOMBROWSKI: First item on the agenda is consideration of and public comment on the proposed amendments to Wage Orders -- oh, I’m sorry -- approval of the minutes. I’m jumping ahead of myself. That was distributed in your packets. Can I have a motion?

COMMISSIONER BROAD: So moved.
COMMISSIONER COLEMAN: Second.

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

(Chorus of "ayes")

COMMISSIONER DOMBROWSKI: Okay. The first item on the agenda is proposed amendments to Wage Orders 1 through 13. We have two proposals, one which was circulated by Commissioner Broad, and a second, which has been worked on, that was included in your packets with some proposals from the industry. What I would like to propose is that we bring up selected members on both sides to testify and walk us through what they -- what they see on these things.

So if I could get both labor -- and I'm looking to Mr. Rankin for his assistance on this -- they just received it, unfortunately, the other -- the alternative language, besides Barry's. Have you seen that or not, Tom?

MR. RANKIN: (Not using microphone) We just received the language --

COMMISSIONER DOMBROWSKI: Okay.

MR. RANKIN: (Not using microphone) -- for Wage Order 4. My understanding is the first item on the agenda deals with election procedures for other wage
orders than 4 and 5. We don’t have a proposal on that.

COMMISSIONER BROAD: Mr. Chairman? Mr. Chairman, I believe that this proposal, which was just distributed, in part deals with alternative workweek and election issues, but it deals with a whole number of other issues that are not on the agenda, haven’t been noticed to the public, and I don’t think are appropriately considered at this hearing.

COMMISSIONER DOMBROWSKI: You’re talking about --

COMMISSIONER BROAD: That’s right.

COMMISSIONER DOMBROWSKI: -- this? That Andy distributed?

COMMISSIONER BROAD: What?

COMMISSIONER DOMBROWSKI: This is what Andy distributed.

COMMISSIONER BROAD: Oh. Yeah. Oh, okay. I thought you were talking about the one from --

COMMISSIONER DOMBROWSKI: No.


COMMISSIONER DOMBROWSKI: You got that? Does that make sense?
It’s going to be a hectic day, folks.

COMMISSIONER BROAD: Okay.

COMMISSIONER DOMBROWSKI: Okay?

I would like to get the healthcare -- healthcare representatives to come forward, and I would like to see if -- why don’t I just bring them up first, and we’ll walk through this one, and then we’ll come to the second one after we go through theirs? Is that all right with everybody?

We’ll go through this one first, the one that Andy just distributed --

COMMISSIONER BROAD: Okay.

COMMISSIONER DOMBROWSKI: -- with their proposals, let them talk --

COMMISSIONER BROAD: Okay.

COMMISSIONER DOMBROWSKI: -- then we’ll bring up the other panel.

MR. MADDY: Good morning, Mr. Chairman.

COMMISSIONER DOMBROWSKI: Let me just clarify, for the commissioners, the document you have is a document that I had prepared internally with some options. And then, what you see underlined are the amendments proposed by the healthcare industry to this document.
Okay?

Mr. Maddy: Mr. Chairman, Commission members, staff, my name’s Don Maddy. I work for George Steffes, Incorporated, and I represent the California Healthcare Association, CHA, which represents about 450 organizations in California’s hospitals and large physician group organizations.

We have gone over Mr. Broad’s proposal, spent a lot of time in the -- with the industry representatives trying to estimate and understand the impacts Mr. Broad’s proposal would have in hospitals and other healthcare environments. We do not agree with a number of different proposals that have been forwarded by Mr. Broad, so we thought it best that we would come up with some alternative proposals that are on the same track and the same subject matter, but that offer different solutions.

Generally our solutions are ones that are very similar, if not identical, in many cases, to the 1993 wage orders. Prior to 1998, wage orders were adopted that -- that were specifically designed to assist with unique circumstances that are involved in the healthcare industry, unique circumstances that are involved with dealing with employee issues in a healthcare environment, where patients are a priority that need to be cared for.
There have been prior commissioners that have sat in your chairs that have had to make some decisions about healthcare employees and healthcare environments that span many years. 1993 was an amendment to a 1989 provisions, which, a good part of the ‘80’s, there was also a number of provisions -- so there’s a long history here of -- of different treatment, in effect, for the healthcare workplace that’s not -- that has not been offered to other employees. So we’re trying as best we can to deal with new ideas that are coming, like those that are presented by Commissioner Broad, and trying to deal with those in the context of what we’ve been doing for a number of years, which is following the 1993 orders.

Our understanding of AB 60 implementation is -- is that there’s a number of things that need to be done that are different in the ’93 orders. I think, for the most part -- and I would say we’ve covered most of those issues in proposals that we’ve offered -- we’ve tried to -- we’ve had some interpretation differences, maybe, with some others about exactly what AB 60 was doing in a couple of cases, but for the most part, we’ve taken the AB 60 language and incorporated it into wage order language from 1993. And that’s a result of a number of
our proposals. There are a few exceptions to that, but we believe, for the most part, ’93 orders with AB 60 implementation should be the direction of the Commission, because it’s worked for a number of years. There’s a few -- there’s a few items that may be able to be improved, but for the most part, it’s worked for -- for the industry. And we would hope that you would adopt proposals that are more akin to what we’ve prepared for today.

First of all, in the -- in the document that was passed out that says Chairman Dombrowski’s -- Chairman Dombrowski’s amendments, there’s a couple of items of concern that we even in this document, which I’ll point out, but for the most part, this changes the ’93 orders by redefining who the healthcare industry is, so that there’s a better definition. There was a -- basically, it just said “healthcare industry” in the ’93 orders. There’s been a desire to define that more narrowly, and we’ve offered something that defines it more narrowly.

There was also -- there has also been a request on the part of labor -- and I won’t speak for them -- as to what the -- what the background is on -- on their initiative, but it was basically contained in Mr. Broad’s initiative -- was that only voluntary overtime was
allowed after a 12-hour shift. So there’s no employer
input into whether employees should work past 12 hours;
it was up to the employee. We -- we have tried to
structure some modifications which address some of our
concerns. That’s Item (J).

And we still don’t -- we still don’t agree that
this should be a provision of this Commission, but we
tried to address all the different concerns that we had
with that provision. And I’ll -- I can get into that in
a moment, as to what our concerns were. We don’t agree
with it, but we know that there’s -- that there’s been a
lot of discussion that it should be a voluntary overtime
instead of mandatory.

Also, we had some language changes that had to
do with reimplementing base period wages. There were
some changes made by some healthcare organizations, even
though the Healthcare Association urged members not to do
that -- we sent a letter in October saying, “Do not
reduce pay and then go to an overtime structure, just
wait till the outcome of this Commission so that we can
try to keep our shifts in place,” but some healthcare
organizations may have reduced their base pay so that
they could have a base pay and overtime-adjusted wage.
If anyone in the healthcare industry goes back to 12-hour
shifts, then they need to re-establish that base pay to what it was before they dropped it, so that no one loses anything throughout -- through the AB 60, when it deals with 12-hour shifts.

In addition to that, we have gone back to 1993 wage orders on nearly everything, and we have a couple of -- of differences. For the most part, we think that the gains made by AB 60 that are in this document are -- are things that we can live with. They are not -- there is nothing, really, in these two sections that differ that much from -- from the ’93 orders that were in AB 60.

I’d like to just make a couple of comments. One is on alternative workweeks, Section (A). We talked to Mr. Baron about this a bit.

There’s a -- there’s a sentence in here that refers to additional payments if the regularly scheduled workdays were not adhered to. Mr. Baron has pointed out that in the elections procedures, if you elect to have so many days per week worked and so many hours per day worked, that you shouldn’t run into a problem with switching days during the week. But in the case -- if you don’t do that, if you set up a schedule that says very specifically who will work when, and you may rotate those schedules or have different menu options, that you
could be subject to having to pay time and a half for the
25th hour worked during a week.

There’s a simple solution to this, is to be
consistent with what’s in the election procedures by
amending this alternative workweek section to say that --
that, “All worked performed in excess of 12 hours per day
and any worked in excess of 8 hours on those days worked
beyond the regularly scheduled number of workdays” --
instead of just “workdays” -- “number of workdays
established by the alternative workweek agreement shall
be paid at double the employee’s regular rate of pay.”

And what that basically does is avoid any confusion that
the number of workdays is what’s being ceded. So you
will be paid extra pay after 36 hours, but you wouldn’t
be paid it after 24 hours if you had a day switch, let’s
say. So it’s the number of days. And that’s consistent
with the elections procedures allowing you to -- to
modify your schedule -- excuse me -- to modify your
schedule based on either -- on the number of days. But
there could be schedules that people set up that say, you
know, this group of people is going to work Mondays,
Wednesdays, and Fridays, this group Tuesday, Thursday,
Saturday. It could be that way, and very specifically
set up for the days. And we don’t want to have people
that set their days and those that don’t be treated
differently and have a premium pay structure that’s
different. So we would -- we would appreciate an
amendment there.

Outside of that, we’d prefer that you adopt the
longer -- the longer healthcare industry definition.
There’s a number of other folks here, a number of people
in the industry worked in a lot of different healthcare
environments to try to come up with this definition.
This is a -- this is a unified group of people that have
attempted to craft something. There’s other testimony
here that will address that, and there’s a couple of
people right here that can address that a little better
with respect to residential care and doctor office and
some other facilities that may have healthcare activities
going on. But we think the definition should be broader
so that units can work together in hospitals and that --
and that people who typically deal with patients, where
it’s difficult to just jump off a shift and -- and --
that they should also get 12-hour.

In addition to that is when we go to the
mandatory -- the no mandatory overtime provision --
that’s (J) -- our biggest problem with -- with not
allowing an employer to have an employee stay is not --
is not a rule, it’s not the rule. And we’ve heard
two examples of exceptions where employers abuse their --
their authority to have someone stay beyond
12 hours. And after 12 hours -- actually, for me it’s not
12 hours every day, but, you know, as soon as I’m ready
to go home, I want to go home -- I don’t -- I don’t think
that’s something that -- that we really object to, but
there’s -- but find there are circumstances that -- on
the other hand, there are circumstances where a patient
needs care, there’s an employee that’s late for work and
another employee -- and another employee may have to stay to
have the patient be cared for. We think this is a lot
different in the healthcare environment than it may be in
other environments where there -- where there may not be
any type of jeopardy.

But for the most part, we’re not worried about --
we’re not worried about nearly all of the people that
are in positions of working a 12-hour shift. Almost all
people that are in this position would act responsibly.
And if there was truly a need to stay and it was
expressed that there was a need to stay because of
patient care, they’d stay. We’re not -- we’re not
doubting that. But it only takes one time when the
hospital doesn’t have enough people on staff because
people could walk out the door who -- who, for whatever reason -- and it could be one person -- I mean, I’ve always -- as long as I’ve been around, no matter -- it’s not a perfect world -- there are people that, at one time or another, may decide they don’t want to stay. And they -- the -- there’s still going to be a problem that’s created by that.

So we try to have some sense of that. We try to reach agreement. We met with labor. We talked a little bit about this problem. I don’t -- I don’t think anybody doesn’t recognize there’s a problem; I just think we’re trying to figure out what the solution would be. So I don’t think it’s an easy solution to just say that, no matter what, you can walk out.

So we need to -- we need to address that. We -- we offered some language that may get to that. I don’t think we support in full that language, but -- but it’s a lot closer than it would be otherwise.

Outside of that, I think, from our standpoint, we’re prepared to answer questions.

Oh, and (K) -- I’m sorry -- (K) is also one that has two different possible solutions. There’s two -- two offered here. The second one, the one that’s underlined, “Arrangements in a secret ballot election pursuant to
this order,” we think that that is better language. I just -- it’s more of a technical item with us. We think the other language fell somewhat short, because it seems like, if someone is working 12-hour shifts now, or a group of people are working 12-hour shifts now, that you could potentially have people get a pay raise as a result of maintaining those shifts, because of that rule. And it’s a -- it’s a highly technical argument that I don’t think we want to spend a lot of time on, but we think it would be much better to adopt the language that makes it more specific, that if you dropped the shifts -- if you dropped the hourly wage rate before, it’s going to remain the way it was before you dropped them. And we’re all in favor of that.

But we -- but we think that other language in some ways could be interpreted differently. So it’s a very complicated legal analysis. So if you like the language that’s underlined and you’re okay with that, we would prefer it.

And that concludes the testimony, and we’ll be happy to answer any questions about these proposals or others. I wasn’t going to address Mr. Broad’s proposal specifically --

COMMISSIONER DOMBROWSKI: That’s fine.
MR. MADDY: -- but I can do that as well.

COMMISSIONER BROAD: Mr. Maddy, tell me about the way you get overtime after working 24 hours, that issue. I was confused by that.

MR. MADDY: Which proposal? I’m sorry.

COMMISSIONER BROAD: You mentioned early on that there was -- you guys were okay with someone who worked three 12-hour days getting overtime after 36 hours a week, but there was some way in which you got overtime after working -- you mentioned 24 hours. I just couldn’t -- I didn’t understand what you were referring to.

MR. MADDY: Well, under -- under the scenario, if you adopt an alternative workweek schedule that says -- say that you work Monday, Tuesday, Wednesday, that’s your three -- that’s your three days. Under this language, if you adopt that schedule and someone is -- someone switches to Monday, Tuesday, Thursday and the employer has anything to do with that change, whether someone -- whether one employee comes and says -- and says, “I can’t work -- I can’t work my usual Thursday; can you help find somebody to switch so that I can work -- so I can work Wednesday instead and the person -- one of the people on Wednesday can work Thursday?” If the employer is involved in that at all, according this
language, because they didn’t work the same number --
because they worked different days, they worked Monday,
Tuesday, Thursday instead of Monday, Tuesday, Wednesday,
it they would get premium pay more than you would if you
didn’t have a schedule that said you work Monday,
Tuesday, Wednesday. If you had a schedule, which you’re
allowed to do under the elections procedure, that says
your schedule is three days a week, 12 hours a day, if
that’s your schedule
-- you could set it up that way according to the
elections procedures -- then you would be treated
differently. You wouldn’t be -- you wouldn’t be subject
to that premium pay.

COMMISSIONER DOMBROWSKI: You’re talking about
Section (A) there?

MR. MADDY: Yes.

COMMISSIONER DOMBROWSKI: Where we talked about
putting in “number of.

MR. MADDY: Right.

COMMISSIONER DOMBROWSKI: “Number of” resolves
that problem.

MR. MADDY: Right. So our suggestion is “number
of workdays.”

COMMISSIONER DOMBROWSKI: Got it, okay.
MR. MADDY: And then that solves the problem.

COMMISSIONER BROAD: Well, so what that means is, that if someone says, “You work three days a week,” at six o’clock on the morning, on any day of the week, the employer can say, “Come to work today.” To create how is that “regularly scheduled” in accordance with the statute? That’s the problem -- that’s the part I have -- the problem I have with it. How can you have something “regularly scheduled” that isn’t regularly scheduled?

MR. MADDY: Well, if you -- that’s an interpretation of the statute on your part because it’s not defined in the statute, what “regularly scheduled” is. In fact, “alternative workweek schedule” is in there, and that doesn’t refer to specific days of the week. I think you’ll have a tremendous, tremendous problem is you schedule specific days of the week in an environment where people want flexibility. This is -- this is an opinion of ours.

COMMISSIONER DOMBROWSKI: Right. Yeah, I’m sympathetic to their position, Barry. I mean, as you and I have talked, I mean --

COMMISSIONER BROAD: Right.

COMMISSIONER DOMBROWSKI: -- if you’re going to try to set this thing up, you’ve got to -- you’ve got to
leave some flexibility in there.

COMMISSIONER BROAD: Right.

COMMISSIONER DOMBROWSKI: You can’t -- you can’t specifically --

COMMISSIONER BROAD: Which is why I had proposed that, by agreement with the employer, the employee could switch, in my proposal.

MR. MADDY: We have that proposal, but --

COMMISSIONER BROAD: What’s wrong with that?

MR. MADDY: We have that proposal, but in this proposal, if they switch, they have to be paid more, in either case. We’re against your proposal, by the way, but for technical --

COMMISSIONER BROAD: Well, it says “without” -- it says “without incurring” --

MR. MADDY: -- for technical purposes. “Number of workdays” is consistent with the elections procedure and it treats -- there’s disparate treatment between people based on the way they set up their schedules. That’s not equitable. You’re raising a different issue than what I’m raising here.

COMMISSIONER BROAD: Well, what -- well, I --

that’s possible.

MR. MADDY: Right. But if “number of” --
COMMISSIONER BROAD: But if the -- no -- if the schedule says you work -- you’re going to work four 10’s and you’re going to work Monday, Tuesday, Wednesday, and Thursday, and the employer comes and says, you know, “Can we switch it around, if it’s okay with you, to a Friday instead, and you’re going to switch to another employee,” my proposal is saying that could be done without incurring any change in cost to the employer in terms of overtime. There would be no -- it would be part of the regular schedule.

It’s just that it -- that I do not understand, conceptually, how you can have a regularly scheduled alternative workweek in which all you know is that you are working so many days of so many hours. Well, there’s nothing -- it could be totally and completely irregular.

MR. MADDY: Well --

COMMISSIONER DOMBROWSKI: Let me just interject. In our “Statement as to the Basis” for the interim wage order -- I believe this is right -- we have a sentence in there that says, in our election procedures, the actual days worked within that alternative workweek schedule need not be specified.

COMMISSIONER BROAD: I -- I understand that. I just don’t think it’s consistent with the statute. And
it will be unworkable, because what it does is it
creates, in effect, a form of on-call employment. And I
don’t see how on-call employment can be “regularly
scheduled.”

MR. MADDY: Well -- and I know people that have
both types of schedules. My brother-in-law is a police
officer here in town, and he has specific days and he’s
locked into those days for six months. According to this
proposal -- or, actually, according to this proposal that
we’re agreeing to, you are locked in for a year.
Somebody changes their vacation. What do you do?
Somebody wants to change their schedule. You have to pay
premium pay to change somebody’s schedule.

You’re saying it always has to be voluntary. I
don’t -- I don’t disagree that calling someone at six
o’clock in the morning and completely changing their
world is not a good thing. I don’t think that the
employment -- I don’t think the employers want to do that
to employees. You can’t -- but you can’t create an
entire workplace environment that assumes the worst at
every single step of the way, because you can do that and
then you will get the worst. You’ll have employees that
can’t change anything for a year. That’s where we
disagree. We think that employees need to have a chance
to change, but sometimes employers need a chance to change. We don’t think that’s unreasonable.

This locks in schedules for a year. There’s a lot of ways you could structure your schedule. You could have people for three months or one month work Monday, Tuesday, and Wednesday, and then they can switch to Thursday, Friday, Saturday so -- so people don’t have to work the weekends all the time. I agree with that. But there’s a point where somebody may have to replace the other person.

In the police --

COMMISSIONER BROAD: Well, see, I don’t disagree with you, and I think that’s a reasonable point. But I -- I also think that given the way the healthcare industry works and the problems that you’ve had with labor issues in the healthcare industry, that -- that it’s reasonable to protect against the worst while giving employers the flexibility that they need, because I believe that there will be situations in which, you know, it’ll be any number of hours up to 12 on any days of the week that we pick. And the notice that the employee will get will be twenty minutes. And that is not a “regularly scheduled” workweek.

Now, can we construct something -- which was my
effort to do -- that says if people want to switch
around, one day for the next, by mutual consent, that’s
fine. You know, I -- I even think we can probably
construct that says, you know, for business necessity on
a nonrecurring basis, if an employer wants to switch
somebody around, that’s fine. But people expect to go to
work on certain days. That’s normally how people go to
work, I mean, right?

MR. MADDY: Well, if you want me --

COMMISSIONER BROAD: They don’t expect --

MR. MADDY: If you want me to respond, I say,
yes, people to go to work on days. But your proposal did
not try to address exceptions. Your proposal is
sweeping. Most of your proposals in here are very
sweeping in their lack of flexibility for the workplace,
for both employees and employers, because you’re
presuming when you write them, in large part, the problem
that happens occasionally as opposed to the situation
that’s going on every day.

And we -- we -- you know, we tried to think of
ways to amend these and we tried to think of ways to come
back, but they’re very sweeping. And we have to have at
least some sense of workplace flexibility without the
presumption that everybody is trying to put one over on
the other person.

You know, we -- there’s a lot of aspects of your proposal that put a third party in between people. You know, I would think the goal should be for employers and employees to communicate better with each other, as opposed to always trying to figure out a way to have them be able to communicate through a third party. You know, this is -- this is a thread that runs throughout this. And we need to try to have open communication when it works.

On -- on the elections, for example, what if five -- there’s five employees and one employer in a health clinic, they want to go to alternative workweeks, you’ve got to get a neutral third party. What if you -- what if you’re in Crescent City? So, you know, are you going to hire somebody that’s -- that’s going to be qualified by the Labor Commissioner to come in and arbitrate. I mean, everybody’s -- and you have to have a secret ballot, you know. Everybody stands there and says, “Hey, we all want an alternative workweek.”

COMMISSIONER BROAD: I agree with you. I actually agree with you. And what I’ve suggested --

MR. MADDY: There’s a lot of problems with these things.
COMMISSIONER BROAD: Well, let me just see whether, then, this change in language is okay for you. Rather than say, “The employer shall select a neutral third party to conduct the election from a list maintained by the Labor Commissioner of approved neutral third-party organizations,” it was to say, “Only on a complaint by an affected employee and after an investigation by the Labor Commissioner, the Labor Commission may require the employer to select a neutral third party to conduct the election”? Does that solve that problem?

MR. MADDY: Well, we spent -- we spent about five or six hours talking to labor representatives, and I thought it was very productive in a couple of senses. We did -- we figured out where we disagreed, in large part, but we -- but we did figure that when you assume the worst or you assume the best, it doesn’t always work out. And this is another situation. I mean, there’s -- there’s -- 80 percent of the population is in 11 counties in the State of California, 20 percent is in 48 counties. You’ve got to find -- you’ve got to find -- for the people that are just simply trying to have the employer and employee work out a schedule that’s allowed by law, you’ve got to go through hoops and loops, and you’ve got
to pay money. And it’s not quite there.

I mean, if there’s -- you know, if we’re going
to have more discussions on this and try to come up with
a solution, that’s -- but about the half the proposal,
you know, we didn’t -- we couldn’t agree on because of
details of it. About half, you know, we could say, well,
logically, in most cases it’ll work. But most cases --
most cases is not what we’re after here. We can’t -- we
can’t have everybody go down a pathway that is only
preserved -- we’re only trying to enforce something
that’s going wrong for a few.

COMMISSIONER BROAD: Well, that’s generally how
the law works. But --

MR. MADDY: Well, and that’s --

COMMISSIONER BROAD: -- my question for you is --

MR. MADDY: -- and that’s unfortunate sometimes.

COMMISSIONER BROAD: You do believe that
elections in the United States generally should be held
in a neutral atmosphere.

MR. MADDY: Absolutely.

COMMISSIONER BROAD: And that it’s not -- and
that it’s not inappropriate for -- in circumstances where
there is an argument that is investigated and it’s
determined that there is not a neutral atmosphere, that a neutral conduct the election, if -- if -- I just think that it’s sort of standard red-white-and-blue Americanism to believe that elections should be free from corruption.

MR. MADDY: Well, you know, if you’re trying to put that into my mouth -- you know, if you’re trying to put that I believe in corruption in my mouth, you know, you’re -- you’re going down the wrong path.

I’m just talking about five people -- five people --

COMMISSIONER BROAD: Um-hmm.

MR. MADDY: -- five employees and employer.

They all get along. They just want to change their schedule. According to the law, they can’t do it without having a secret ballot. They can’t raise their hand; it’s got to have a secret ballot. They can’t just agree, they can’t just sit around and agree; they have to get an arbiter to come in and make sure that they were all thinking straight or whatever they’re supposed to be doing. I mean, it’s just -- you know, to me there’s --

COMMISSIONER BROAD: Well, that pesky secret ballot thing is in AB 60.

MR. MADDY: I know. And we’re -- we’re okay
with it, because we know you’ve got big -- you’ve got big situations as well as small. But you go way beyond that. We’re fine with two-thirds vote, we’re fine with secret ballot. You know, we’re okay with all that. We’re okay with AB 60 as far as these rules go, because it’s the law. So we’re going to be okay with that part.

But when you go way beyond that in a regulation, it’s way beyond -- it’s way beyond what the Legislature viewed as where they wanted to go. And we’ve talked very specifically about the problems that you create. I know what you’re saying. You’ve got a couple situations that are bad and you -- and you’ve seen them, and you want to address them. I don’t -- I don’t disagree with that. You just -- but you’re going to put that onto everybody to go through a lot of bureaucratic hoops and loops to get there. I think -- I think there’s other solutions that could be worked out. We’re not going to be able to do them today, but I think there’s other solutions that can be worked out.

COMMISSIONER BROAD: Thank you.

MR. MADDY: Thanks, Barry.

COMMISSIONER DOMBROWSKI: Any other questions?

(No response)

COMMISSIONER DOMBROWSKI: Any other comments
that you want to make?

MS. MESSER: Yes. Kerry Rodriguez Messer, with the California Association of Health Facilities. And I wanted to address the definitions that Mr. Maddy has already made reference to, the two different definitions of the healthcare industry.

And we are supportive of the second, in that we think it is more proscriptive than descriptive about the type of environments in which health and preventive programs are administered.

COMMISSIONER DOMBROWSKI: Let me -- let me state, since it’s the proposal I circulated for comment, that I would -- that I would amend this proposal to incorporate the underlined sections that were suggested by the healthcare industry, so -- and also with the inclusion of the word “number of workdays” in Section (A), so just so that’s -- so everybody understands what we’re looking at here.

MS. MESSER: Any questions?

(No response)

MS. REES:: Kathy Rees, representing the California Assisted Living Facilities Association. Our facilities are typically licensed by the Department of Social Services. 365 days a year we staff. We primarily
provide care for the frail elderly population.

I’d just like to address one point that maybe hasn’t been dwelt on so dramatically.

We support the definition that Mr. Dombrowski just referred to, and that certainly Mr. Maddy was describing.

In the course of all these discussions, the very people that we care for we cannot lose sight of. I don’t know how many of you have walked in the shoes of having parents in these situations or parents in acute-care settings, but I’ll tell you, it’s a whole lot easier to work with their care and work within a framework when you’re dealing with two people who are their primary caregivers a day than when you’re dealing with multiple staff. And so, from the standpoint of efficiency, credibility, continuity, I strongly urge, for the -- for both the patients’ circumstance as well as for the express desire of most of our employees, to have this flexibility is very, very critical to the kind of model of care that we provide.

Thank you.

COMMISSIONER BROAD: Can I just ask a question –

COMMISSIONER DOMBROWSKI: Absolutely.
COMMISSIONER BROAD: -- about this definition of healthcare industry? It says, “For purposes of this order, the . . . ‘health care industry’ is intended to cover, but is not limited to, employees who work at or for facilities or organizations that provide health care services.” If it’s not limited to it, what are the -- what does the unlimited part refer to? What industry -- what does “not limited” mean?

MR. MADDY: Richard?

MR. SIMMONS: The objective here was to --

MR. MADDY: Identify yourself.

MR. SIMMONS: I’m sorry. Richard Simmons, from Sheppard, Mullin, Richter and Hampton, here to represent the California Healthcare Association.

Mr. Broad, the objective in that definition was to make sure that issues were put to rest in terms of the broad scope of the healthcare industry. And the idea was to identify in practical terms those facilities and entities that readily came to mind, without suggesting that there could be no other entities in the healthcare industry that would also be part of the healthcare industry.

COMMISSIONER BROAD: So “an organization or facility that indirectly provides healthcare” would mean
any workplace in the State of California where somebody
hands out a Bandaid, by what I -- how I read that.

MR. SIMMONS: Well, it would only be within the
purview of this order. I think the -- the general rule
has always been that when you have a more specific order
that deals with an industry specifically, then that
situation will not even be examined under Wage Orders 4
or 5, that would instead be examined under the applicable
wage order, like Wage Order 7 if it was a retail
environment, Wage Order 1 if it was in a manufacturing
environment, something like that.

So, I don’t think that this language lends
itself to that potential problem.

COMMISSIONER BROAD: Well, isn’t this -- this is
a proposal for Wage Order 4 and 5, correct?

MR. SIMMONS: Correct.

COMMISSIONER BROAD: Okay. Well, Wage Order 4
crosses all those lines because it’s an occupational wage
order.

MR. SIMMONS: Well, in reality, I think Wage
Order 4 would only apply, again, in those occupations
that are not governed by a specific industry-wide wage
order.

COMMISSIONER BROAD: Okay. And then it says the
facility -- then they -- it talks about employees who
work in “ancillary fields.” What are “ancillary fields”?
Are we back to the janitors and the security guards at
the hospital with this? Is that intended to include
every employee that works at a hospital?

MR. SIMMONS: Well, I -- I do think -- I don’t
know that I could give you an all-inclusive definition of
the ancillary fields --

MR. MADDY: Why don’t we let Tom -- Tom, you
want to address that?

MR. LUEVANO: Tom Luevano, chief labor and
employee relations officer for Sutter Health.

Commissioner Broad, from my perspective, it does
intend to include all classifications within healthcare.
We do have employees who work 12-hour work shifts who
work in our environmental services unit, who also work in
the plant operations and maintenance unit, who work in
the food service unit. It’s not limited to, as
previously defined, direct patient caregivers. We have a
number of units.

Our business office is an example. When I was
looking at this language, I was trying to determine
whether or not it would cover our central billing office
staff, who do work 12-hour workdays. And from my
perspective, it would cover -- I’m hoping that it would cover all classifications.

COMMISSIONER BROAD: So it would cover the secretary that works for your lobbying organization in downtown Sacramento that has no patients coming to it.

MR. LUEVANO: I -- I don’t have a -- I don’t work for a lobbying organization --

COMMISSIONER BROAD: Whatever. And that means it applies to all the employees in the steam plant, for example.

MR. LUEVANO: If you’re talking about plant operations and maintenance --

COMMISSIONER BROAD: Yeah.

MR. LUEVANO: -- Commissioner Broad, you’re correct.

COMMISSIONER BROAD: Gardeners.

MR. LUEVANO: If we had gardeners as a classification and if they elected to work 12-hour workdays, you’re correct.

COMMISSIONER BROAD: How do you square that with the statute that -- if that’s the case, we could simply create 12-hour days for every single employee in the state. There’s no -- there’s no rational distinction between a gardener at a hospital and a gardener at any
other place of business.

MR. LUEVANO: Commissioner Broad, I -- quite honestly, and I don’t mean to be disparaging -- I’m not concerned about other industries. I’m really only concerned about the healthcare industry and what we have done for the last twenty to twenty-five years.

I’ve been in this business for almost twenty-one years. I’ve had alternative work schedules in this industry well before we had any changes to the wage orders. In southern California, we were one of the first healthcare facilities to do alternative work schedules, doing what you dislike, which was the reduced rate. But that was the only way that we could accommodate the request of the employees.

And so --

COMMISSIONER BROAD: Tom, I --

MR. MADDY: Could I interrupt for a sec? I’m sorry, but if the concern is that we’ve limited -- that we’ve not limited enough employees, where it says “but is not limited to employees,” we’ll take that out. We’ll take that out. We don’t want to -- we don’t want to take out the list of healthcare -- places where healthcare is happening, because we gave a list and there could be other places. But we’ll take that out.
COMMISSIONER BROAD: Now, let ask another question. Ambulance drivers are under Order 9, transportation. They are not under Order 4 or 5 now. Do you intend to switch them from the transportation wage order to this order?

MR. LUEVANO: I can’t answer that. I don’t -- we don’t -- we don’t employ ambulance drivers.

MR. MADDY: Maybe Mr. --

COMMISSIONER BROAD: Ambulance --

MR. MADDY: Mr. Simmons might want to answer that.

MR. SIMMONS: Mr. Broad, if -- if an ambulance company were covered by Wage Order 9, then it is true that its driver would be governed by Wage Order 9. But if a hospital were to directly employ an ambulance driver, then the ambulance driver, like all other employees of the hospital, would be governed by Wage Order 5.

And that is why there has always been historically a provision in Wage Order 5 that addressed ambulance drivers in the past.

COMMISSIONER BROAD: Okay. Thank you. But let me just ask one more question. What’s a “dispensary”? I mean, obviously that’s a term of art.
MR. MADDY: Tom, do you want to talk about why we put “dispensary” in there, or Richard? Anybody want to answer it?

MR. LUEVANO: Quite honestly, having -- and I apologize to the group -- I got this just about ten minutes before, and probably at the same time you did, so I’m looking at this -- I would have to -- I would have to defer --

COMMISSIONER DOMBROWSKI: It’s a pharmacy, isn’t it?

MR. LUEVANO: Yeah, well --

COMMISSIONER DOMBROWSKI: In-store hospital pharmacy.

MR. LUEVANO: -- if you -- by definition, if you’re saying dispensary was a pharmacy, then we could substitute the word “pharmacy.”

MR. MADDY: This was the work of a number of people that put input into this definition, so --

MR. LUEVANO: I mean, we have -- we have -- we have pharmacies that are centrally located that, by definition, we would say they are pharmacies. We have dispensaries, which are not full-service pharmacies, that are on the units, where there’s a limited amount of medications for patients. That I would constitute as a
dispensary. But if this is intended to cover pharmacies, all-inclusive, then my recommendation would be -- it would be amended. But I’m going to leave that up to whoever’s drafting it.

MR. MADDY: Well, it -- I don’t -- you know, if someone here that wanted that in that represents one of the groups --

COMMISSIONER DOMBROWSKI: Dispensaries is a term, I think, that’s in the industry.

MR. MADDY: Okay. Questions?

COMMISSIONER DOMBROWSKI: Commissioner Bosco.

COMMISSIONER BOSCO: Could I ask, under the existing orders, how is the healthcare industry defined? And does this broaden it or make it more narrow?

MR. SIMMONS: Commissioner Bosco, the term is not itself directly defined in the wage orders. When the healthcare industry approached the Commission back in 1992 and 1993 to request modifications, there was at that time no attempt to define healthcare industry. It was simply a declaration as the intended breadth of those 1993 amendments in the petition that was filed.

Because confusion has existed since then as to what the term “healthcare industry” really does encompass, we thought it best actually to define it now.
But this would be the first actual definition within any wage order, to my knowledge.

COMMISSIONER BOSCO: So, in other words, up till now, we've been operating under no definition at all, and this is the first attempt to kind of decide the parameters of this industry.

And also, does this include -- I've gotten like 200 calls from veterinarians -- is this -- are they part of the healthcare industry now? And how do they fit into this definition, because I don't notice "human" in here as a limiting factor?

MR. SIMMONS: Would you like them to be included?

COMMISSIONER BOSCO: Well, I'm asking if they are included. I -- my vet would like to be.

MR. MADDY: They can be included.

COMMISSIONER BOSCO: No. I mean, in all seriousness, that's a big industry, and for one reason or another, they all are impeaching the Commission to do something about their situation. And is this -- are they included in this definition?

MR. SIMMONS: I think they should be. And it may be beneficial to specifically identify them, if the Commission deems it appropriate.
MR. MADDY: Right. I guess it would be possible that the Business and Professions Code could have a different definition of “healthcare” that may exclude them, so we should probably list them if we want to.

MS. RODRIGUEZ-MESSER: Mr. Bosco, I would also just sort of clarify with regard to your question. The healthcare industry has changed a lot, and because there wasn’t a firm previous definition -- sometimes it was broader than we thought it ought to be, sometimes it was narrower than it ought to be -- the industry I represent basically is that part of the healthcare continuum that used to be considered the intermediate care facility, of nursing homes. And now it’s called assisted living, and it’s licensed by the Department of Social Services instead of Health Services. But we still provide various levels of healthcare there, and we do have 365 days, and we do have frail elderly and a lot of different needs.

So, from our perspective, it is very critical that there not be any ambiguity about whether or not residential care facilities for the elderly are included. It’s -- it’s most critical.

COMMISSIONER BOSCO: Well, this would clearly cover home healthcare --

MS. MESSER: Right.
COMMISSIONER BOSCO: -- nursing homes --

MS. MESSER: Yes. And so much healthcare is moving into the home and out of hospitals. So there’s really a need for this sort of clarification.

COMMISSIONER BOSCO: Now everybody’s going to want to write their own version here, I can tell that.

MS. MESSER: The -- the other -- the other comment I would make is, since there have been some allusions to AB 60, the only objection that I, and perhaps my clients, have to AB 60 and its passage is that the Legislature exempted themselves, and our hours are set by theirs. So --

COMMISSIONER BOSCO: Well, that’s not uncommon. I could point out about six or seven different times that that happens.

All right. So, I guess the answer to my question is that we’re dealing now for the first time with defining this industry, how broad it is, how narrow it is, and whether it includes animals.

MR. MADDY: Yes, Mr. Bosco.

COMMISSIONER BOSCO: Okay.

COMMISSIONER DOMBROWSKI: Any other questions?

(No response)

COMMISSIONER DOMBROWSKI: Other witnesses in
support, if you could -- unless you have something new, just identify yourself, your affiliation, and your support.

MR. ARNOLD: Michael Arnold, representing the California Dialysis Council, a statewide association of - - of dialysis facilities.

Obviously the issue is in -- in some flux. Just hoping that dialysis facilities, under whatever definition you come up with, are permitted to have a -- a 12-hour day.

In dialysis, it’s a -- it’s a situation where it’s best for the employees, for the employer, and most importantly, for the patients, because dialysis patients dialyze three times a week for three or four hours a day. Our dialysis facilities usually run two 12-hour shifts. One starts at six a.m. in the morning and finishes at six p.m. The other shift starts at nine a.m. and finishes at nine p.m. This accommodates the needs of the patients, of the employees, and of the employer.

So we want to just make sure we go on record as asking that dialysis facilities are given the ability to have the 12-hour day.

COMMISSIONER BROAD: Mr. Arnold, other than adding dialysis clinics, you have no other issues with
regard to the proposal?

MR. ARNOLD: Mr. Broad, I think we can live with any other issues that -- that -- I’m sorry -- with any other language that all the other employer community can live with. We just wish to have ourselves included as the -- as having the ability to have the 12-hour day.

COMMISSIONER BROAD: Yeah, I agree. I agree that you should be included.

MR. ARNOLD: Thank you, sir.

MS. KOWALEWSKI: Denyne Kowalewski, representing the California Association for Health Services at Home.

We agree with the 12-hour workday. However, where we have difficulty is that our members represent home health and hospice clients, and we have difficulty with the term “regularly scheduled.” Our workers go out to homes, and we don’t know what we’re going to expect from day to day. We are intending to give the employees a regularly scheduled workday, but they may show up on a Tuesday and the patient has been sent to the hospital or will be sent mid-shift. And there’s no flexibility for an alternative work schedule.

And I guess one of the things that CAHSAH was looking at is one of the options that employees could vote for is a flexible work schedule, that is --
COMMISSIONER DOMBROWSKI: Did we not -- we just talked about "number of" days, earlier in the discussion. Does that -- doesn't that address your issue?

MS. KOWALEWSKI: No, it does not address the issue.

COMMISSIONER DOMBROWSKI: Why is that?

MS. KOWALEWSKI: Because you -- we may have four days, but, again, an employee may show up to a home on their second day and the patient has been discharged or has gone to a hospital that day.

Holly Swiger, from Vitas Healthcare, can add more information to that here.

COMMISSIONER BROAD: Well, let me just ask this question, though. I mean, that just makes them sort of a standard worker. You don’t need an alternative workweek. They show up to work and there’s no work to do, the employer can choose to send them home and incur no additional cost. So I’m -- I’m kind of confused.

MS. SWIGER: Well -- my name is Holly Swiger, and I’m actually here with Vitas and also the California Hospice and Palliative Care Association.

What’s a little different when you work in community-based care, home health and hospice, is -- I don’t like to say this, being both in the -- being in the
shoes of what brought me here as a nurse to hospice, but
then as an employer too -- the employer is a little bit
less in control in this case.

The law actually mandates that our team manages
the patient and decides what care to go in and when. So
it’s not like they have a shift where they hand over the
care to another person. They’re responsible. We have
on-call staff to handle emergencies and that, but Monday
through Friday, they’re responsible for the care needs of
that patient and family. And it may be that they need to
have dialogue with the family in the evening. So trying
to coordinate their time and only scheduling -- they
schedule their own time, so they work seven days during
the -- seven hours during the day and they expect to do
an hour of care at night, and they can’t reach that
family member, or that family member can’t talk. Now
they only get paid seven hours, under the current wage
scale.

So we --

COMMISSIONER DOMBROWSKI: Well, let me -- let me
just -- I mean, we have had a lot of discussion on this
issue for the last six months, and, I mean, there are
just some things we can’t do. Section 511(a), AB 60, has
termed “regularly scheduled alternative workweek” --
that’s in the statute, and we can’t change that. So, I mean, I can appreciate your problem, but our hands are tied.

MS. SWIGER: The other issue that we’d just like to speak to is the limitation on your proposal, as I understand it, Barry, to the licensed and certified.

Again, I think I mentioned this previously. We have people that are master’s and doctoral-prepared, but they aren’t necessarily licensed and certified, and are actually more educated in the area. We’d like it -- if we’re looking at the healthcare proposal as presented here earlier by the Healthcare Association, we support that as it being broader to include those.

COMMISSIONER BROAD: Okay. I would just say that if you’re talking about people that have, you know, Ph.D.’s and master’s degrees in professions, that they would be exempt from overtime as professional employees. In other words, if -- I mean, if you’re talking about, say, a licensed psychologist or something that goes and visits someone, they’re a professional. I -- so I’m not --

MS. SWIGER: Maybe I’m confused, then. Would chaplains -- I know -- I know that’s always an issue here.
COMMISSIONER BROAD: I -- I would ask you to talk to the people from the Labor Commissioner’s office. I’m not sure --

MS. SWIGER: Okay.

COMMISSIONER BROAD: -- how religious professionals are dealt with. But my guess is that priests, rabbis, ministers are not -- are exempt from overtime. But I -- I could be wrong, but that -- I think we might ask for some clarification. That issue has not arisen --

MS. SWIGER: Okay.

COMMISSIONER BROAD: -- in the -- before, but, you know, it seems like there’s something every minute here.

COMMISSIONER DOMBROWSKI: Well, let’s get -- I mean, you can do that, to the Department of Labor.

MS. SWIGER: Thank you.

COMMISSIONER DOMBROWSKI: Robyn.

MS. BLACK: Mr. Chairman, members, Robyn Black, with Aaron Read and Associates, on behalf of California Society for Respiratory Care.

Mr. Chairman, Mr. Broad, and the members, as you know, the 12-hour shifts is extremely important to our members, and as opposed to their representative telling
you their stories this morning, I’d like to introduce to you this morning Randy Clark, who is the president of the California Respiratory Care Therapists.

MR. CLARK: Thank you, Robyn.

Mr. Chair, Mr. Broad, and commissioners, what I’d like to say is we don’t want to pick the proposal apart, and certainly don’t want to pick this brand-new proposal -- I just looked at it -- apart. What we’d like to say, from the 17,000 members of the society, is we appreciate the efforts of this Commission, who are going to make some sense out of all these controversial issues.

And we especially want to thank Mr. Broad personally for taking our phone calls and spending the time and extending to us every professional courtesy available that he has.

And we want to tell you that we trust that the final solution will be fair and just and allow the flexibility for employees and employers alike, and that the appropriateness of whatever is decided at the end of this day or at the end of another meeting is going to be appreciated.

So, on behalf of the society, we give you 17,000 thank yous and 17,000 “we appreciate the work you’re doing.”
Thank you.

MS. BLACK: Mr. Chairman, if I may add too, I’d like to also thank the members of the Commission, and in particular Mr. Broad and Mr. Dombrowski, for a tremendous effort. For something that is supposed to be a part-time job, this is a full-time job, and this Commission has been very dedicated.

And, Mr. Dombrowski, I will remind you the best title in the world is “former chair of the IWC.” So, good luck.

MS. LAUBACHER: Cindy Laubacher, on behalf of the California Veterinary Medical Association. I’d like to thank Commissioner Bosco for raising the issue with regard to veterinary hospitals.

We would, in fact, argue that we are very -- very much just like -- we run just like a human hospital except we deal with people’s family pets instead of their family members. Our facilities -- our staff -- our facilities are comprised of regular offices as well as surgical centers. Our employees that we are seeking to have included in the provisions of this exemption do everything from insert IV’s to provide chemotherapy to ultrasounds to hip replacement surgeries. It all operates very similar, under similar circumstances. We
operate in emergency conditions. We have staff at 12-hour and 24-hour hospitals that oftentimes have to, by virtue of the number of patients in the facility at any given time, have to work beyond an 8- or even 10-hour day. And it’s the employees who are seeking this.

We, in a -- in a veterinary hospital, we operate on much different margins. We’re much smaller. We have much smaller staff to work with. And so, it’s more difficult for us, when we run into situations, as one of our facilities did last weekend, where, Friday night, they’re looking at having -- at fifty animals that they have to provide care for, and -- and trying to find the staff to work beyond that 8 hours and be able to afford that, it’s very difficult for them. So, we would appreciate inclusion in the definition of a licensed healthcare facility.

Thank you.

MR. SKOIEN: Hi. I’m Charles Skoien, representing Community Residence Care Facilities of California. We represent about 2,500 members. There’s about 12,000 facilities in the State of California. Eighty percent of those are mom-and-pops, six beds and under, with a reimbursement of $27 a day.

We recommended something on definition to make
sure that our CFE’s are residence care facilities -- or Community Care Act is a part of the definition, which is not in the original thing.

Yet we’d like to retain the 1993 amendments as to the 80 hours, 14-day period. Also, it relates to alternate workweek, 3(K). And then we basically would love to work with your Commission and the Department of Labor to put out a -- a booklet for our industry only, which is a federal government booklet composed -- that the University of Michigan put out that we’d cooperate. So our people are educated and informed, so -- actually, there was just this thing in California about -- in the last fifteen months, 45 percent of the facilities were out of compliance with the labor laws, federal labor laws. And our biggest problem there is that we have 24-hour people with three days, four days at the facility. And how do you calculate that overtime? We’d appreciate some help.

In our letter -- you have five-page letter that asks for those definitions and descriptions. We’d appreciate a response.

MR. JACKSON: Hi. My name is Wardell --

COMMISSIONER DOMBROWSKI: We’ll address that, from your letter, over here and --
MR. SKOIEN: Okay. Good.

MR. JACKSON: My name is Wardell Jackson. I’m the president of the Association of California Care Operators. I’ve been here before.

My main problem is that we represent some of the same people that Chuck -- Chuck represents. We have 24-hour, seven-day-a-week operation. We have people that live in our facilities who -- who may not work during the day, but they work overnight. It is a problem if -- with this law, many of us, 80 percent of us, will go out of business.

With the facilities that -- mainly that we represent, we represent people that are -- get reimbursement from the regional centers of California, through the Department of Developmental Services, and we -- our rates are much more than people who only deal with the mentally ill. They get half, or sometimes a third of the rate that we get. All of these facilities will be out of -- out of business, because a lot of them do have live-in staff that have to work overnight or 24 hours a day. And there should be some other kind of -- I’m not sure -- some -- something else that we can fall under, because we basically don’t fall under anything that you basically have here today. We are a specialized
industry, and with the rates that we get, we could not afford to pay according to these work orders.

So that’s mainly our concern. Initially we were requesting a waiver, because the Department of Developmental Services right now is doing a rate study, and that rate study will be completed by January 1, 2001. And at that point, there may be raises in our rates. But right now, we are still paid at almost 30 percent less than we had been paid -- than we should be paid for this kind of service.

So we’re asking that either a waiver be given, an exception be given, for at least 24 -- for 12 months or -- for a 24-month waiver, really, to be given.

COMMISSIONER COLEMAN: Sir, let me just ask. Your industry is covered under this proposal. And are you in agreement with that or -- there’s nothing we can do about your rates. I’m certainly sympathetic to that issue.

MR. JACKSON: No. Yeah, I understand that.

COMMISSIONER COLEMAN: But that’s not something the Commission can address.

We can include you in the definition of “healthcare industries,” which we are doing, which then gives you the 12-hour day exemption. Is that something
that your industry supports?

MR. SKOIJEN: If it would be retroactive to say that -- some of our people don’t have 12-hour days now, alternative workweek, they’d have -- basically, May 31st, we’d have to tell our people and educate our people they can use the 12-hour work without overtime. Otherwise they’d be paying overtime. We’d have that extension, to May --

COMMISSIONER COLEMAN: You would have to follow the procedures that the rest of the industry does in this regard.

MR. SKOIJEN: I have no problem. We -- most of our facilities have complied with that. Our biggest problem is the 24-hour person that lives there four nights a week, takes off for three days, the sleep time -- if we could really adopt the federal Labor Standards Act as it relates to our industry, it would be the ideal situation to do.

COMMISSIONER COLEMAN: Well, again, with AB 60, we’re not -- we’re under stricter requirements --

MR. SKOIJEN: Yeah.

COMMISSIONER COLEMAN: -- than the FLSA.

MR. MARTINNO: Yes. My name is Tony Martinno.

I’m going to -- I want -- I want to talk about the same
thing like -- oh, should I -- oh, sorry. Wrong button. I want to talk about the same thing like Mr. Wardell Jackson was talking about it. And my main concern is the small facilities, like myself. I have an employee that, you know, is a so-called exempt position. You know, that person actually works 8 hours a day, sometimes 7 hours a day. And according to the laws, when my staff is asleep, we're going to have to pay for them. And that's the place where, really, that's where -- they're at rest, they don't have no place to live. And if you look in the letters Wardell Jackson, he gave you, you can look at the figures there. And how can I be in business if I'm going to have to pay for the time my staff is sleeping? I have to put money out of my pocket, you know, and that's -- and that's what Mr. Wardell Jackson asked you, if we can have an extension, at least until July, 2001. By then we should have some more (inaudible) from the government. Other than that, we're going to be out of business, and the people -- the clients are going to be in the streets, because I cannot continue to operate under the laws that they're trying to impose on us, because we are mom-and-poppa, and again, like I say, I pay over -- above a minimum wage. Actually, this is my figure, $6.50. And besides that, if
I -- if I cannot -- you cannot help us, I going home and I’ll close my facility.

COMMISSIONER DOMBROWSKI: Well, again --

MR. MARTINNO: The people are going to be in the street.

COMMISSIONER DOMBROWSKI: Again, you are covered by the definition that’s been proposed. And I believe that’s about as far as we can go within the statute.

And in terms of the intricacies of your business, I -- I would suggest you contact the Department of Labor and make sure you’re in compliance. And maybe they can advise you about the nuances of this.

But in terms of what this Commission can do, I think, if we adopt this, it’s about as far as -- as we can go.

MR. MARTINNO: Okay.

MS. SMITH: Good morning. My name is Lila Smith. I am here as a single parent, representing many more like me. I’m also a respiratory therapist that works in southern California.

I work in an acute facility which has already undergone the changes. I also work in a subacute facility. I have two jobs.

I support the -- the changes of the -- with the
amendment. Without the changes, I will not be able to continue working my two jobs and going to school.

I wanted to bring my two badges from the two hospitals I work at and my -- my parking pass, to show you that I do -- am I viable person in the community.

That’s all I want to say. Thank you.

MS. HARDER: Hello. My name is Patricia Harder. I work as a registered nurse for a subacute facility, pediatrics, in Loma Linda, totally kids. And I’m here representing our nursing staff to let you all know that we do approve and support the proposal to include us in the 12-hour workweek. There are many of us who support the 12 hours due to educational reasons, being with family, and continuity of care. And we do support it.

COMMISSIONER DOMBROWSKI: Thank you.

MS. HARDER: Thank you.

COMMISSIONER DOMBROWSKI: Mr. Rankin, I think it would be -- bring your witnesses up, and I guess we will shift to this -- well, both this proposal and Commissioner Broad’s proposal, and hear your comments.

COMMISSIONER BOSCO: Mr. Chairman, I wonder if we can limit the testimony, really, to language and more technical things than just people that support or don’t support in general, because we’ve had hearings on the
general nature of this.

COMMISSIONER DOMBROWSKI: Are you okay with that?

MR. RANKIN: Well, let me just start out with a basic procedural question.

We are faced here with something that I was handed at 10:25 this morning, which I was told was a document which amended the document that is -- was in your agenda and was given to the public a month ago, on April 25th. So -- and most people here got this at 11:05 this morning.

Anyway, this was supposed to be -- with the underlined changes on this document -- I’d like you to both -- all the commissioners take these out and put them side by side. This was portrayed as being an amendment to what was in your agenda.

COMMISSIONER DOMBROWSKI: It was not -- it was not supposed to be an amendment.

MR. RANKIN: The underlined -- the underlined portions were portrayed as being amendments. They’re totally different documents. This is in no way an amendment to what was on your agenda today.

How -- look, we have people here from the hospital industry saying, “We can’t have all these
election procedures with the Labor Commissioner and everything." How in the world do you think workers are supposed to trust their private employers when this is the way a public body operates? We need all the protections we can get!

(Applause)

MR. RANKIN: What I would suggest is that you simply put this item over. We have had no time to analyze this document. We got it a few minutes ago. And we’re -- we are opposed to a lot of it. But what it mainly lacks is the protections that are in the document that’s on your agenda for today.

So what do you want to do? How do you want to proceed on this? I would suggest that you put this item over to a future date when it can be rationally considered. I mean, how can you make -- how can you make regulations in this fashion? It’s beyond me.

COMMISSIONER DOMBROWSKI: Let me address that that was not presented as an amendment to what was circulated. It was an -- it was a document I had drafted, which I believe I gave to Commissioner Broad at some, and the other commissioners earlier, internally with my thoughts.

Also, let me suggest that there have been
discussions this week between you and your
representatives and the hospitals that I think covered a
broad range of issues, all of which we are talking about
today.

MR. RANKIN: Yeah. The discussions we had, we
had discussions totaling less than four hours with
representatives of the hospital industry. And we didn’t
even get through a complete list of issues when they gave
up. That’s the discussions that were held.

COMMISSIONER DOMBROWSKI: Other comments?

MR. RANKIN: Well, I -- I would like an answer
about the procedure. I mean, it just seems --

COMMISSIONER DOMBROWSKI: I want to hear
comments on both proposals. I want to hear --

MR. RANKIN: At this particular time, you want
to put us in the position of responding to a proposal
that we got --

COMMISSIONER DOMBROWSKI: I don’t think there’s
anything -- I don’t think there’s anything in there that
we haven’t discussed in general terms over the last three
or four months, and what we’ve been looking at. I don’t
think there’s anything in there that way. I think you
are -- you can prepare -- you can respond to that. You
can advocate for the proposal Commissioner Broad
What I would hope to do, quite frankly, is to come to some resolution today, because I do not want to put the industry in a position of being two days before their exemption expires when we finally adopt.

COMMISSIONER BROAD: Mr. Chairman, I just have one question. I -- there are provisions in this that actually seem to remove stuff that was in -- that we already adopted in the interim wage order, and modifies the interim wage order.

I -- I -- what makes me uncomfortable about this document is that -- I guess what I would like to see is some kind of a side-by-side comparison of the two so that you can catalogue all the differences and not all the differences so that we would know what we were voting on. That’s the problem here. We --

COMMISSIONER DOMBROWSKI: I’m sorry. Which document changes the interim wage order?

COMMISSIONER BROAD: Well, for example, just unless I’m missing something, we adopted a provision -- your document, your proposal -- we adopted a provision in the interim wage order that said if you have someone in a regularly scheduled alternative workweek and the employer simply sends them home early on that day, that they are
paid time and a half for hours in excess of eight on that
day.

COMMISSIONER DOMBROWSKI: I don’t think it’s been changed.

COMMISSIONER BROAD: Well -- I don’t see it.

COMMISSIONER DOMBROWSKI: It’s (B). Isn’t that (B)?

COMMISSIONER BROAD: No.

MR. HOLOBER: Mr. Chairman, can I make a comment? I’m sorry.

COMMISSIONER BROAD: Oh, that’s right. No, it’s there.

COMMISSIONER DOMBROWSKI: One second. One second.

COMMISSIONER BROAD: Well, anyway -- you’re right. I’m sorry. But that’s the -- I mean, I sort of looked through it and missed it, but I don’t know what is in here. I don’t know whether we should have some effort to -- and we’ve got all day -- to produce some kind of side-by-side thing.

What I’m concerned is, is we have to -- if -- let’s say -- there’s probably a lot in each of these that are the same, and I -- I -- and there’s a lot -- and there are things that are different. It’s putting them
side by side. You have no idea what’s the same and what’s different and what the import is of that, plus I had a sort of a third proposal, by way of compromise, that I had our executive director send to you all yesterday. And so, the -- you know, that’s yet another possibility.

And I think that it just seems like we ought to -- to proceed in an orderly manner, we really should have these things sort of lined up so that we know what we’re really dealing with.

COMMISSIONER DOMBROWSKI: Richard?

MR. HOLOBER: Yeah, Mr. Chairman. Richard Holober, with the California Nurses Association.

I think there really is a problem with receiving something this late and, you know, there’s no time to review it and really scrutinize it. And, you know, I know, whether it’s in the bargaining -- collective bargaining process or in front of the Legislature, you know, when someone tries to do that -- and I’m not -- I’m not saying someone’s trying to, you know, slip something through -- it immediately sends up red flags. And, you know, the first thing you’ve got to do is say, “Wait, let’s stop and let’s spend whatever reasonable time is necessary to really do a line-by-line review.”
We did -- you know, my organization did that with Commissioner Broad’s proposal. We’re here to -- you know, prepared to comment on his proposal. If -- if -- if there’s any consideration of doing something other than adopting or modifying his proposal, I would caution this Commission from moving without, you know, the proper diligent review that’s required.

COMMISSIONER BROAD: Mr. Chairman, let me just say this in defense of Chairman Dombrowski. What we had hoped --

COMMISSIONER DOMBROWSKI: Indefensible.

COMMISSIONER BROAD: What we had hoped was that by putting labor and the employers together, that they would, taking the document proposed, come to some compromise. And we waited and waited and waited. And that -- until the time expired. And now, maybe that was a -- a mistake in the sense that we were perhaps too hopeful that such an outcome could occur. However, I don’t think we should give the impression here that the chair is intending to sort of pull a fast one, because I don’t think he is.

And nevertheless, the lateness of these various proposals does raise, I think, a sort of question about how we proceed in an orderly fashion.
COMMISSIONER BOSCO: Could I ask a question of our counsel? If we -- I believe that there always is a moment of truth in passing any kind of legislation or regulations, that you’ll never get to a point where everybody has seen everything and everyone is agreed on everything, and we could go on and on and on with this language. This is very technical, and I don’t think we’ll ever get to the point where everyone understands, to the extent they all want to, everything that is presented or comes before the Commission.

But -- so my inclination is to move ahead and vote on what this Commission’s policy will be in these general areas. However, what my question is, if we were, for instance, to vote on Mr. Dombrowski’s language, would we have the opportunity to amend in a technical sense this language before the July 1st deadline?

MS. MOSLEY: There’s another hearing scheduled for -- oh, sorry -- there’s another hearing scheduled for June 30th, I believe.

COMMISSIONER BOSCO: So if some egregious mistake were made or if -- in other words, if we were to pass this, and all the various parties go home and look it over, and their lawyers look it over, and find things that, you know, in a technical sense, vary from perhaps
what we’ve already agreed to, we would still have one other opportunity to remedy those matters.

MS. MOSLEY: Yes.

MR. RANKIN: Well, let me just --

COMMISSIONER BOSCO: I’m not saying that that’s necessarily what we will do, but we would have the opportunity.

MR. RANKIN: Well, our objections to the Dombrowski proposal are very extremely substantive. They are not technical exemptions -- problems with it. You know, there are -- there are tremendous changes to what he’s -- differences between what he’s proposing and what the public has been looking at here for the last month.

Let me just go over the basic -- where we’re coming from on this.

The Legislature passed AB 60 last year. And there -- in passing it, they adopted very strong language about their view of the 8-hour day as a basic protection for California working people. They also allowed you to look one more time at the 12-hour day in the healthcare industry and decide whether or not it should be continued, whether or not it should be changed, more -- there should be more limits put on it. And our position is that, given the Legislature’s strong position in favor
of the 8-hour day, when you look at doing something other
than the 8-hour day, you’d better look at it very
carefully.

Now, we’re willing in this one industry, after
long deliberation amongst ourselves, to go for a 12-hour
day. And for that, we expect a no mandatory overtime
provision, we expect very strict and fair election
procedures, we expect that these folks are not going to
be required to work long times in -- we expect at least
two consecutive days off for these folks, and some other
restrictions on the use of the 12-hour day. That’s where
we are coming from on this issue.

So the differences between the proposal that was
in your agenda today, which basically reflect our views,
not entirely on everything, but we could go with that,
and what we got at 10:25 this morning are huge. They’re
substantive differences. They are not technical
differences.

What you -- what you -- what we got this morning
does have something on no mandatory overtime. It
contains an -- a clause that makes the whole thing
meaningless, for instance. It -- it does not at all
restrict -- and you’ve had testimony here for many
meetings about parts of the healthcare industry that may
deserve a 12-hour day with restrictions. But then, what
you’re proposing here is to give it to everyone under the
sun, laboratories, dispensaries, doctors’ offices,
dentists’ offices, patient homes. You never got
testimony on that stuff.

COMMISSIONER DOMBROWSKI: We could cite the
correspondence.

MS. CANFIELD: Glenda Canfield, SEIU.

I would echo Mr. Rankin’s comments. We were
handed this document about fifteen minutes ago. And we
came today, having met with the industry for about four
hours. We requested to meet with them again yesterday,
and we were informed that they needed yesterday to
prepare for today. So, in a sense, we have had a very
short time even to meet with the industry over many of
these issues. Many of the -- many of the issues in Mr.
Dombrowski’s proposal are very substantially different
than Mr. Broad’s. And we would -- we came today prepared
to address Mr. Broad’s proposal. And we would request
that these proposals be formatted in a way that could be
-- that they could be adequately reviewed and compared.

MR. HOLOBER: Could I comment on some of the
substance -- Richard Holober again -- with the
understanding that I really haven’t been able to digest
this, so I think, with some more time, I’d be able to, you know, give a better response to this? Let me just address a few of the issues, because I don’t know where you -- where you’re going to go today as a Commission, so I think at least you want to understand our position.

And, you know, we have stated in writing the position of CNA regarding overtime, and our position is very clear, which is that nurses know best when they have reached the point that they can no longer perform at the quality of care that they are required to give to their patients and that their licenses require.

We have a -- we have nurses caring for more and more patients in California. We have, in fact, the second worst ratio of staffing of nurses to patients in the nation, which means that nurses are being pushed harder and harder. The work they do is extremely stressful, both physically and mentally, because they are involved in making decisions and administering care to a number of patients. This requires a lot of judgment. And at the end of a shift, if a nurse feels that she, either for a reason of exhaustion or mental fatigue, or because of another personal commitment, cannot work overtime, that that nurse should have the right to say no.
Now, what’s in -- and that would apply to anyone on any shift of any length, whether they’ve agreed to an 8-hour or 10- or 12-.

What Commissioner Broad’s proposal appears to us to be is an attempt at a compromise. There’s no other industry in California that is regulated that allows for longer than a 10-hour day without overtime pay, with one exception, and that is the mining industry. And, in fact, in that industry, if you have a 12-hour day, you are literally legally prohibited from working longer than 12 hours. That’s it, 12 hours, period.

There’s no other industry that allows you to go 12 hours without overtime. So the healthcare industry is getting something here that is unique.

And it’s about money. When nurses work 8-hour shifts, part of what they’re doing on their job is either giving or receiving a report from the other shift. So, in an 8-hour day, you’re going to spend a half hour, typically, receiving a report and a half hour giving a report to the next shift. Okay. The math on this is very simple: three shifts a day, one hour of each nurse’s time giving report, the hospital is paying for three hours of reporting time. If you have two shifts a day of 12 hours, there are two hours spent. That means
that the hospital has saved the equivalent of one hour of
pay during which time a nurse would be reporting rather
than doing other duties. That’s roughly 4 percent of a
payroll cost savings to that hospital. I mean, that’s
what this really is all about. And that’s why the
hospitals are so interested in having the 12-hour day.

Now, we accept that in California, you know, the
12-hour day has become part of the landscape in
hospitals. And we are okay with the proposal that would
allow for a 12-hour day, with an election, with a secret
ballot, with some safeguards. And AB 60 did clearly
direct the Industrial Welfare Commission to develop
safeguards to assure that these elections are conducted
fairly.

Commissioner Broad’s proposal does address
establishing some safeguards, like having neutral parties
conduct elections, and so forth, which we think are
proper. But the other thing that is embodied in his
proposal, I think, is the recognition that, in effect, if
the hospital is getting something that no other industry
is getting, and they are asking a nurse or another
employee to vote for a 12-hour day, that that employee
should at least know that when they’re signing up for
that deal, that when they’re voting for that deal which
is a highly unusual work arrangement in the State of
California, that at least when that shift ends, they can
say, “I’ve had enough, I don’t feel that I can continue
to perform at the peak level required to deliver safe
care to my patients, and I don’t want to work any longer,
and I should have the right to not work any longer.”

This is such a huge issue for our organization
that this has been a major demand at the bargaining table
in our current round of negotiations. And we have, in
the past year, negotiated contracts covering about 5,500
nurses in California in fifteen hospitals that banned
mandatory overtime. And I spoke yesterday to the
director of our Acute Care Division who negotiated these
contracts, and I asked him, “Have we had any complaints
from hospital management in any of these fifteen
hospitals where there is a strict prohibition on
mandatory overtime?” And he told me that they have not
had one complaint.

These -- these contracts have been in place, on
average, about eight to ten months. So, during that
time, there’s been, you know, an opportunity to observe
and learn whether or not this is a problem for a
hospital. It is not a problem for a hospital. We have —
— you know, we would know. We would be getting
complaints if this was an issue.

What this does, in fact, is make an employer do a better job of managing. It means that they have to staff properly, they have to plan properly, they have to have contingency plans, so that they are doing their job to make sure they have proper coverage.

What I saw in both -- I don’t know if it’s Commissioner Dombrowksi’s proposal or the hospital industry proposal, but basically, what I see in that proposal is an enormous loophole that says any nurse -- chief nursing officer or other executive can make a declaration in that hospital that there’s some special condition there that allows them to require people to work overtime. Now, our contracts do have language that allow for an exemption if there’s a state of emergency declared by state or federal or county officials. That means there’s a healthcare crisis in that community. And under those conditions, we would agree that a nurse could be required to work overtime, because they have a responsibility to patients.

Our contracts also state that before calling someone in or requiring somebody to continue to work even in that emergency, the hospital has to exhaust other efforts, such as recruiting volunteer employees to work
overtime, calling employees who are off duty to see if they would volunteer to come in, using registries and so forth. There are lots of other ways you can staff in an emergency. But if they’ve exhausted those options, then, as a last resort, we would agree, in a genuine emergency recognized by some authority other than the boss, that mandatory overtime, you know, would be a reasonable thing to expect of someone.

So, we have -- you know, this is a very major issue. There was a strike last -- settled last month in -- last week in Massachusetts, the first nursing strike in fourteen years in the State of Massachusetts, and there was one issue on the table, mandatory overtime. And the -- and the nurses there who do work a 12-hour shift won a severe restriction. I think, under their agreement, the employer can, on four occasions during the year, say, because of some unpredictable circumstance in that hospital, they can require someone to work overtime. But it is a very, very severe limitation on their right to otherwise have people work overtime.

So, this language is much, much too permissive in terms of allowing a hospital administrator to just, you know, make a declaration and, in effect, waive workers’ rights to be able to refuse overtime.
You know, I -- a couple other issues that could be real problems here, the definition here appears to be very, very broad in terms of who’s in the healthcare industry. It appears to go way beyond what was in the old wage orders, clearly goes way beyond what we had heard was always the issue for the hospitals, which was continuity of care.

Now, we don’t think that that’s really what this is about for the hospitals, that it’s really about money, but if we’re talking about continuity of care, then we should restrict this to those employees who are direct patient caregivers. This is way, way beyond. It’s pretty clear to me that this is about saving money, because when people work longer hours without overtime, the boss saves money.

You know, the other issue that I know is addressed in the hospitals’ -- let me ask you -- is the hospitals’ proposal in front of you, or is that not on the table? Because they had other stuff in there which I think goes back to the old ’93 wage orders, which is clearly unlawful under AB 60.

COMMISSIONER DOMBROWSKI: What we’re -- what we’re looking at is the document I believe you have which has my name on the top --
MR. HOLOBER: Okay.

COMMISSIONER DOMBROWSKI: -- with the underlined proposed amendments that I’ve already agreed I would incorporate.

MR. HOLOBER: Okay. And I didn’t see --

COMMISSIONER DOMBROWSKI: And Barry’s proposal.

MR. HOLOBER: I didn’t see in here the kind of peculiar definition of “primarily engaged in” that I saw in the hospitals’ proposal, so I assume it’s not in there. Okay. Thank you.

So, you know, those are a couple of key issues.

I think there’s another issue on the table which -- AB 60 stated that if you’re working a 10-hour day under a secret ballot vote that occurred before, you know, 1998, that those were grandfathered. AB 60 also said that if you’re in the hospital industry and if you’re working a 12-hour day under a pre-1998 secret ballot election, that those were grandfathered until July 1st of 2000. The grandfathering should end on July 1st of 2000. The law is very clear on that. They have the opportunity to revote people. These are always employer-initiated votes.

Thank you.

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

Rosenfeld.

And like the others sitting here at the table
today, I received Chairman Dombrowski’s proposal about
midway through --

COMMISSIONER DOMBROWSKI: Excuse me. Can I make
a -- I just want to make a point of order, because it’s --
I don’t want to keep hearing -- repeating, so let me
just cut through something here.

If you take my proposal in front of you and you
take the first page, all of these items are in the
interim wage order.

If you go to Page 2, Item (F) is in the interim
wage order, Item (G) is based on the statute, Item (H) is
in the interim wage order, and Item (H)(5) is in the
statute.

If you go to Page 3, we have -- the definitional
is simply a disagreement -- I mean, that’s -- Barry has
his definition proposal and mine has my definition
proposal.

Item (I) is in AB 60. Item (J) in mine is, I
believe, similar to Barry’s.

MR. RANKIN: Which (J)? You have two (J)’s.

COMMISSIONER DOMBROWSKI: The top (J) is Barry’s
and the bottom (J) is my counterproposal.

Item (K), I believe, is from Barry’s, top (K).

And the bottom (K) is my counterproposal.

Election procedures, these are all the existing wage orders, (A), (B), (C), (D). And (E) is from the interim wage order. (D) is from the existing orders.

Administrative -- the section on the administrative is simply the language from the interim and the current statute.

And the meal periods -- meal periods, that -- that’s going to have to come out, actually. Yeah, we’ll amend that. We’ll amend that one out.

Meal periods is from the existing wage orders.

So just -- I know that’s a lot to throw at you, but I’m just trying to put a comparison in place for you.

MS. GATES: No, I -- I -- Commissioner Dombrowski, I appreciate you explaining the document, but what my concern is, is that we -- we heard from the healthcare industry, but one of the concerns I have is -- I work at a law office that represents more than two million workers statewide -- and when presented with something that -- that’s new, I really have a duty to them to read it side by side with existing law and with AB 60.
What I -- what I feel concerned about is that, while we've had lots of testimony from the hospital industry, if you look at Page 4 of -- of your proposal, and I think that if I looked at the Broad proposal, I might find that it's the same, but I -- but I don't have time to do that right now. I'd like more time to do that.

But what I'm concerned about is that this proposal will affect all workers in the state, because we're actually making these amendments to every single wage order, as I understand it. We're not just making these amendments to Wage Orders 4 and 5. Is that correct?

When we're undertaking something this serious, we're affecting the rights of millions of workers in this state. It's too -- I think it's just too rushed of -- of an effort here, and I think we need some -- just some time to read these side by side.

I noticed, just at first blush, that one of the differences -- and again, these may be differences that can be explained, but the Dombrowski proposal adds administrative, executive, and professional employee exemption at Page 5 -- and the pages aren't numbered, but I've numbered them with my pen -- and in "Meal Period,"
at Page 6, that weren’t part of the -- of the proposals
contained in the noticed document and the one that we had
an opportunity to review in detail.

I feel, at this stage, I would -- I could not
testify on the new document. I was prepared to testify
on the -- the Broad proposals that were part of the
noticed document that went out to the public one month
ago. But I

-- I do not feel prepared at this time, at this moment,
to testify as to the new proposal that I received just a
few minutes ago.

MS. CANFIELD: Glenda Canfield, SEIU. I would
like to echo those comments.

In the brief period that I had to review Mr.
Dombrowski’s proposal, I have quickly noted that there’s
not even a guaranteed meal period in here for a person
who’s working 12-hour shifts and who may be working up to
-- who knows how many hours? If there’s no mandatory
overtime, how many hours could a person be potentially
working? On Page 6, I don’t see -- and I have -- and I
admit, I quickly reviewed this in the last few minutes --
I don’t see any guaranteed meal break for a person
working that number of hours.

We represent many, many nurses, and I talk to
many, many healthcare workers across this state who tell me that they’re working long, long hours without meal periods, without even -- without any type of break. And in asking people -- you’re asking people to give up overtime, but this also asks them to give up a meal period.

The other issue that I would like to address in Mr. Broad’s proposal, and the reason that we support it, is because it helps protect healthcare workers in elections. As a registered nurse and an instructor for other nurses and other healthcare workers around the state, I have many opportunities to talk to healthcare workers, organized and unorganized workers, who tell me that they are basically given a document to sign and instructed that they can either volunteer to work 12-hour shifts without overtime or they can seek other employment. And I have too many healthcare workers give me this -- the same story to -- to completely disregard it.

Admittedly, that does seem -- that does seem kind of extreme, but I have had this -- this reported to me many, many times. And so, I think that protections in elections for healthcare workers and oversight of a neutral third party is absolutely essential. And I think
that any employer who wants to ask healthcare workers to
give up overtime after 8 hours should be willing to
expend the extra energy to find a neutral third party.

And I know, as we met with the industry in the
last couple days, even with the industry we explored many
ways to develop a broad list of criteria that could be
used for neutral third parties to make them readily
available to oversee these elections.

But I think this is an absolutely critical part
of Mr. Broad’s proposal and certainly, I don’t see, in
the short time that I’ve had to review it, I do not see
in Mr. Dombrowski’s.

COMMISSIONER BROAD: Well, let me make this
comment to the chair.

While he’s gone through things that compare his
proposal to the interim wage order and to some portions
of the proposal that were noticed, there’s a whole bunch
of things that were in the -- my proposal that simply are
not present.

For example --

COMMISSIONER DOMBROWSKI: Oh, I understand.

COMMISSIONER BROAD: Right. But -- but, I mean,
I think it’s worth discussing those.

You know, for example, my proposal suggests that
an employee who does work overtime that’s on a 12-hour shift be entitled to 8 consecutive hours off duty in that day to prevent an employer from requiring someone to work 48 hours in a row without any rest, which I think is -- would be extraordinarily bad, and to which I don’t think the employers particularly objected.

And there are a number of provisions that deal specifically with these 12-hour shifts, for example, the requirement that there be not less than one off-duty meal period for a person working on a 12-hour shift. Someone working 12 hours should be guaranteed time to eat during the day. And I don’t know that any -- the employers have objected to that.

So, I think that we should debate this matter very fully so that we really understand not only what is present in the chairman’s proposal, but what is absent as well, because I think there are many issues in there that I do not believe are matters of significant controversy at all.

COMMISSIONER BOSCO: Well, Mr. Chairman, I -- I don’t disagree at all with Commissioner Broad, and I thought that was what we were going to do today. I mean, I think it’s good to have more testimony, but it should be really limited to very -- to the technical aspects of
this language. And then, we as a Commission can go over, paragraph by paragraph, what we intend to vote on. And Commissioner Broad can raise any of these issues. And I, for one, have some language changes that I’ve been noting all the way along. But at some point, we have to come back to the Commission and -- and vote on these things.

I mean, I -- with all due respect, I understand that people have clients and others that may not have read every word of this or understand different aspects of it, but at some point, this Commission has to bite the bullet and go through it and vote -- vote on it.

We cannot meet during the week together -- that’s part of the problem here, you know -- to hammer out these things ourselves. So we have to do it in meetings like this. And I’d just suggest that we go ahead and do it.

MS. BAYER: I’d like to speak, if I can. Debbie Bayer. I’m a nurse at -- registered nurse and I’m a secretary of the California Nurses Association.

There are -- there are way more than technical differences.

The provision for no mandatory overtime in Mr. Dombrowski’s proposal really says no mandatory overtime unless the employer wants to do it because he feels he
needs to. And that’s ridiculous. I mean, I don’t want to be disrespectful, but, you know, unless they feel like their overall operational status and staffing means that they have to, and so they always feel that it means that they have to. This is a huge issue for nurses.

And what I originally came here to do was to speak to Mr. Broad’s proposal, which I thought failed, in two respects, to give enough. One was mandatory overtime is unsafe after any shift, after 8 hours or after 12 hours. We work -- we work different shifts. You might have a nurse who comes at 3:00 p.m. expecting to work till 11:30, and that’s an 8-hour shift. But she might have been up at six o’clock in the morning with her children and spent a day of work at home before she took her kid to daycare and then came to work. We’re talking -- you have no idea -- an employer has no idea, when they tell somebody that they have to stay an additional 8 hours or more, how long they’ve been up and what they’re capable of. Only the worker knows what they’re capable of.

And in an industry where people’s lives are depending on your ability to think, this is a wrong thing to do. And also, it’s an abuse of, really, the employees’ rights, any workers’ rights, to be told -- if
I, at this point, locked the doors and didn’t let people leave here for 16 hours, I would be arrested for kidnapping. And yet somehow we think it’s okay for an employer to treat a worker that way, just because that worker is in his employ. We are not serfs; this is not a feudal system. We voluntarily agree to work certain shifts. If I don’t show up at that shift, I can be terminated. I don’t see why I owe my employer more than what we contracted between each other to work.

Now, this does not mean that nurses don’t already work hundreds of hours of voluntary overtime. In 1998, we put in an information request in our hospital to see how much overtime we were working, and at Children’s Hospital, Oakland, where I work, we were collectively -- the registered nurses in my hospital -- in one year worked 20,800 hours of overtime. Most of that was voluntary. We put in lots of voluntary overtime.

Mandatory overtime only occurs when everybody is so burned out by working voluntary overtime that they can no longer continue. And it is not a rare occasion, as a hospital. I heard -- I heard Mr. Luevano say several times, at this meeting and at previous meetings, that there’s maybe a few bad apples and it hardly happens. I think you’d be hard-pressed to find a hospital in this
state where mandatory overtime is not a big problem.

So, I would say that instead of Mr. Dombrowski’s language -- and we could even improve on Mr. Broad’s language, although I really appreciate the effort he made -- is to say that no healthcare worker has to be ordered -- should be ordered to say, unless there is an emergency. An emergency is an unexpected disaster, in the -- in the sense of fire and earthquake. And we also are willing to say if there’s, you know, a patient coding, we don’t ever walk out on our patients in those situations.

Okay. And then the other thing I would like to say -- speak to, is that if we have an election and we go to 12-hour shifts, I would put in a plea that no worker who is unable to transfer to a 12-hour shift lose his job. It doesn’t seem right to be basically, because of your age, your health status, or because of maybe family commitments, to lose your job, because the 12-hour shift is just that, it’s an alternative work shift. The 8-hour day is and should remain the standard. If you cannot adapt, for whatever reason in your life, you can’t adapt to working 12 hours, you shouldn’t be forced with giving up your job.

And I think that more than just “the employer
shall make reasonable accommodation," a stronger protection for a worker would be to say a worker whose -- the rest of his shift goes to 12-hour shifts, still has a right to work an 8-hour shift. And this is not such a hard thing to do.

I -- when people found out in my union that I was coming here to speak, and it was just a couple days ago, I was faxed 134 names on a petition from a couple different hospitals saying:

“Mandatory overtime causes a decrease in critical thinking, leads to significant medication errors, transcription errors, and a decrease in judgment. Mandatory overtime affects morale and patient outcomes. The nurses listed below have experienced and witnessed mistakes made because employers mandated the nurse to work additional hours. The RN’s and NP’s” --

-- and this is at Kaiser Hospitals --

“ -- would like to see laws that protect not only the patient, but nurses also.”

So, I want to submit this. I want to submit a letter with my -- it’s really just two simple provisions: one, that no mandatory overtime at all, and two, that
workers do not lose their job if they can’t adapt to a 12-hour schedule. And it’s signed by three of the officers of the California Nurses Association.

And also, this is just some brief testimony by nurses about the effects of mandatory overtime that was given at my hospital. And I just want to hand that in.

MR. RANKIN: Mr. Chairman, I have a suggestion that might move things along, and that is that the group here go through, point by point, as Mr. Bosco suggested, the proposal that was -- is before us today officially, the so-called Broad proposal, and basically give us our rationale -- give you our rationale for each of those points that are covered in that proposal. And I just think that might expedite things, and you might get a better understanding of why we are convinced that we need a proposal of this sort -- and we even have -- you know, we -- this -- so you know, this proposal represents a different proposal from the one that we gave to you a couple months ago. There are amendments to that, to the proposal we gave you. This is not a reflection of our proposal. It is Commissioner Broad’s proposal, and as --

COMMISSIONER DOMBROWSKI: Tom, I agree, if it would -- it’s your time, and how you want to do it --
MR. RANKIN: Fine.

COMMISSIONER DOMBROWSKI: -- but let me -- let me clarify something, because you’re going from the proposal that was sent out with the notice, correct?

MR. RANKIN: Right.

COMMISSIONER DOMBROWSKI: Okay. Thank you.

MR. RANKIN: So, without necessarily spending a lot of time on each section, (A) simply sets out the ability of the employer to -- to, through the election procedure, institute 12-hour workdays. And I don’t know that anyone has any problems with that. Once that -- but what follows

-- we consider that a major concession, and what follows has to be taken in that light.

(B), again, talks about the ability of the employer, with a two-thirds vote, to institute three 12-hour days, regularly scheduled workweek, within a 36-hour workweek.

And then we go through (1) -- (1) defines who is eligible for this 12-hour day. And as you will note, this is a very different proposal from the proposal of the chair, in terms of coverage. I know that this has been subject to discussion between a couple of you, at least, and that some other language was proposed which
would broaden this somewhat to cover a licensed 24-hour healthcare facility or licensed dialysis clinic, and we could accept that -- that change in the Broad proposal.

Number (2) simply says that if you work more than 36 hours a workweek, you get time and a half, if you’re on 12-hour days. And I believe the Dombrowski proposal only gives you overtime after 40 hours a week. I can’t be held to all this, because I haven’t really had time to scrutinize it that closely.

Number (3), which we thought was a good part of a trade-off for a 12-hour day, guarantees that employees who work 12-hour days would be getting paid -- would not be getting paid less than they were getting paid for the 40-hour week. In other words, it’s a 36-for-40 proposal. In the discussions between the chair and Mr. Broad, this was proposed to be eliminated, which would be a major concession on our part.

Number (4) says that if you are assigned to work 12-hour shifts, you cannot be required to work more than 12 hours in a 24-hour period, or more than 40 hours in a workweek. I believe that was missing from Mr. Dombrowski’s proposal.

COMMISSIONER DOMBROWSKI: That’s there.

MR. RANKIN: No? That’s there? Okay.
Number (5), if you’re assigned to work a 12-hour shift, you may voluntarily work an additional 4 hours of overtime in the same 24-hour period, provided that you are entitled to a break of at least 8 consecutive hours off within a 24-hour period. And we had testimony here this morning that this is viewed as essential to being able to provide proper patient care. You don’t want people working without at least consecutive -- 8 consecutive hours off-duty.

COMMISSIONER BOSCO: Could I interrupt a second?

Then, Mr. Chairman, is that addressed at all in your draft, this -- so I’m trying to make note of where we’re different and where we’re the same so we can go back to some of these things.

MR. RANKIN: That is not addressed in that draft, as far as I know. It was, in terms of the -- the discussions between two of the commissioners, was left in the proposal.

COMMISSIONER DOMBROWSKI: Yeah. I don’t think it’s in here.

COMMISSIONER BROAD: Yeah. Mr. Chairman, I -- I believe neither Paragraph (5) nor (6) were addressed in Mr. Dombrowski’s proposal.

COMMISSIONER BOSCO: I wonder if --
MR. RANKIN: (6) -- (6) --

COMMISSIONER DOMBROWSKI: (6) is addressed as my meal period language.

MR. RANKIN: (6) deals with the meal period issue that one of the folks on the panel just went into. It guarantees the second meal period and allows it to be taken as an on-duty meal period, by mutual consent.

Number (7) deals with a situation where employers have reduced hourly wage rates between the time the bill was passed and January 1st, 2000, having to restore the base rate of pay.

COMMISSIONER BOSCO: And that is included in the chairman’s draft? Is it?

MR. RANKIN: Well, now we understand how difficult this is?

COMMISSIONER BOSCO: Where is it?

COMMISSIONER DOMBROWSKI: It’s --

COMMISSIONER BROAD: I believe --

COMMISSIONER DOMBROWSKI: It’s in Clause (K).

COMMISSIONER BROAD: -- it’s in Clause (K).

COMMISSIONER BOSCO: See, I think a number of these we can really go over quickly, because they’re already included.

MR. RANKIN: They may be included, but in some
cases they may be included with different language. So
you have to be cognizant of that possibility.

COMMISSIONER BOSCO: Are you saying that an
occasional change in language can cause lots of trouble
later on?

MR. RANKIN: Yes, I am.

COMMISSIONER BOSCO: Okay.

COMMISSIONER BROAD: Not for us. We’ve been
confirmed.

(Laughter)

COMMISSIONER BOSCO: Are we to be commended on
that or sympathized with?

COMMISSIONER BROAD: Not reappointed.

MR. RANKIN: (C) defines a regularly scheduled
workweek.

(D) --

COMMISSIONER BOSCO: Is that the same?

MR. RANKIN: -- whether or not that is in --

COMMISSIONER DOMBROWSKI: I have a different --

COMMISSIONER BOSCO: The proposal we got this
morning.

COMMISSIONER BROAD: No, that -- that -- the
difference there is that this says the length of the
shift and the days of work are predesignated, as opposed
to the number of days of work.

COMMISSIONER DOMBROWSKI: Right.

COMMISSIONER BROAD: So this is the question that -- that the menu of options should include the days. They vote on and adhere to a regular schedule that names the days.

COMMISSIONER BOSCO: Okay.

MR. RANKIN: Yeah, this is a basic issue here. Whether or not a regularly scheduled workweek means that an employee is going to know that he or she is going to work on a Monday, Wednesday, and Friday as a regular schedule for a certain period of time, or whether or not his or her schedule can be shifted totally at the discretion of the employer so that one week, he may be working Monday, Wednesday, and Friday, then the next week, Monday, Tuesday, Wednesday, the next week Thursday, Friday, Saturday.

COMMISSIONER BOSCO: But you have no objection, I assume, to -- if the employee initiates wanting to change this, that --

MR. RANKIN: No. No. And I think that was provided for --

COMMISSIONER BROAD: That’s in Section (F).

MR. RANKIN: -- here in (F), in (F).
COMMISSIONER DOMBROWSKI: Okay.

MR. RANKIN: Otherwise, I don’t see that a regular schedule means much, if all it means is you’re going to -- all you know is you’re going to work any three out of seven days a week. I wouldn’t consider that to fall within the dictionary definition of “regular,” that’s for sure.

Okay. We just went through -- go back to (D). It talks -- basically is language from the statute -- talks about the menu of options and so forth. I don’t believe that’s in the Dombrowski proposal.

(E) we just talked about, allowing the employee to shift days.

(F) also allows for a -- oh, no -- (E) -- I’m sorry, (E). (F) was -- (F) was what allows the shift -- (E) is an important one.

What (E) does is say that any workweek, alternative workweek, that’s adopted has to provide for at least two consecutive days off within a workweek and will provide for at least four hours of work in any workday.

COMMISSIONER BROAD: Mr. Chair, I’d just like to comment on that. That is actually the existing language in Order 1, the manufacturing wage order, which happens
to be the one wage order where, in the one time in the
history of the Commission, as I understand it, where the
labor and employer representatives agreed on something.
And I happen to have been there at that time, which just
shows my persuasive powers.

(Laughter)

COMMISSIONER BROAD: Anyway, so that is not
without precedent, although, by way of compromise, I
would be willing to have it be two days off, so that we
just don’t have a situation where, you know, you’re --
you have an alternative -- a schedule where you never get
a day off.

And the “not less than four hours,” I think, is
important because the other -- the other -- I think it’s
inappropriate to have an alternative workweek schedule
that switches. You know, somebody could come to work one
hour for the day. I don’t think it’s very likely.

There’s already provisions in the wage orders that -- for
show-up time, that if you come to work and the workday is
less than four hours, you’re paid additional hours. So I
think it kind of makes it consistent with that.

MR. RANKIN: Okay. (F) we talked about, the
substitution.

(G), this deals with a situation where an
employee is coming in to work the regularly scheduled 12
hours and is suddenly told to go home. It says that if
they work more than 8 hours in that day, they get time
and a half for the hours over 8 hours and they get double
time for over 12 hours, which -- so -- and I don’t know
that that appears -- I don’t think that appears in the
Dombrowski proposal either. It’s a protection against
employers sending people home and costing them pay.

(H), “An employer shall not reduce an employee’s
regular rate of hourly pay as a result” -- I think that’s
in the statute.

(I) deals with the reasonable accommodation
issue. We’ve heard from some on the panel that they
don’t even think that this is strong enough, that
employees should be guaranteed the right to work 8-hour
days if the unit votes for a 12-hour day.

(J) simply protects against pyramiding. I think
everyone would agree on that.

(K) deals with the situation of an employee who
was voluntarily working an alternative workweek. I think
that’s in the statute, as I recall.

And so, that deals -- that’s the end of that.

Then we go on to election procedures. And the
(A) says that you can only have an election once a year.
So, if an employer calls an election and the 12-hour-day proposal is voted down, they cannot have another election for at least twelve months.

COMMISSIONER BROAD: And I’d like to add there that that -- it was in the wage orders from 1976 onward. It was to prevent an election a week. You know, once you have an election, you -- it really becomes sort of unfair for the employer to come back and say, “Well, we’re going to have an election every week until this thing passes,” or for employees, for example, to have an election to repeal it every week until -- so, it -- you know, once a year, I think, is enough.

MR. RANKIN: Provides stability.

(B) simply says secret ballot election. That’s in the statute.

(C) defines a work unit, and it basically takes from the wage orders a large share of the language and adds the concept of sharing a community of interest concerning the conditions of employment. And we feel that it’s very important that that language be in there so that these units that vote are actually meaningful, and not just a conglomeration of folks.

COMMISSIONER DOMBRowski: Just to interject, though, Tom, not to -- excuse me, but I’m not going to
keep going back to which ones of those are in my order,
but a number of those are in my order.

MR. RANKIN: Well, the community of interest in
not in your proposal. So I think you just lifted the
language pretty much straight from the old wage orders.

(D) requires the employer to give employees 14
days’ notice before an election, with written disclosure
about where and when the election is going to take place
and the effects of the shifts on wages, hours, and
benefits of the employee; the rights of the employee to
repeal; and that a neutral party be selected to conduct
the election, pursuant to subsection (G); and the right
of the employees to request a review of the Labor
Commissioner of the appropriateness of a designated work
unit.

What we have here -- what we have had, and it’s
been a problem for us for years in the wage orders, is a
situation where the election is called by the employer,
the employer determines who votes, the employer
distributes the ballots, the employer counts the ballots.

Now, Mr. Bosco, I don’t think you would want to
run for office under the circumstances where your
opponents had control of the election. And that’s
exactly the situation we’ve had with elections up until
this point. And it is crucial at this time in history --

COMMISSIONER BROAD: They sure tried.

(Laughter)

COMMISSIONER BOSCO: Well, I was just going to say, that did happen a couple times.

MR. RANKIN: Well, you had -- you had some recourse. And that’s why we put the Labor Commissioner in here.

We put the Labor Commissioner in so, if there are questions that employees feel that a unit has been gerrymandered to just win the election, make sure they got the votes for the 12-hour day, that can be reviewed by the Labor Commissioner. There has to be a remedy.

There is currently no remedy.

COMMISSIONER BOSCO: Mr. Chairman, could I ask a question here?

I think I -- I agree with you on that, but there was some testimony, “But what about these five- or six-person units all over the place, you couldn’t -- you don’t mean that they have to have somebody come up from Sacramento, do you?” I mean, maybe we could make a distinction between the larger units and these little mom-and-pop places.

COMMISSIONER BROAD: Well, what I had proposed -
- because I think that there is -- with all due respect for Mr. Rankin, with whom I agree much of the time, in retrospect, in looking at that, I think that these are, after all, elections having to do with shifts. And in certain circumstances, I think the testimony of Mr. Maddy may be quite correct. And therefore, I had suggested, by way of compromise, that rather than there be a neutral party in every instance, that upon a complaint and an investigation by the Labor Commissioner, the Labor Commissioner might, by way of remedy, appoint a neutral party.

I think that that would answer the questions raised by the employers about imposing, you know, significant costs of hiring neutrals and so forth in every single aspect. I think it’s a reasonable compromise.

MR. RANKIN: Yeah, I think it’s probably a fairly reasonable compromise, except that you give, I think, the Labor Commissioner too much discretion in terms of -- I think you -- I think -- I have to find -- I’m trying to go through this point by point, and we haven’t reached that point yet -- but I think we might want to have some stronger language in terms of when the Labor Commissioner has to act. But let’s deal with that
when we -- when we get to it.

Here, this involves the concept of notice. It involves, this section, disclosure in non-English languages, if a certain percentage of the affected employees speak that language primarily. It involves mailing the disclosure to employees who did not attend the meeting that was required to be held. And if this is violated, then the election would be rendered null and void.

(E) deals with the repeal election. And a significant difference here is that, under this provision, a group of employees could repeal by a majority vote instead of the two-thirds vote that’s required under the present wage orders. We think that you might want to have two-thirds vote to institute it, to make sure it’s a popular thing, but if -- if more than half of the employees don’t want it, they should be able to repeal it. It also sets in time limits for compliance with -- with -- for holding the election and so forth.

(F) talks about who’s eligible to vote. We want to make sure, by this provision, that the employer does not stack the -- the vote, so to speak, by bringing in a number of employees at the last minute to vote. And it seems like a pretty reasonable -- we talked -- actually,
this is one of the things we’ve talked with the hospitals about. They wanted to put in the word “regular employee” instead of “permanent employee.” They say there are no more regular -- no more permanent employees in the industry, so maybe you want to think about using the word “regular.”

The -- (G) says that elections have to be held during regular working hours at the work site. Presently, there’s no such requirement. Elections can be held at midnight. And I don’t think Mr. Dombrowski’s proposal deals with this.

(H) provides for a period of time to make a transition from one work schedule to another after an election has been held, 30 days.

(I) simply bans an employer from establishing a work unit solely for the purposes of adopting or repealing an alternative workweek.

COMMISSIONER BROAD: Excuse me, Tom. In my discussion with the chairman -- and I want to note for the record my discussion was only with the chairman, and no other commissioners -- he had suggested, and I thought it was a very reasonable proposal, that the Labor -- you have a situation there where, based upon an employee complaint, the employer investigates the appropriateness
of the unit. He raised the question, you know, every seven days you get a new proposal, the employer never gets to hold the election, and it gets to be sort of dilatory. He suggested that the Labor Commissioner’s determination be final and binding. In other words, he looks at the question of appropriateness of the unit, and he or she makes that determination, and that’s it. That’s the appropriate unit, and there’s no further complaint process. Do you have an objection to adding that?

    MR. RANKIN: That’s probably not a major problem.

    COMMISSIONER BROAD: Thank you.

    COMMISSIONER DOMBROWSKI: I just, to clarify that, didn’t get my vote, though, so --

    COMMISSIONER BROAD: Not yet.

    (Laughter)

    MR. RANKIN: (J) basically talks about the requirement that there be a neutral atmosphere; employees shall be free from intimidation and coercion; can’t be discharged or discriminated against for opposing -- expressing opinions concerning the alternative workweek, or for opposing or supporting its adoption or repeal. It’s basically a protection for employees who might not -
- who might not like what the employer is proposing and might want to talk to other employees and express their dislike.

(K) simply -- I think that is in the Dombrowski proposal in some form, but probably not in exactly this form -- requires reporting to the Division of Labor Statistics and Research about the results of the election; includes the final tally of the vote, the size of the unit, the nature of the business of the employer. One of the problems we’ve had in dealing with the whole question of overtime is that there hasn’t been much data to look at. And this would at least provide some kind of record about who’s using alternative workweeks and who isn’t, and then someone might want to look into that and figure out whether they’re working or not.

(L) allows an employer to repeal an alternative workweek based on business necessity, and if they decide to do so unilaterally, they have to give the employees 45 days’ notice.

COMMISSIONER BROAD: Can I just comment on that? This is a proposal that actually, I think, is a considerable -- adds considerable business flexibility for the employer. My feeling in suggesting this is that if an employer has instituted one of these alternative
workweek elections, and the election was held, and it was
passed, but it is causing tremendous stress in the
employer’s workplace, that -- and the employer concludes,
“I would just like to return to the basic, standard law
of daily overtime after 8 hours in a day and 40 hours in
a week,” that the employer should simply be able to
 impose that unilaterally for business necessity reasons,
give the employees, you know, some notice before it
occurs. It’s my view that it’s an employer’s right to
run the business as the employer sees fit. And if they
want to return to the basic statutory standard, there
should be no impediments placed there.

I realize that that somewhat obviates the result
of the election -- clearly obviates the result of the
election and allows the employer, in effect, to overturn
it. However, if it is not working at all in the
workplace, I think it would cause considerable problems
if the employees then consistently refused, in any
subsequent election, to repeal it, while the employer
felt that it was a nightmare, for whatever reason.

COMMISSIONER BOSCO: So, basically, you’re
saying that if the employer starts to look at the world
the way you do, it’s all right if he goes ahead and
unilaterally absolves everyone of their election, huh?
COMMISSIONER BROAD: Only if he looks at it in the way the legislation established the basic standard.

COMMISSIONER BOSCO: Right. I was going to say, you seem to have developed a new respect for employers’ care of their charges.

I’m sorry. Commissioner Broad is shocked.

(Laughter)

COMMISSIONER BROAD: Well, I could take it out and try to be more consistent.

(Laughter)

MR. RANKIN: Well, one --

COMMISSIONER BROAD: I don’t know if the employers object to that in there. I mean, maybe they do. I don’t know.

MR. RANKIN: One other point. I think -- again, I think that the discussions between the two of you give the Labor Commissioner maybe a little too much discretion in terms of requiring -- it says they “may require the employer to select a neutral third party to conduct the election.” It seems to me, if there is a problem, a violation, then the election -- the Labor Commissioner should not be given discretion; they should simply be required to do it.

One other point. We have been working on
language dealing with the issue of an exception to the no
mandatory overtime provision that we feel is so crucial
here. And I believe Mr. Broad has been given that
language, and I don’t know if any -- if that’s been
shared. But it is -- it allows for exceptions in
emergencies, and it sets forth restrictions so that
clearly -- it makes it clear that a hospital could not,
simply because of bad planning, require someone to work
overtime by arguing -- by saying, “Oh, we just don’t have
the staff.” It -- it makes it -- I think it tightens it
up. It’s much tighter than the language that the chair
has proposed, which actually has a loophole in that makes
it meaningless.

So, I would suggest that, on that particular
element of the wage order, that you look at language that
explicitly takes into account emergencies, of different
kinds of emergencies, not just necessarily ones that are
declared by the state, but also protects the hospital
workers from a situation where, you know, at the
beginning of the shift, the hospital knew that -- that
the replacement
for the worker at the end of 12 hours wasn’t coming in,
and they say, “You have to work overtime today.” That’s
not acceptable. That’s not a ban on mandatory overtime.
COMMISSIONER DOMBROWSKI: Other testimony?

MS. CHINARD: Hi. Good morning. Good afternoon, I guess it is now. My name is Michelle Chinard. I’m a registered nurse. I work for the County of Marin. I’ve worked there for twenty years in the psychiatric emergency service. And I came today to talk about mandatory overtime and the effect that it’s had on my life.

I was asked to work -- I was told to work a mandatory overtime shift, which I objected to, and my objections were overruled by my manager. And I have a medical condition, I have fibromyalgia, which causes extreme fatigue. And I was overtired after having worked my 8-hour shift. It was a very, very busy shift. We had a lot of very sick people in the unit. None of us had a break. There were three of us on the shift. None of us had a break.

And I had to stay and work the night shift, after having worked my evening shift. And the reason for this was that the -- the manager simply hadn’t noted that someone had called in sick two days before with pneumonia and said that they wouldn’t be at work that particular night. And he just forgot and didn’t plan for this person’s absence. And there was no one to cover the
shift other than myself. So, I stayed.

At about twelve and a half hours, I took a break and fell asleep. And I was terminated because of that.

COMMISSIONER DOMBROWSKI: Any other comments?

(No response)

COMMISSIONER DOMBROWSKI: Okay. I’m going to suggest that we take a lunch break. Does everybody want thirty minutes? Is that enough for lunch? We get an on-duty lunch period, actually.

COMMISSIONER BOSCO: I think we’re supposed to have two in a 14-hour period, aren’t we?

COMMISSIONER DOMBROWSKI: Right. Why don’t we -- it’s twenty to one -- why don’t we say we’ll reconvene at one-thirty? And I would suggest various parties might want to talk to each other and see if there’s anything else that they want to discuss.

(Thereupon, at 12:40 p.m., the meeting was recessed for lunch.)

--o0o--
COMMISSIONER DOMBROWSKI: All right. I would like to reconvene.

Mr. Rankin, I believe you have some more representatives who wish to testify. And we have agreed we would limit this section to ten minutes, and then we will proceed to the commissioners deciding what next steps to take.

MR. DAVENPORT: Mr. Chairman and members of the Commission, Allen Davenport, with the Service Employees International Union.

I should say we are the largest union of healthcare workers in California, and we represent a broad diversity of healthcare workers in a -- in a great many places. But I’m not a healthcare worker; I’m a lobbyist. I’ve been a lobbyist since Mr. Bosco was chair of the UIDI Subcommittee, which used to meet sometimes in
this room when it had walnut paneling.

As such, I -- I’ve had experiences like this before, where somebody comes in with forty pages of amendments to a proposal and you haven’t had a chance to see it, and I know how these things can happen. But I would caution the Commission that when the Legislature said re-examine the healthcare industry, that it meant for you to do that because there was not a great deal of consensus that the existing system for creating alternative workweeks was at all satisfactory. And I think the testimony that we’ve presented here and at previous hearings should cause you to -- to want to create a substantial reform in a number of areas, including the elections.

I would like to enter into the record just one example of how elections can be rigged in healthcare systems. This is the report on the employees’ election to form a union at Catholic Healthcare West. This is an NLRB oversight election. And this commission that was established by the speaker of the Assembly, with a lot of reputable people from this community here, found violation after violation of employees’ rights. And that’s this report.

The second thing that happened was that the
National Labor Relations Board looked into this election and found lots and lots of violations. Nevertheless, the Board didn’t find enough violations to undo the election. But we just want to tell you that there is a bias out there on the part of the employer in these elections, and the idea that the election can be run by the employer in a fair way is just not simply -- doesn’t meet the test of trying to protect the workers in the workplace from the down sides of the 12-hour shift.

And so, what -- one of the fundamental things that we’re asking for here is fair elections overseen by a neutral party.

A couple of other things have come up here. We were not particularly, as Mr. Broad knows, satisfied with everything that was in his proposal. We did view it as a compromise kind of proposal. One of -- one of -- but given that there is a -- obviously, another proposal here now that would broaden significantly what Mr. Broad has proposed, I would like to comment on a couple of matters related to that.

One of -- one of the key elements of Mr. Dombrowski’s proposal is to -- is to broaden the kinds of occupations that can be included, far beyond the licensed personnel that Mr. Broad’s proposal would have limited it
to. And we represent both licensed and unlicensed personnel. And the licensed personnel and unlicensed personnel, some of them sometimes vote for the 12-hour shifts, and some of the times, they don’t. But one of the things that we find in these elections that employees find unfair is when a certain class of people on -- in a designated unit which has an interest in doing this can then vote against another class of people, another classification of workers, who don’t.

And so, we’re going to say -- so our proposal is -- is that if you’re going to get beyond licensed personnel, and I don’t know any reason why you should, necessarily, but if you do, as does exist in some of our contracts, then you ought to make sure that -- that people vote by classification here. Let’s not have twelve nurses on a shift outvoting one janitor on a shift, okay?

Now, I don’t know any reason why janitors have to have 12-hour shifts here, okay? I don’t even think it works.

But, in any case, we would say that if you’re going to broaden the universe of people that this is going to apply to, then that’s going to have an impact on the election procedure that you’re going to put together,
and you ought to take that into account. And no proposal
here at the moment has any account of that.

So, I leave that work to you.

The other thing I wanted to talk about was the
“brinksmanship” that’s going on here today. I think
that, while we have had a lot of testimony about what --
some of the egregious problems regarding mandatory
overtime, there hasn’t really been a process for
developing a -- a response, until Mr. Broad’s proposal
went up on the Internet. And even then, you know, it
wasn’t until 72 hours ago that the industry people felt
like they had to sit down with us. It’s made me a great
believer in the wage board system, all right? I mean, I
think if we had had to have a wage board, and had to go
through this process, you folks wouldn’t be in this
position today, because I -- I didn’t get the feeling,
when we sat down with the hospital people the other day,
that they really cared about reaching an agreement with
us. I think they cared about you guys being put in the
position of voting for one proposal or the other. And
it’s hard for me to think that we couldn’t have done a
better job if we’d had a better structure here.

But having said that, I don’t think that you
ought to be pressured by them into saying, “Oh, we’re
going to have to -- you know, if you vote for Mr. Broad’s proposal, you know, we’re all going to have to -- you know, we’ll have some kind of sudden death here in the hospital administration as we know it." I think there are ways to create transition here that you -- that are perfectly within your right. I think that if you decide, as we hope you do, that, on balance, Mr. Broad’s proposal is the better proposal, it seems that there -- you know, it seems fair that there ought to be some kind of transition, so that not everything has to change as of July 1st. We would say that there ought to be new elections in every place according to the new rules, so that everybody is treated fairly, but I think we could say that they -- you know, that those elections could take place over a period of time.

I think -- you know, in other words, there are ways to make this a manageable circumstance, even if you create the kind of change that we think you need to create to create fairness here.

So, I think I’ll limit myself to those three remarks so that other people will have some time here. But I think it’s important to realize that if you’re going to engage in what you’re doing here, you’re going to have to take into consideration some things that
aren’t even in front of you right now.

COMMISSIONER DOMBROWSKI: Okay. That took about

half of the ten minutes we have, folks. So, please, be

brief.

MR. ZACKOS: Good afternoon, Mr. Chairman. My

name is Mike Zackos, and I represent the United Nurses

Association of California, also a part of the National

Union of Hospital and Healthcare Employees, representing

more than 11,000 registered nurses in the southern

California area.

You’ve heard a lot of testimony -- I certainly

want to be brief -- but I -- it’s our opinion that the

best protection for patients and healthcare workers is to

ensure the importance of setting safety standards.

Therefore, in the interests of setting general safety

protections, we recommend -- we strongly recommend that

you do not consider mandating people to work overtime.

We’ve had previous meetings before. We’ve identified

reasons why, health reasons.

More specifically, you’ve heard testimony this

morning about the nurse who had fibromyalgia, was

mandated to work overtime. She works overtime, certainly

taking into consideration her health condition, she fell

asleep at work. What happened? She got terminated.
Certainly she does not -- she was not in a condition to provide ideal quality patient care. And certainly, I believe your decision to decide to be able to mandate people, other than in a national emergency or a national disaster, is certainly setting yourself up to jeopardize patient care.

Also, we certainly ask you to consider, and we strongly support, two consecutive days off during the week, as well as 8 hours -- at least 8 hours off after the 12-hour shift.

We have a large proportion of nurses today who certainly are making up an aging workforce. And you’re putting restrictions on them to work under mandatory situations. And when something happens, you’re placing patients and the nurse at risk.

Thank you.

MR. CAMP: Mr. Chairman, members of the Industrial Welfare Commission, my name is Bill Camp. I’m the executive secretary of the Sacramento Central Labor Council, and I come here today representing those workers in the six counties here in the Sacramento area.

We have some very serious concerns about the -- the pace and the way in which this has been settled, but more particularly, about the expansion of the definition
of who you plan to cover. We’ve always assumed that this was simply talking about those people that had essentially a job classification of nursing. And if we’re going to go and now expand this to include almost anybody, anybody -- we’re talking people that work in a -- in a grocery store selling Band-aids. I mean, what -- what is the -- what is the intent here of the Industrial Welfare Commission in terms of trying to move for the expansion of the definition?

Secondly, it is a real serious problem for us that we’re saying to workers, “You must deal with and you must accept the blame for the unplanned circumstances of management.” To say to management that we can consider this a crisis because we didn’t plan very well how we manage our workforce, and therefore you’re going to have to work a 12-hour shift, is the kind of abuse of workers that we really believe that this Commission was designed to prevent, not to implement, that the statutes, in our minds, were created to provide the kind of minimal protections from the -- this classic example of saying, “We can force you to work more than a 12-hour shift because we didn’t plan very well how to handle the circumstances we were faced with.”

It is a serious dilemma for thousands of workers
in this state, not just the few that came here today.
And, in fact, I’ve got more than 400 cards that I’d like to have the secretary of the Industrial Welfare Commission to share, who is -- whoever’s the responsible party. But it includes in that several hundred letters, each of which had some individual information with it about the seriousness with which people consider this erosion, so that what we would like for you to do is to consider the fact that this is not just an issue that’s gone away. This is an issue which our members all over the state continue today to raise as a big problem, that -- what we are not asking you to do is to make an immediate decision without realizing that there are people everywhere who look to you for leadership, for those protections.

What we’ve seen since 1973 is a tremendous crunch on the standard of living for working people in this state. We’ve seen wages go down as the number of people in each family working increases by 100 percent. When we tell you that there’s a problem about how you’re going to implement these 12-hour shifts, we’re telling you that what you’re doing is you’re destroying American families. You’re destroying people’s ability to have a family life and to be engaged in the civic interests of
the community. And you can’t do that. You can’t do that as those appointed with this authority to -- to protect the interests of these people, without giving us some careful protections, some very diligent protections from abuse of this election process.

There’s no question but what the people who have the big interests here, who came to you this morning at the last minute with these proposals, said, “Hey, listen, we’ve got a grand plan here, and let’s just slip it in at the last minute,” have a major financial interest. That’s not a doubt. But what we’re faced with is people who also have a major financial interest, and that’s the people that work.

And we’re asking that you not talk about an expansion of who gets covered, nor talk about people being able to be given more than a 12-hour shift because some employer didn’t do a good job of planning. We think you need to make the arrangements in the election process that counterbalances or tries to level the playing field between these people who are working for a living and those that have a phenomenal financial interest, a financial interest designed not to talk about their family life or their civic engagement or their participation in the community, but an interest of our
community. We can’t afford to see our families torn apart, our lives torn asunder economically, by these kind of last-minute decisions.

What we’re asking for is a considered, thoughtful review of how do we protect these families, how do we protect those people who are being forced to go out and work these horrible shifts. You can’t grind the labor force down like that. You’ve got this whole cohort of people who were born after ’44 to ’46 --

COMMISSIONER DOMBROWSKI: Bill, please -- I mean, we are running out --

MR. CAMP: It’s an aging population. And to put an aging population into this kind of work -- work demand is -- is the kind of abuse that the Industrial Welfare Commission was designed to prevent.

Thank you.

MS. DENT: Good afternoon. My name is Barbara Dent, and I’m a registered in Sharp Chula Vista, down in San Diego.

And most of the points that I wanted to address here have already been addressed quite clearly, but I would just like to address one other issue, which is in Mr. Dombrowski’s proposal, (H), Number (5): “An employer shall not be required to offer a different work
assignment to an employee if such a work assignment is not available.” To my way of thinking, this would lead to broad firing of persons who were unable, for medical reasons or family reasons or whatever, they would be out of a job if they could not -- if they were unable to work the 12-hour shift.

I would -- would really like to see some language in there saying that employers would do everything they could to accommodate people in other areas, other than -- because not all of the hospitals are 12-hour shifts, not all the units, that perhaps employers could give people who are unable to work 12-hour shifts the opportunity to apply in other areas where they might be needed where there is 8-hour shifts.

Thank you.

MS. OBASIH-WILLIAMS: My name is Cheryl Obasih-Williams, and I’m a Tenet employee. And I do understand, as a registered nurse, this would impact me if you mandated me to actually stay over past my 12 hours, because then it affects my license. Then the licensure has to go back and look at the fact that I disobey mandatory overtime, I left the patient, and therefore it impacts me.

And I wish you’d give some careful consideration
to this, because I feel that the employer does not do his job fairly either. He does not hire enough employees to cover the shift. And then, at the last minute, they want you to stay over. That’s not fair to me. I’ve already put in 12 hours. I’ve already worked hard, as well as my other co-workers.

And we would just like you to have some careful consideration.

COMMISSIONER DOMBROWSKI: Thank you.

MS. SWEET: My name is Carol Sweet. I’m a registered nurse in Lakewood. I work for Tenet Corporation.

I also was very pleased about the AB 60 bill when it first came out. I was very impressed at how hard you all worked at having all these things put into this bill. However, after reading it, I realize that my employer would never go for any of the proposals that you have in here. And they didn’t. My pay was reduced from $24.23 an hour to $21.41 an hour, in -- on December the 8th. However, we were not notified until December the 14th.

But these kind of things are the loopholes that I think that they will get around. All these amendments are great; I think they’re wonderful, and I think they’ll
really work for us. But there are -- if you leave one
loophole, they’ll find it.

I don’t want to work till I’m seventy years old
and not be able to live. I don’t think you do either.

I strongly urge you to consider the bill as it
was presented the first time around and pass it, for the
sake of our healthcare.

Thanks very much.

COMMISSIONER DOMBROWSKI: Thank you.

I’d like to just propose for the commissioners,
just to reiterate, on my proposal, in Section (A) on Page
1, Line -- one, two, three, four, five, six, seven,
eight, nine -- Line 10 shall include the words “scheduled
number of workdays.” I’m simply reiterating the “number
of workdays” amendment.

In the definition -- I’m sorry I didn’t have
this page numbered -- Page 1, 2 -- 3, “For purposes of
this order, the term ‘health care industry’ is intended
to cover,” delete the words “but is not limited to.”

Procedurally, on Page 5, we are not addressing
administrative, executive, and professional employees in
this -- in this docket, so that should just be deleted.

Commissioner Bosco, I believe you have some
comments.
COMMISSIONER BOSCO: You already addressed one of the ones that I had, which I think the definition of “health care industry” is overly broad, and you did take out “but is not limited to,” which I think narrows it. And I would like to suggest taking out “either directly or indirectly” as well.

COMMISSIONER DOMBROWSKI: Okay.

COMMISSIONER BOSCO: Also, back to the veterinary establishments, I don’t know if we have to list them in here, but I think they should be included.

COMMISSIONER DOMBROWSKI: How about if I include in the list “veterinary facilities”?

COMMISSIONER BOSCO: That would be fine.

And I had some other --

COMMISSIONER DOMBROWSKI: Okay.

COMMISSIONER BOSCO: I think of all the testimony we’ve had. The real compelling issue still exists about people that are required to maintain after a 12-hour shift. I think that there’s been too much testimony that abuses exist to pretend that it doesn’t. And yet, on the other hand, just about everybody has agreed that in true emergency situations, to ask someone to stay on isn’t too far-reaching. And I think almost any human being would be willing to stay on if a real
emergency exists. But I am not convinced that we have
the language that properly describes that situation. And
I think that you’ve done a very good job of attempting
that, and I intend to vote for this language today, but I
think our staff should seek assistance, maybe from the
Department or others that are used to enforcement, to
come up with language that would be more narrow and
really specify what a true emergency situation is that
would permit people to be forced to work after the 12
hours.

So, I guess what I’m saying is I don’t think we
should open all this up to yet one more hearing, but I
would be amenable to proposing an amendment to this at
our next hearing, if we could seek help in getting
language that was better suited to meeting that need.

COMMISSIONER DOMBROWSKI: Okay. Anything else?
COMMISSIONER BOSCO: That’s it for now, as far
as I’m concerned.
COMMISSIONER BROAD: Mr. Chairman?
COMMISSIONER DOMBROWSKI: Mr. Broad.
COMMISSIONER BROAD: I’d like to consider going
through the thing that was proposed on our agenda and
noticed to the public and determine whether various
things that aren’t in your proposal have a majority of
votes today. How do you want to proceed with that?

COMMISSIONER DOMBROWSKI: I would have you go through all of them, because I’m just going to say I’m going to vote no on all of them, and -- but I’ll leave it up to the other commissioners if they want to have individual votes or just have an up-and-down.

COMMISSIONER BOSCO: I don’t know why I’m feeling particularly in the hot seat here, but I guess what would ordinarily happen is Commissioner Broad could raise the particular issue, then we’d have to figure out where it would fit in this, to amend it.

COMMISSIONER DOMBROWSKI: Right.

COMMISSIONER BOSCO: You’d be proposing amendments to Mr. Dombrowski’s text. Is that true and correct?

COMMISSIONER BROAD: I guess that would be it.

I would propose, as a substitute, since there was no objection, the language, first, on the first page, (B)(1), that it would be:

" -- limited to licensed and certified healthcare personnel employed by a licensed, 24-hour health facility or licensed dialysis clinic, who are engaged in direct patient care, or pharmacists dispensing prescriptions in any practice setting
where they are required to engage in direct patient care.”

That would be my first suggested amendment to his proposal.

COMMISSIONER DOMBROWSKI: Anyone have a second?

(No response)

COMMISSIONER DOMBROWSKI: I guess the procedure is --

COMMISSIONER BROAD: If it doesn’t have a second, it doesn’t have a second.

COMMISSIONER DOMBROWSKI: No second.

COMMISSIONER BROAD: Okay.

On (B)(2), I would propose as a substitute -- and I’m not sure which section:

“All hours worked in excess of 36 hours in a workweek shall be compensated at a rate of not less than one and a half times the employee’s regular rate of pay and all hours worked in excess of 12 hours in a day or in excess of 8 hours on any workday beyond three days in any workweek shall be compensated at a rate of twice the employee’s regular rate of pay.”

I don’t believe that there’s actually any objection to that anywhere.
COMMISSIONER BOSCO: Well, is there an objection to that, Bill? Can you speak to that?

COMMISSIONER DOMBROWSKI: I’m -- I’m not prepared to vote for it.

COMMISSIONER BOSCO: I’m not going to second that one either.

COMMISSIONER BROAD: All right.

Next I would propose as Order -- on (B)(4), the following language dealing with an exception:

“No employees assigned to work a 12-hour shift established pursuant to this section shall be required to work more than 12 hours in a 24-hour period or more than 40 hours in a workweek, except under the conditions provided in Subsection (b). “Prior to mandating overtime pursuant to this section, an employer shall exhaust all reasonable staffing alternatives, including soliciting off-duty employees to report voluntarily to work, soliciting on-duty employees to volunteer to work overtime, and recruiting per-diem and registry employees to report to work.”

And then (b):

“An employee may be required to work
overtime if either of the following conditions are met: 1) a state of emergency declared by a county, state, or federal authority is in effect in the county in which the healthcare facility is located; or 2) in unanticipated and nonrecurring event which imperils patient care at the healthcare facility. An employee shall not be required to work overtime under this subsection on more than three occasions in a twelve-month period.”

COMMISSIONER DOMBROWSKI: Do we have a second?

COMMISSIONER BOSCO: Here again, I’m -- I actually feel that the language that is proposed by the chairman is not strong enough, not limited enough, and should be strengthened. I think Commissioner Broad’s language is more along the lines of what I was thinking of. But I would prefer that, if possible, an agreement be reached between the parties on that and that we revisit that one issue in the future.

So I’m not going to second your proposal, Commissioner Broad, although I am giving notice, as it were, that I do believe that what we have here needs to be strengthened.

COMMISSIONER COLEMAN: I would agree. I think
we’ve heard testimony today, fairly compelling testimony, in this regard. And I would agree that if we can work something out more specific for the next meeting, that would make sense.

For example, I’m not sure we know, you know -- we have three times listed in here. I think healthcare experts would be able to give us some guidance in terms of, you know, what numbers make sense and that sort of thing.

COMMISSIONER BROAD: Okay.

Next I would propose, in Paragraph (5):

“Employees assigned to work a 12-hour shift established pursuant to this section may voluntarily work an additional 4 hours of overtime in the same 24-hour period, provided, however, that every employee shall be entitled to not less than 8 consecutive hours off-duty within a 24-hour period.”

That essentially caps the amount of overtime at 4 hours so that they would work a 16-hour day, maximum. Assuming that they’re working other 12-hour days in the same workweek, it’s possible that within a 48-hour period, they could work 32 hours, under this proposal, as opposed to 48 hours or 72 hours consecutively.
COMMISSIONER BOSCO: I’ll second that motion.

COMMISSIONER DOMBROWSKI: Let’s call the roll.

COMMISSIONER COLEMAN: Can I comment briefly?

COMMISSIONER DOMBROWSKI: Sure.

COMMISSIONER COLEMAN: If we clean up the language on mandatory overtime to something that we’re all comfortable with, wouldn’t it take care of this?

COMMISSIONER BROAD: I don’t think so. I think that’s a separate issue. The question is how many times they can ask for it, not the circumstances in which it occurs. And I feel very strongly that employees in safety-sensitive positions should have 8 hours off. For example, for the past sixty years, truck drivers, pilots, boat operators, other people in safety-sensitive positions, have limits on their hours which require them to have 8 consecutive hours off-duty, for fatigue questions. And I think people in healthcare should probably have the same.

COMMISSIONER DOMBROWSKI: 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: Two to two.

COMMISSIONER BROAD: We may have to revisit that one next month, huh?

Okay. I would like to move on to Paragraph (6):

"Every employee assigned to work a 12-hour shift established pursuant to this section shall be entitled to not less than one duty-free meal period during the shift, which may not be waived. However, an employee shall be entitled to a second meal period, which may be taken as an on-duty meal period by mutual consent of the employer and the employee consistent with the provisions of this Order."

The purpose here is that when you have 12-hour -- employees on 12-hour shifts, that they do have an off-duty meal period, a time which is free. Otherwise, what they would be essentially required to do is work all 12 hours and try to catch a meal period during that time. They would -- the second meal period, which is mandated by law, could be an on-duty meal period.

COMMISSIONER BOSCO: I'll second that.
COMMISSIONER DOMBROWSKI: Any other comments?

COMMISSIONER COLEMAN: Just to clarify. So they couldn’t, even by mutual consent, waive one of the meal periods, is what you’re saying.

COMMISSIONER BROAD: That’s correct, which I think is consistent with the statute.

COMMISSIONER DOMBROWSKI: 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: I’m going to be trouble today. No.

MR. BARON: Again, two to two.

COMMISSIONER BROAD: On the following page, Paragraph (E), “Any” -- I would like to propose -- that’s on --

COMMISSIONER DOMBROWSKI: The other one.

COMMISSIONER BROAD: -- the other one, yeah. “Any alternative workweek agreement adopted pursuant to this section shall provide for not
less than two days off within a workweek and shall provide for not less than 4 hours of work in any workday."

COMMISSIONER DOMBROWSKI: Do we have a second?

(No response)

COMMISSIONER DOMBROWSKI: No second.

Commissioner Broad?

COMMISSIONER BROAD: Okay. Paragraph (F):

"Nothing in this section shall prohibit an employer and an employee, by mutual consent, to substitute one day of work for another day of the same length in the shift provided by the alternative workweek agreement on an occasional basis to meet the personal needs of the employee without the payment of overtime."

COMMISSIONER BOSCO: Second.

COMMISSIONER DOMBROWSKI: 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: Aye.

MR. BARON: It’s adopted.

COMMISSIONER BROAD: I would like -- in the section of Mr. Dombrowski’s that refers to a reasonable effort -- let’s see -- on his first page, Paragraph (E), I would like to add the following sentences:

“At a minimum, an employer shall give an employee who is unable to work the alternative workweek schedule first priority to work an 8-hour shift in any department within the facility where the employee regularly works, or any other facility operated by the employer, provided the employee meets the qualifications of this position. Nothing in this section shall prohibit an employer from permitting employees who are unable to work the hours established by the alternative workweek agreement to work 8-hour shifts within the same work unit covered by the agreement. An employer shall be permitted” --

-- I believe actually this may be the same, but -- “ -- an employer shall be permitted, but is not required, to accommodate any employee who is hired after the date of the election and who is
unable to work the alternative schedule established as a result of that election. An employer shall explore any available reasonable alternative means of accommodating the religious beliefs or observance of an affected employee that conflicts with an adopted alternative workweek schedule, in a manner provided by subdivision (j) of Section 12940 of the Government Code.”

COMMISSIONER DOMBROWSKI: Second?

(No response)

COMMISSIONER DOMBROWSKI: Commissioner Broad?

COMMISSIONER BROAD: Subsection (C):

“For the purposes of this section, ‘regularly scheduled’ means a schedule where the length of the shift and the days of work are predesignated pursuant to a valid alternative workweek agreement.”

COMMISSIONER DOMBROWSKI: Were you -- I’m sorry. Where are you?

COMMISSIONER BROAD: On Page -- on (C), Paragraph (C) of the proposal that was noticed.

COMMISSIONER DOMBROWSKI: The one that begins, “For the purposes of this section, ‘regularly
scheduled’”?

COMMISSIONER BROAD: Yes.

COMMISSIONER DOMBROWSKI: Okay.

COMMISSIONER BROAD: And the difference is that that means that they have to name -- they have to -- they’re voting on the days of the week of their schedule as opposed to number of days. And I would sort of add to that that you would also change that in Paragraph (A). Or actually, you could leave it as “scheduled workdays,” actually the way it is, in your proposal.

COMMISSIONER DOMBROWSKI: All right. And this is where I put in -- this is my proposal where I’m saying “number of days.”

COMMISSIONER BROAD: Right.

COMMISSIONER DOMBROWSKI: Got it.

Second?

COMMISSIONER BOSCO: Well, can I ask, how does that differ from the way that you amended your proposal, Mr. Chairman?

COMMISSIONER DOMBROWSKI: My proposal does not make you designate the specific days of the workweek. His proposal, if I understand it right, would have you designate the specific days.

COMMISSIONER BROAD: In other words, you would
be voting on a four-10 arrangement Monday through Friday, or a menu of alternatives that the employer would propose, but that they would name the days of your schedule.

COMMISSIONER DOMBROWSKI: This is the language we said that was in the “Statement to the Basis” of the interim wage order, my language is.

COMMISSIONER BOSCO: And this would be done on a what, biweekly basis or something like that?

COMMISSIONER COLEMAN: It’s annual. It’s annual, isn’t it? The vote is annual.

COMMISSIONER BROAD: Well, I think they would vote -- well, I don’t know if it’s annual. They vote once for an alternative workweek arrangement, but --

COMMISSIONER BOSCO: I’m asking how often --

COMMISSIONER DOMBROWSKI: In practice, I think you -- in practice, you would be doing regular schedules. However -- you know, if that’s every two weeks, every month, depending on the business, that’s the idea. What I’m trying to get is that they have the flexibility to juggle it around on a -- on a -- some regular basis.

COMMISSIONER BROAD: Right. The language that we adopted a moment ago allowing the employee -- in combination with what I’m just proposing and the language
we adopted a moment ago, a person would have a regularly
scheduled workweek, and by mutual consent with the
employer, they could switch the days of the week. That’s
the -- that would be the effect of that.

My concern with the existing proposal and what
was in our interim wage order is that I do not see how
you can have a regularly scheduled workweek in which the
person at no time knows when they are scheduled to work,
which day of the week they are scheduled to work. It
might be an hour before they’re scheduled to work. And I
don’t think the Legislature contemplated that alternative
workweeks were intended to be on-call arrangements. And
that’s my concern.

COMMISSIONER COLEMAN: But just to clarify, two
thirds of the work unit would have agreed to this
flexible work arrangement in the first place, right? So,
two thirds of them are agreeing to not have a five --
five 8-hour regular days, if they agree to this, whatever
the menu of options is.

COMMISSIONER BROAD: That’s correct. And
obviously, they’re going to tell them, “Your schedule is
such and such, your schedule is such and such.” And
that’s the point. I mean, I -- I don’t --

COMMISSIONER BOSCO: Well, I think the real
operative word is “predesignated.” And what you’re saying, I think, and I think Mr. Rankin talked to this, is what does it mean to be “regularly scheduled.” It means to be predesignated to work a certain -- or to work a certain number of -- certain days of the week and to be off certain days of the week. But how often do these schedules get made? Every couple weeks or something? It seems to me that someone should know, within that period of time, when they’re --

COMMISSIONER DOMBROWSKI: I believe they will, commissioner.

COMMISSIONER BROAD: Well --

COMMISSIONER BOSCO: You believe they will? Well, perhaps --

COMMISSIONER DOMBROWSKI: Yes. They will have -- they will be provided a schedule.

COMMISSIONER BOSCO: But certainly you couldn’t -- a year earlier -- I mean, certainly everybody’s schedule won’t be set for a whole year.

COMMISSIONER DOMBROWSKI: With Commissioner Broad’s proposal, you would have to, I would assume, schedule them regularly, Tuesday, Wednesday, Thursday, or next week Wednesday, Thursday, Friday, in the election, right?
COMMISSIONER BROAD: No, that’s not my intention, actually.

COMMISSIONER DOMBROWSKI: What are we -- what are we doing here?

COMMISSIONER BROAD: My intention is -- I guess I’m more along Commissioner Bosco’s point of view. At some point, regular people, when they go to work, know which days of the week they’re going to work.

COMMISSIONER DOMBROWSKI: Right.

COMMISSIONER BROAD: And it’s a regular schedule. And I don’t believe that the Legislature contemplated that it would be an on-call arrangement.

Now, at some point I believe you should be able to -- the employer should be able to change the days of the week, perhaps, but not --

COMMISSIONER DOMBROWSKI: Let me suggest that we adopt the language that I’m proposing in the interim wage order, that since then, it has been in the public domain. Since then, I haven’t seen one complaint from anyone about this procedure, so what are we arguing about? Where’s the problem?

And until we see a problem -- I’m more than willing to address it when we see a problem, but we’ve had this out there and nobody is complaining about it.
COMMISSIONER BROAD: Well, sometimes it takes more than two months for these complaints to work their way forward.

COMMISSIONER COLEMAN: I think what we’ve heard from testimony, though, the employer needs the certainty as much as an employee does. I mean, they have to set a certain number of people to schedule for the week. I mean, it doesn’t make any sense to the employer, just like it doesn’t make any sense to the employee, to have it be an on-call arrangement. That wouldn’t be a rational way to run a business.

COMMISSIONER BROAD: Well, let me look -- at some point -- I’m not sure we, any of us, disagree with each other here. The question is, how do we introduce the concept that you’re letting the employee know in advance what the days of the week that they’ll work on, more than twenty minutes before the day starts. It’s -- that’s -- there’s no question here that I think -- do any of you think that this allows someone to just say, “You’re working four days, and we’ll tell you which days, right before they happen”?

COMMISSIONER DOMBROWSKI: I don’t think that’s happening.

COMMISSIONER BROAD: Well, I don’t know whether
it’s happening --

COMMISSIONER DOMBROWSKI: So why do we have to change the language?

COMMISSIONER BROAD: Well, I don’t know that it’s happening or not happening, except trying to make people on-call employees is a big problem out there, as far as I know.

COMMISSIONER DOMBROWSKI: You know, commissioner, when it comes to be a problem, I’ll be more than willing to revisit the language.

Do we have a second?

COMMISSIONER BOSCO: I think this might be the second thing that perhaps we could use some better language on, because I really don’t think there’s any disagreement on this. Maybe you could propose something, you know, next time we meet.

I’m not going to second it right now, though.

COMMISSIONER BROAD: Okay.

COMMISSIONER DOMBROWSKI: Commissioner Broad?

COMMISSIONER BROAD: I’m going.

Okay. On Page -- on the election procedures, I would like to make a substitute motion to the proposal in the -- in the noticed provision, and with the following changes to it: in Paragraph (G), strike the sentence,
“The employer shall select a neutral party to conduct the
election from a list maintained by the Labor Commissioner
of approved neutral third-party organizations,” and
substitute:

“Upon a complaint by an affected employee and
after an investigation by the Labor
Commissioner, the Labor Commissioner may require
the employer to select a neutral third party to
conduct the election.”

On Paragraph (I), add: “The Labor
Commissioner’s determination shall be final and binding.”

On Paragraph (J), strike “Violation of this
subsection shall” and add:

“The Labor Commissioner shall investigate
any alleged violation of this section and may
render the alternative workweek schedule null
and void.”

Let me suggest what the changes are. Paragraph
(A) for the election procedure says:

“An employer may submit a proposal to hold
an election seeking the adoption of an
alternative workweek schedule no less than
twelve months after a prior election to
establish or repeal an alternative workweek
That is the existing rule as it is always applied. Mr. Dombrowski’s proposal would, I believe, allow elections to happen as frequently as anyone wanted to call them.

COMMISSIONER DOMBROWSKI: No, I don’t believe so.

COMMISSIONER BROAD: I think so.

COMMISSIONER DOMBROWSKI: Where are we?

(Pause)

COMMISSIONER DOMBROWSKI: Which page is that?

Yeah.

COMMISSIONER BROAD: Oh, I see, what your -- it’s in your Paragraph (D).

COMMISSIONER DOMBROWSKI: You’ve got it. It’s in my -- it’s in Paragraph (D).

COMMISSIONER BROAD: Okay.

Paragraph (C) adds the language “sharing a community of interest.”

We had the discussion about Paragraph (D), from Mr. Rankin.

COMMISSIONER BOSCO: Well, are you going to go -- why don’t we do a little bit of this at a time?

COMMISSIONER DOMBROWSKI: Where are you again?

COMMISSIONER BROAD: You want -- okay, you want
COMMISSIONER BOSCO: Yeah.

COMMISSIONER BROAD: Okay. All right.

COMMISSIONER BOSCO: We’ve been doing pretty well on that so far. Let’s --

COMMISSIONER BROAD: Yeah. It kind of depends how you look at it.

COMMISSIONER BOSCO: I’m not saying the results have been, but at least that procedure.

COMMISSIONER BROAD: Okay. Paragraph (C) would provide that except for the alternative workweeks with regard to healthcare employees that are doing 12-hour shifts,

“-- for the purposes of this section, a ‘work unit’ may include all nonexempt employees in a division, department, job classification, or shift sharing a community of interest concerning the conditions of their employment in a readily identifiable work group.”

“Or shift sharing a community of interest concerning the conditions of their employment in a readily identifiable work group” is what is added.

The existing rule has no concept in it that the employees have to be somehow related in some way to one
another. And I think employers should -- it’s very wide-ranging language as it is, but at least suggests that the employer -- and it can be down to one individual -- however, the employees need to be somehow related to one another. It does not make sense for an employer to have an alternative workweek schedule that has, you know, the janitors in one facility and the television engineers in another facility of the same employer voting together.

COMMISSIONER BOSCO: Okay. I’ll second that.

COMMISSIONER DOMBROWSKI: Can I just make a comment that my language is, again, taken out of our -- it’s taken out of the existing wage order.

We have a second. 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: Two to two.

COMMISSIONER BROAD: Paragraph (D) of -- says that,
“At least 14 days prior to an election on a proposal to adopt or repeal an alternative workweek schedule, the employer shall provide each affected employee with a written disclosure of the time and location of the balloting, the effects of the adoption of the proposal on the wages, hours, and benefits of the employee, the rights of employees to repeal the proposal” -- and the new -- and then I will strike “the neutral party selected to conduct the election pursuant to (D), and the right of employees to request of the Labor Commissioner of the appropriateness of a designated work unit.”

“This written disclosure shall be distributed at a meeting held during the regular work hours and at the work site of the affected employees. An employer shall provide that disclosure in a non-English language as well as English if at least 5 percent of the affected employees primarily speak that non-English language. The employer shall mail the written disclosure to employees who do not attend the meeting. The failure by an employer to distribute this written disclosure at the meeting and by mail renders
the adoption of an employer-proposed alternative
workweek schedule null and void.”

The difference here is -- actually, it just sort
of fleshes out what the requirement is. Right now there
is nothing that -- the employer has to hold a meeting, as
I understand it, under Mr. Dombrowski’s proposal, but
doesn’t -- it’s not clear what happens to people who
can’t -- who are not there that day at work, or who are
sick. This requires them to just mail the written notice
that’s already required to them and to provide -- where
you have non-English-speaking employees, to provide it in
that language so that they can understand what they’re
voting on.

I think that would be the only significant
changes from the current requirement.

COMMISSIONER DOMBROWSKI: Again, in the current
wage order, it’s:

“Such a disclosure shall include meetings duly
noticed, held at least 14 days prior to voting,
for the specific purpose of discussing effects
of the flexible work arrangement. Failure to
comply with this section shall make the election
null and void.”

COMMISSIONER BROAD: Right. So, I think what is
-- what is being added here is a requirement that --
spelling out what’s in the proposal, and that the written
disclosure be given to employees who are not present for
the meetings, and that it be distributed in non-English
languages where they -- people don’t speak English. We,
of course, have a large percentage of the workforce that
-- whose first language, and in some circumstances, only
language, is a non-English language.

COMMISSIONER COLEMAN: Just a point of
clarification. Do you know if this was part of the
previous arrangements for alternative work voting, or is
this --

COMMISSIONER BROAD: That would be a --
COMMISSIONER COLEMAN: Or is this fairly new --
COMMISSIONER BROAD: This is new.
COMMISSIONER COLEMAN: -- way of doing it?

Okay.

COMMISSIONER BOSCO: Can I again -- as I
understand it, you’re adding the requirement of mailing
to people that aren’t present or can’t be present, and
that it -- the notice be in the language that that
individual speaks, if it’s non-English.

COMMISSIONER BROAD: Well, if it’s 5 percent or
more of the workforce.
COMMISSIONER BOSCO: And that’s the only change that you’re contemplating?

COMMISSIONER BROAD: I believe so. I think, in the first sentence, where it says, “The employer shall provide each affected employee with a written disclosure of the time and location of the balloting, the effects of the adoption of the proposal on the wages, hours, and benefits,” I believe that is what’s required now, the effects on the wages, hours, and benefits. It doesn’t -- it’s assumed, but doesn’t say, require, that the time and place of the balloting be noted. The right of employees to repeal the proposal is in the wage order, but would be -- would be part of this notification, and the right of employees to request review by the Labor Commissioner of the appropriateness of a designated work unit.

COMMISSIONER DOMBROWSKI: I’m going to make -- again, Barry, when you’re doing an alternative workweek, the employer is trying to encourage the vote. And I -- again, I haven’t heard problems on this. I haven’t heard of anybody saying they were excluded from the vote, they didn’t get the materials. I mean, I just, from a philosophical point of view, it seems like we have enough direction there for the procedures and that they would be followed, to encourage, to get the vote --
COMMISSIONER BROAD: Well, Mr. Chairman, actually, the fact of the matter is that there was never any legal requirement that any of these elections be filed with the Labor Commissioner. The employers, prior to AB 60, vigorously opposed that because they didn’t want to tell the government that the elections were ever happening. So we never knew how many alternative workweeks were ever out there, since 1976. So, we don’t know how many violations there were, or what the employers were doing, or whether they were saying, “Hey, here’s what we’re voting on; vote for it.” We really don’t know.

However, I think that the employer -- there is nothing that the employer should fear from having to tell employees the truth about what the law provides. The employer can make all kinds of arguments about why this is a good idea, why it’s the greatest thing in the world, but employees should have the right to know what is occurring. It’s a requirement that is posted, in any case, or is supposed to be posted, with the wage order anyway. So I just don’t see what the problem is.

COMMISSIONER COLEMAN: The bill requires that -- the current bill requires that they report the results of the elections to the Labor Commissioner anyway, doesn’t
COMMISSIONER BROAD: That’s correct.

COMMISSIONER COLEMAN: Okay.

COMMISSIONER DOMBROWSKI: Does everybody understand the proposal?

Could I have a second?

(No response)

COMMISSIONER DOMBROWSKI: Commissioner Broad?

COMMISSIONER BROAD: Paragraph (F):

“Only employees who have been hired on a permanent full-time or permanent part-time basis who have worked at least 8 hours per week in the thirteen weeks preceding the election shall be eligible to vote.”

I think the problem here is what happens when, particularly in seasonal industries, you know, what occurs when a whole bunch of people leave or go within a period, and that the timing is made -- could vary considerably the number of people who are eligible to vote, since the election binds all future employees and you may have a situation where the workforce composition changes dramatically.

COMMISSIONER DOMBROWSKI: You know, as I read this, though, afterwards, I think it conflicts, because
we are proposing that all affected employees be able to
vote, and then we’re proposing that only those -- well,
not all affected employees. And I, again, would rather
leave it with all affected employees being able to vote,
and let’s -- again, if problems develop, let’s address
that at that point.

    COMMISSIONER BOSCO: I didn’t hear any testimony
that there is this sort of expansion and contraction of
the voting pool, you know, that regularly happens. So, I
mean, it doesn’t seem to me that, at least from the
testimony, that we need to fix something that no one’s
complained is broken.

    COMMISSIONER BROAD: All right.

Paragraph (G):

    “Any election to establish or repeal an
alternative workweek schedule shall be held
during the regular working hours at the work
site of the affected employees.”

I believe that’s in the chairman’s proposal.

    “The employer shall bear the costs of conducting
an election held pursuant to this section” is current
law, but is not in the wage orders, and I think should be
specified. They can’t charge the employees for the costs
of conducting an election.
"Upon complaint by an affected employee and after investigation by the Labor Commissioner, the Labor Commissioner may require the employer to select a neutral third party to conduct the election."

COMMISSIONER DOMBROWSKI: And I will second that motion, Barry.

Andy, we need to have a roll.

COMMISSIONER BROAD: Things are getting better.

(Laughter)

COMMISSIONER BROAD: Gradually.

COMMISSIONER BOSCO: Make slight gains on this.

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: Four-zip.

COMMISSIONER BROAD: Paragraph (H):

"Employees affected by the change in any work hours resulting from the adoption of an
alternative workweek schedule may not be required to work those new hours for at least 30 days after the announcement of the final results of the election.”

The purpose of this is to ensure that people can rearrange their lives to do this. We heard a great deal of testimony about family matters and childcare and other concerns that are raised. Going from an 8-hour shift to -- you know, five 8-hour days to three 12-hour days, would necessarily require major changes in things like childcare and transportation. So I think this is a very reasonable proposal.

COMMISSIONER BOSCO: I’ll second it.

COMMISSIONER COLEMAN: My concern on this is that I’m afraid we limit the flexibility of the workers and the workplace, putting 30 days in.

COMMISSIONER DOMBROWSKI: Could we just --

COMMISSIONER COLEMAN: If we’ve two thirds of the majority voting for the thing, I think we should leave the flexibility to the --

COMMISSIONER BOSCO: Well, this doesn’t prohibit it from going into effect. You just can’t require those that don’t want to do it to do it for 30 days, right? I mean, say if one person doesn’t want to do it, they
simply would have to be set aside, I guess. I mean, I think you could implement the plan right away, and then those that simply need 30 days to get acclimated to it would have that. That’s how I read it.

COMMISSIONER COLEMAN: So this wouldn’t preclude them from implementing it before 30 days, if the majority --

COMMISSIONER BOSCO: Not as I read it. It just says, “No employee shall be required to,” right?

COMMISSIONER BROAD: Yeah. You know, it -- well, I don’t --

COMMISSIONER DOMBROWSKI: Could I -- I actually thought I had something on this in my language.

COMMISSIONER BROAD: You have something that says when the election is held, not when the proposal goes into effect for the employees. So I just don’t think you’ve addressed it in your proposal.

COMMISSIONER BOSCO: I think, when you have something as important as going from an 8-hour day to a 12-hour day or something in between, people should have a period of time to adjust to that. This doesn’t preclude -- as I say, it doesn’t preclude 80 percent of the people from going -- making the change immediately.

COMMISSIONER BROAD: I mean, for example,
anybody who has kids in childcare knows that you’re paying by the month.

COMMISSIONER DOMBROWSKI: Okay.

COMMISSIONER BROAD: So you’ve got to get to the end of the month.

COMMISSIONER DOMBROWSKI: Barry, you’ve got my vote.

Call the roll.

COMMISSIONER BOSCO: See, Barry, when we team up on these things --

COMMISSIONER BROAD: Yeah.

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: Four-zip.

BB. Okay. Paragraph (I), it’s already in the proposal, and it is in the statute, I believe, as well as in the proposal -- correct me if I’m wrong -- I know it’s in the statute -- I’m not sure if it’s in Mr.
Dombrowski’s proposal -- but:

“No work unit may be established by an employer solely for the purposes of adopting or repealing an alternative workweek schedule. The Labor Commissioner” --

-- and this is new --

" -- shall review and approve, reject, or modify the designation of any work unit of affected employees by an employer if a written request is made to the commissioner by an employee of the employer at least seven days prior to the date of the election held on the proposed adoption of an alternative workweek schedule. The Labor Commissioner’s determination shall be final and binding.”

This allows employees who feel like this is a bizarre or inappropriate work unit, where people do not belong together in any logical way, to make a request to the Labor Commissioner. The Labor Commissioner -- the Labor Commissioner’s determination would settle the matter for all purposes for that election.

COMMISSIONER DOMBROWSKI: Second?

(No response)

COMMISSIONER DOMBROWSKI: Commissioner Broad?
COMMISSIONER BROAD: Okay. Paragraph (J):

"The employer shall maintain an atmosphere of neutrality regarding the election and employees shall be free from intimidation and coercion. No employee shall be discharged or discriminated against for expressing opinions concerning the alternative workweek election or for opposing or supporting its adoption or repeal. The Labor Commissioner shall investigate any alleged violation of this section and may render the alternative workweek schedule null and void."

The purpose here is to require that the employer not be engaging in conduct which is intimidating or coercive. The idea of having a secret ballot vote is that employees are free to vote and should be free to talk about this matter at work and express their opinions without fear of retribution.

I can’t -- I don’t know that any of the employers commented in any way that this was problematic, in any of their correspondence. And it seems like it’s axiomatic that the atmosphere in which this election is conducted should be neutral.

COMMISSIONER BOSCO: I have a question. I
think, obviously, you’d want to maintain an atmosphere of neutrality, but that would not prohibit the employer from taking a position on the subject. Is that true? I mean, wouldn’t it --

COMMISSIONER BROAD: Right. And to answer -- I think, to answer that, I think maybe we should add a sentence that said, “Nothing in this section shall prohibit an employer from expressing its opinion with regard to the proposed alternative workweek.”

COMMISSIONER BOSCO: With that change, I’ll second the amendment.

COMMISSIONER DOMBROWSKI: Was this -- I have a question. Was this in AB 60 at any point?

COMMISSIONER BROAD: No.

MR. BARON: And where --

COMMISSIONER BROAD: Oh, gosh -- after the second sentence, “Nothing in this section shall prohibit an employer from expressing its opinion with regard to the proposed alternative workweek arrangement.”

COMMISSIONER COLEMAN: Is that problematic with the sentence that says the employer must maintain an atmosphere of neutrality?

Do you --

COMMISSIONER BOSCO: Well, that’s why I raised
it. But I think an atmosphere of neutrality is one where
people aren’t, you know, being coerced or intimidated.
That’s different from an employer being able to say, “In
my opinion, this is a bad idea or a good idea.”

COMMISSIONER BROAD: I think it’s the difference
between an employer saying, “Hey, you know, I think this
would be really good for us to do this shift,” and an
employer saying, “Why are the two of you standing there
talking? You know, what are you talking about?” You
know, that’s -- well, I don’t really want to -- “Why are”
-- you know, “Are you talking about this alternative
workweek thing?,” you know. “Stop talking about it.”
That would be, I think, a violation of this section.

Obviously, the employer is proposing it and is
in favor of it, and the employer has every right to say
that they think it’s a good idea.

COMMISSIONER BOSCO: Kind of eliminate the water
coolers and everything before --

COMMISSIONER BROAD: Yeah, right.

COMMISSIONER DOMBROWSKI: Okay. So we have a
second?

COMMISSIONER BOSCO: Yes.

COMMISSIONER DOMBROWSKI: 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: Two-two.

COMMISSIONER BROAD: Okay. With that, I would make -- well, I want to understand something, Mr. Chairman. With respect to the issues where Mr. Bosco and myself voted “aye” and where there might be a reasonable likelihood that Mr. Rose would vote “aye,” I assume that we will be free at the next meeting to put those issues on the agenda for reconsideration. Is that how --

COMMISSIONER DOMBROWSKI: Reconsideration, but no testimony, if that’s okay with you.

COMMISSIONER BROAD: That’s fine with me.

COMMISSIONER DOMBROWSKI: Yeah. And, I mean, that’s fine, and everyone should understand that.

MR. BARON: So can I just --

COMMISSIONER BROAD: I have nothing more.

MR. BARON: Can I just -- can I just be clear on the last? So on all the items were there were like two-
to-two votes, those items will be noted for reconsideration? Is that the point?

COMMISSIONER BROAD: Is that right or --

COMMISSIONER COLEMAN: The two-to-two votes.

COMMISSIONER BROAD: As well as the matters that were -- well, actually, I think --

COMMISSIONER BOSCO: Technically, reconsideration is usually done by someone that wants to vote the other way on something. But I think it just be an agreement between us that, on those items -- that we’re not going to open up the whole thing, but on those items, we’ll reopen them. Can’t we agree to that?

COMMISSIONER DOMBREWSKI: I’m fine with that.

COMMISSIONER BROAD: Okay.

COMMISSIONER BOSCO: I don’t think it’s a technical reconsideration.

COMMISSIONER BROAD: Right, right. Okay. Then we’ll just assume that that will -- that those items will be on the agenda.

COMMISSIONER DOMBREWSKI: Okay.

COMMISSIONER BOSCO: Could we have like a two- or three-minute break? Are we finished with what we’re going to do here? Could we have a couple minutes right now?
COMMISSIONER DOMBROWSKI: Sure.

(Thereupon, a short recess was taken.)

COMMISSIONER DOMBROWSKI: We’ll reconvene the hearing. I believe we last left that we had agreed to notice for reconsideration all of the items that were two-to-two votes. There are a couple other items that I agree that we will schedule for reconsideration as well.

Commissioner Broad, do you want to --

COMMISSIONER BROAD: Yes. Those items are the definition of who is covered in healthcare by 12-hour days, and the issue of whether overtime for those 12-hour days is to be paid after 40 hours or after 36 hours.

COMMISSIONER DOMBROWSKI: Okay.

Commissioner Bosco, is there anything else?

COMMISSIONER BOSCO: Mr. Chairman, I’d like to return to, actually, where I started on this. And I -- I feel that we should pay closer attention to who’s covered under the definition of “healthcare industry.” And I’d like to have that discussed again when we meet.

COMMISSIONER DOMBROWSKI: Agreed.

COMMISSIONER BOSCO: Also, could I ask a technical question of our legal counsel or other staff people, or anyone who might know the answer to this?

I’m not familiar with the noticing requirements
in California as to -- the way we’ve been doing this now
is we noticed one proposal, and we’re amending back and
forth and rewriting --

COMMISSIONER DOMBROWSKI: Right.

COMMISSIONER BOSCO: -- and I don’t know if we
have to put out for public notice what we’ve done now,
before we vote on it, or --

COMMISSIONER DOMBROWSKI: We’ve followed the
procedures on this that I believe we followed, basically,
on in the interim wage order, in terms of posting
something out and then amending it at the hearing. I
sympathize that it’s very messy and ugly, but --

COMMISSIONER BROAD: Well, the only distinction,
I would say, is that what we did today was not amend what
was noticed, but amend something that wasn’t noticed,
that is to say, your proposal. And that’s the difference
between -- and perhaps critical difference -- between
what was done at the interim -- with the interim wage
order. We made a modification of the thing that was
noticed to the public.

COMMISSIONER DOMBROWSKI: But when all is said
and done, this is an amendment to your notice. What I
prepared was from existing orders, interim wage orders,
interim statute, and then the amendments that were
suggested.

So, again, I think -- I would not that we are scheduling for reconsideration those controversial items.

Anything you want to add?

(No response)

COMMISSIONER DOMBROWSKI: Okay. Andy, I think you have to make -- you have some language to the chair’s alternative proposal which we are substituting as an amendment to Commissioner Broad’s proposal. Do we have a motion?

COMMISSIONER BOSCO: Yes, I move adoption of the chair’s amended proposal.

COMMISSIONER DOMBROWSKI: Second?

COMMISSIONER COLEMAN: Second.

COMMISSIONER BROAD: Point of order.

COMMISSIONER DOMBROWSKI: Um-hmm.

COMMISSIONER BROAD: That proposal, as amended by the various things that we --

COMMISSIONER DOMBROWSKI: Right.

COMMISSIONER BROAD: Okay, that -- that I had suggested that received three votes.

COMMISSIONER DOMBROWSKI: Correct.

COMMISSIONER BROAD: Okay.

COMMISSIONER DOMBROWSKI: Call the roll.
1  MR. BARON: Dombrowski.

2  COMMISSIONER DOMBROWSKI: Aye.

3  MR. BARON: Bosco.

4  COMMISSIONER BOSCO: Aye.

5  MR. BARON: Broad.

6  COMMISSIONER BROAD: No.

7  MR. BARON: Coleman.

8  COMMISSIONER COLEMAN: Aye.

9  MR. BARON: Three-one, adopted.

10  COMMISSIONER DOMBROWSKI: Okay. The next item on the agenda is consideration of amendment to Wage Order 5 deleting personal attendants, resident managers, and employees who have direct responsibility for children in 24-hour care from Section 3(D) of that order to comply with pertinent federal regulations.

11  Mr. Baron.

12  MR. BARON: The issue, which has been raised previously, is that in the -- in Order 5, as amended in ’93, this Section 3(D) called for, again, personal attendants, resident managers, and this issue of adult employees, were under a situation where they had exemption for up to 54 hours. In 1998, at the same time when the 8-hour day was repealed, representatives of the Department of Labor informed the Commission that these
exemptions violate the Fair Labor Standards Act, and
that, as opposed to 54 hours, that it needed to be 40.
So, in the 1998 version of the orders, the Commission
adjusted it from 54 back to 40.

However, as part of AB 60, AB 60 makes reference
of going back now to the earlier version of the orders,
so we now go back to the ’93 version that has 54 hours.
So, the representatives of the Department of Labor came
and said that, you know, we’re now back to where we were
before, and that this 54 hours is out of compliance with

So, you have language sitting before you that,
in essence, deletes from the 54-hour exemption those same
-- those same entities that you see crossed out, to then
conform with the feds, and so that, therefore, the only
one that’s left in here is organized camp counselors,
which is
-- who do have that degree of exemption. So it basically
-- basically, what this would do is put these folks in
the same situation as employees generally, in that, you
know, they then would, you know, have to live under --
let alone FLSA, but also have to live under AB 60.

And my understanding is that I’ve been
approached by representatives of entities involved here
saying that what -- that they seem to understand that
they go back to 40, but that they’re still looking to not
have to be covered under the 8-hour day. I had said
that, among other things, that the only instances where
the Commission has looked to deal with ongoing
exemptions, exemptions looking at this, had been for the
industries and occupations that have been specifically
delineated in the bill, and that otherwise, the
Commission, like -- be it for computer professionals or
the construction industry, has always kind of -- the
policy has been that you would have to go to wage boards.
So, that’s basically where the issue is sitting
here. There seems to be some interest on behalf of these
entities of wanting to have some time to inform their
folks of what the situation is going to be. So, you
know, if people want to, you know, put off till the next
hearing doing this -- but the fact is that -- again, I’ve
laid out what the situation is in terms of state and
federal law.

COMMISSIONER DOMBROWSKI: So, let me understand.
The parties affect us want us to put this over for the
next hearing so that they can communicate with us?

MR. BARON: So that, I guess, in general, they
can communicate with their folks the change in
circumstance, and that -- my understanding is, is that they may be coming back before the Commission to deal with this issue, but, you know, my understanding here is that for the Commission to deal with this issue in line with the approach they’ve taken to any industry or occupation that was not specifically listed in the bill, is that you would have to go to a wage board. So, I mean, if --

COMMISSIONER DOMBROWSKI: All right. Without objection, I would -- I would move that we just put this over, then, to the next hearing and give them some time.

COMMISSIONER COLEMAN: Second.

COMMISSIONER DOMBROWSKI: We’re talking about putting this item over to the next hearing.

Call the roll.

All in favor?

(Chorus of “ayes”)

COMMISSIONER DOMBROWSKI: Item 4, in accordance with provisions of Labor Code Section 554 and 558, consideration of and public comment on and an amendment to Wage Order 14 to add the language in Section 10 of Interim Wage Order 2000, “Civil Penalties,” to Section 17 of Wage Order 14.

MR. BARON: This deals with the fact that in AB
60, there’s reference in Section 554 that basically says that AB 60 does not apply to Order 14, which affects agricultural employees, other than Section 558. Section 558 is the section that lays out penalties. So, basically, all we are doing here is taking the mandate of AB 60 and putting those penalties, which are both listed in the bill and listed in Section 10 of the interim, and just saying that we will be putting those penalties into Order 14.

COMMISSIONER DOMBROWSKI: Okay. What do you need us to do?

Okay. Can I get a motion to adopt?

COMMISSIONER BOSCO: So moved.

COMMISSIONER DOMBROWSKI: A second?

COMMISSIONER COLEMAN: Second.

COMMISSIONER DOMBROWSKI: All in favor, say “aye.”

(Chorus of “ayes”)

MR. BARON: So adopted.

COMMISSIONER DOMBROWSKI: Item Number 5 is further consideration of managerial duties.

COMMISSIONER BOSCO: Don’t you think we’ve had enough controversy for one day?

COMMISSIONER DOMBROWSKI: Well, I do, and I
would state up front, I’ve been informed we’re not going
to take a vote on this issue, so what I would like to do
is just simply have a twenty-minute discussion, ten
minutes of the proponents, and then I’d like to get ten
minutes in response, with the understanding that we’ll be
recalendaring this again for the next hearing.

Mr. Young and Ms. Thompson.

Is this item in the packet somewhere?

MR. YOUNG: Thank you, Mr. Chairman and members.

I understood our item wasn’t a prime-time event. I just
didn’t expect to follow Conan O’Brien on the time slot
here.

Again, as you stated, we want to -- actually
wanted to use this time to come to the Commission, not
ask for a vote, because this has really become like
untying a Gordian knot. I mean, it is -- it’s one of
those damn Rubik’s Cubes; we have not figured out how to
get all the colors aligned yet.

What you have in front of us is -- in front of
you is a work in progress, and truly nothing more than
that. I mean, the proponents and the opponents, I mean,
we literally finished this just yesterday and shared it
with them. We want them to have a chance to digest and
come back to us with suggestions and try to get further
input. It’s furthermore our desire to make sure this does not affect the construction trades, to limit it to Wage Orders 4, 5, and 7.

And the one thing we do feel strongly about this is, in keeping with the language that was in AB 60 certainly -- and our desire is to get -- and one of the things we took to heart, the criticism of our previous proposal, is that it was in conflict with FLSA regulations. We’re trying to get closer to that, and, in essence, we’re trying to, in short form -- or, excuse me -- in short, trying to adopt the federal long form, the long test for what is a manager. Again, we’re not there yet. We continue -- we will continue to work on this and report to the Commission and all interested parties before we ask the Commission to study our final work product.

I have Lynn Thompson, who can at least explain at least where we’re at now, and I’ll turn it over to her.

MS. THOMPSON: My name is Lynn Thompson, and I’m an attorney with the Law Firm of Brian Kays, LLP, in Los Angeles. And I have been working with the California Retailers Association and my clients, who are businesses in California, to try to come to grips with the
definition of duties that meet the test of the exemption for purposes of the executive, the administrative, and the professional exemptions in California.

I think that employers doing business in California have a real need for clarification of the duties test. They need to have rules that they can clearly understand and follow. The existing language in the wage orders has been very sparse, and it has been the subject of interpretation by the DLSE over the years, and, quite frankly, in the employer community, we have experienced variations in the interpretation of the exemptions over the years and the tests that are being applied and the duties that are considered exempt and nonexempt. And we think that there’s a real need for clarity.

What this proposal is not about is not about creating a loophole to somehow render large groups of employees exempt simply because they have a managerial title and managerial responsibilities. That’s not what we’re trying to achieve. We understand very clearly that the statute requires that more than 50 percent of the employee’s time must be spent engaged in exempt duties, and we understand that our task here is to try to identify what are those duties that constitute exempt
duties for purposes of satisfying that requirement.

The proposal that was present a couple of months ago and hotly debated was the subject of some objections, which included a concern that the attempt to enumerate duties for executives was somehow too broad. Some believed that it went beyond even the duties that would be considered exempt under the FLSA. There was concern that it didn’t include certain elements of the duties test that had been historically adopted by the DLSE in California that we derived from the federal long test duties.

And so the proposal you have in front of you is an effort to try to build back in some of those concepts, and hopefully do it in a way that will make everybody comfortable that it’s in the best interests of both business and employees in the State of California.

If you just take a look at the proposal, my task here today is to try to outline it for you, really, and try to express what the objectives are for the proposal. I personally think we’ve gotten pretty close to a workable draft, but there are still some questions that have been raised, and we’re going to be working through those in the next month.

But fundamentally, I think what you have to
understand as a baseline is that, under federal law, for employees that are earning two times the minimum wage in California, the federal short test applies, the short test for determining the exemptions. And that is purely a qualitative test that requires that primary duty be management, and that the employee direct two or more employees. That is the federal baseline.

Now, what we are proposing to do here --

COMMISSIONER BROAD: Excuse me. That is not California law, however.

MS. THOMPSON: That is the federal baseline.

COMMISSIONER BROAD: Right. So it’s not relevant to this discussion because we do not have a “primary duty” test, period.

MS. THOMPSON: I’m just saying to you that that is the federal -- that is the federal standard that applies to employees in California. That’s -- that is -- we’re working -- we have to operate here under both federal and state law. I’m just trying to create a framework. I’m not suggesting --

COMMISSIONER BROAD: But that --

MS. THOMPSON: -- that that’s the state test.

COMMISSIONER BROAD: But the state -- but the
federal test does not apply under the Fair Labor Standards Act because the state provides a more protective standard.

MS. THOMPSON: Actually, the federal law does apply under the Fair Labor Standards Act if people go to the federal law to enforce the overtime laws. The federal law applies equally in California. The Department of Labor has jurisdiction to enforce the Fair Labor Standards Act in California, and, in fact, does so. As a practical matter, many overtime claims tend to be spiraled up through the state system in California because the requirements have traditionally been more restrictive.

But from an employer -- from a business standard, we have to worry about complying with both sets of regulations in California. We’re not exempt from the Fair Labor Standards Act here. So all I’m trying to say is that we have a baseline here.

As an employer, when you look at your wage and hour obligations, you look at federal law and you see we’re paying people two times the minimum wage, we have to satisfy these requirements under the Fair Labor Standards Act. It doesn’t matter what California says; we have to do that in order to be in compliance with
federal law.

Okay. Now we turn to California law. And what do we need to do to satisfy the requirements for an exemption, for an analogous exemption, under California law? That’s -- that’s the premise.

Now --

COMMISSIONER BROAD: Though if you satisfy the federal law but do not satisfy the California law, you’ve got to -- they are not exempt in this state.

MS. THOMPSON: They’re not exempt under California law.

COMMISSIONER BROAD: They’re not exempt, period. You cannot -- how can you exempt them?

MS. THOMPSON: Well, they’re exempt from federal overtime, but they’re not exempt --

MR. YOUNG: Now, Commissioner Broad, we understand your distinction and we -- you’re right, you’re correct -- and let our witness, if you could, just describe the proposal. You are correct. In fact, California law would be -- obviously, they would not -- they would not be exempted.

So let’s --

MS. THOMPSON: You have to comply with California.
MR. YOUNG: We’ll move on with the proposal.

MS. THOMPSON: Right.

What this proposal is doing is it is basically building into the California exemption the federal long test, which includes a series of duties requirements that have been historically utilized by the DLSE in California, which include the exercise of discretion, the ability to hire and fire, the direction -- responsible direction of two or more employees, and in the context of managerial work, that you’re primarily engaged in -- that your primary duty is managerial.

Now, in addition to those -- so we are -- we are carrying forward what the DLSE has always used as predicate duties for the exemption in California, taking them out of the federal long test. Now we add the quantitative requirement under California law, that the employee must spend more than 50 percent of his time engaged in exempt duties.

So, you will see in front of you what we say here.

In Section (A), we say that, “The employee’s duties and responsibilities must satisfy the long test requirements for the applicable exemption under the Fair Labor Standards Act and pertinent regulations,” and we cite the
specific ones so that people can refer back and see exactly what we’re talking about. And, in addition to that, “More than 50 percent of the employee’s working time must be spent engaged in exempt work.” And that is the federal long test duties plus the 50 percent “primarily engaged in” standard that comes out of Labor Code Section 515(a).

For purposes of determining what are exempt duties, in terms of determining if you’re spending more than 50 percent of your time engaged in exempt work, we’re also looking at the federal definition of what duties are exempt and what duties are nonexempt.

And so, we refer back, again, to the pertinent regulations and law under the Fair Labor Standards Act that provides, I think, a very workable definition, in the federal long test, of what exempt work constitutes. And hopefully, it’s not going to be terribly controversial. I think it is -- if one reads those regulations and reads the duties, it seems to me that it is very consistent with the framework that is historically the case in California and is acceptable in California.

The test very specifically and explicitly, under federal law, excludes working foremen. For example,
people who are spending too much time performed in work
of the same nature as their subordinates are not going to
be engaged in exempt duties. That kind of work is
declared as nonexempt under the Fair Labor Standards Act.
The benefit, I think, of this approach is that,
number one, I think it addresses the concern that was
raised last time, that somehow, in attempting a unique
definition of duties under state law, we undercut the
federal law or we somehow are acting in a way that’s
inconsistent with the federal framework. And frankly,
it’s also much easier, I think, from an employer’s
standpoint. It’s much easier to be dealing with a common
source of definitions rather than attempt to craft an
entirely new set of, you know, an enumerated list of
duties, as was tried last time, something like that. We
have consistency, and we have clarity, and we have the
ability to rely upon a volume of information that we can
turn to in understanding what we’re talking about.

So, that is fundamentally what this proposal is
all about.

If you turn to the second page of the proposal
that’s in front of you, the paragraph at the top talks
about, really, the methodology for conducting the
analysis of whether you are spending more than half your
time engaged in exempt work. And again, I think this comes right out of the methodology that is described in the Ramirez case and the methodology that the Department has traditionally employed, in the sense that you look to work actually performed during the course of the workweek and you determine the amount of time that you’re spending on that work, and you allocate it as between exempt and nonexempt. You figure out what work goes in this column, what work goes in that column, add it up, and if more than 50 percent of the time is spent in the nonexempt column, then you’re nonexempt.

This paragraph also incorporates, in the middle of the sentence, some language out of the Ramirez case where the Supreme Court said that it’s appropriate also to consider what the employer’s expectations and the realistic requirements of the job are. And that’s because it shouldn’t be that an employer can set out a set of requirements and have an employee not perform, you know, the duties, basically by not -- not doing what he’s supposed to be doing, sort of move himself out of the exemption. And the Supreme Court specifically addressed that, and this incorporates that -- that language out of the Supreme Court’s decision.

The final paragraph, I think, is the paragraph
where there has been some controversy and some concern, and I think this is really where the debate centers, as I understand it. And let me try to describe to you briefly at this point what we’re really trying to address here. Time devoted by an employee to exempt work is exempt time for purposes of determining whether that employee is primarily engaged in managerial work, even if the employee is simultaneously or incidentally performing other work, such as production, that might be characterized as nonexempt.

Now, what that is trying to deal with is a situation where an individual performs a combination of tasks or duties in the course of their job. And the realities of the way people work nowadays in this era of multi-tasking, so to speak, is that people do, in fact, do more than one thing. They are engaged in a variety of activities. What I would really like the commissioners to focus on, is the first eleven words of this paragraph simply is saying that the time that an employee is spending devoted to exempt work is exempt time, even though the employee might be doing other things incidentally. And that’s -- that is not to say that somehow, because the employee is doing -- you know, again, has a managerial label on his forehead, that the
time he devotes in nonexempt work is exempt time. That’s not the objective, and that’s not what we’re saying here. By illustration, just taking my own work as an example, I prepare position statements or letters using my computer. I am physically engaged in typing the keyboard. I may, you know, rush out to the fax machine and, you know, generate a fax cover sheet and fax a document to my client. I regularly use the copying machine. But those activities are incidental, it seems to me, to the work that I’m engaged in, which is -- which is work that would be considered exempt for purposes of California overtime laws.

I think, similarly, you can make analogies in the managerial context. A manager who is preparing a report and who is using a computer to prepare that report, that is incidental work. It is simultaneous. It does not destroy the character of the work. That -- it is -- it is directly and closely related, if you will, to the performance of the exempt duty. That is basically the concept that we are trying to capture here, that the exemption is not somehow destroyed with respect to the time that is devoted to exempt work because something else incidentally or simultaneously is going on. And I would suggest to you, those words “incidentally or
simultaneously” are narrow words.
You know, again, what we’re trying to determine here is the overall character of the work that the employee is engaged in and attempt to fix that and count only that time that is spent engaged in exempt duties.
And again, just to emphasize, production work or other work that is unrelated or only remotely related to exempt work is not exempt. We’re not contending otherwise.
Okay. And there are many examples that we could use to, I think, sort of flesh that out and try to get comfortable --

MR. YOUNG: But, Mr. Chairman, that’s the essence of the proposal.

COMMISSIONER DOMBROWSKI: Right.

MR. YOUNG: Again, a work in progress. What we would urge, again, those who have the language, to perhaps, if they -- if they have suggested alternatives, to try, if possible, to get them to us so we can, I think, at least try to incorporate that into our draft.

MS. THOMPSON: Right.

And let me just briefly address the presumption, which is the last sentence, in just -- just a minute, just so that -- to try to put that in context too.

First of all, this was taken --
MR. YOUNG: Well, why don’t we wait? When we bring the final proposal to the Commission, at that point, we’ll deal with it. I mean, I think we’ve exceeded our ten minutes. I was getting the signal.

MS. THOMPSON: Okay. All right.

COMMISSIONER BROAD: Yeah. Well, I do believe, in the intervening months, you’ve improved the pitch, if not the -- if not the essence of the pitch.

One, I don’t agree with you that California permits, under AB 60, Section 515 of the Labor Code, for us to create legal presumptions that would affect litigation. That’s something that should be done in the Evidence Code. And, in fact, I think it reverses traditional presumptions in labor law altogether.

The fact of the matter is, if we -- if we leave your example, because you’re an attorney, so you’re exempt because of your licensure -- you can use Xerox machines all day long and be exempt. The question really is who we’re really talking about here, which is the so-called working managers, the person who is, in fact, flipping burgers for 60 percent of their time, but you would presume that burger-flipping time to be exempt time for the purpose of the law, which is in conflict in principle with the strictly -- the strict test which is
an allocation of time between exempt and nonexempt
duties. You either are or you are not spending more than
50 percent of your time.

I agree with you that if a manager is sitting in
the manager’s office and goes and sharpens his or her
pencil and then goes and writes a report that says, “I
believe that X, Y, and Z Employee should be terminated
immediately,” that the fact that they’re sharpening the
pencil is an incidental activity. However, if they’re
spending 25 hours a week sharpening pencils, and that’s
what they’re doing, the fact that they have other
managerial duties is pretty irrelevant if what they do is
-- they are a pencil-sharpener.

MR. YOUNG: But, Commissioner Broad, I think
what we’re trying to do is craft something so that -- I
mean, we keep talking about flipping burgers and
sharpening pencils in a wired world, where the reality
is, is that most people have desktop computers, and most
people have either networked or their own personal
printers. And now, I think, the age of have a secretary
come in and we’ll dictate to them, I think that is long
since past. It is, at best, the exception, not the rule.
And yet there are people like myself, who might spend one
or two days just writing letters. They have to come over
to the building and do nothing more than work on my
computer, yet I’m clearly a manager of the -- I mean, you
know, certainly, I have responsibilities --

COMMISSIONER DOMBROWSKI: To be -- to be
specific, though, the proposal calls for the -- skip over
-- I mean, we know we’re talking about the presumption,
but this proposal is calling for fulfilling all of the
duties spelled out in the long test. So, as a practical
matter, I would assume that you wouldn’t be able to
satisfy all of those duties. You’d -- I mean, you have
to satisfy all the -- do all those duties more than 50
percent of the time. That’s still the heart and essence
of this proposal.

COMMISSIONER BROAD: Well, I just find that
Paragraphs (A) and (B) are in conflict with the last two
paragraphs, altogether. They’re just in fundamental
conflict.

I think there probably is -- I think it’s a fair
criticism, from the point of view of employers, that we
have had, since 1947, a rule as to the duties that is
referred to federal law in its enforcement, but we don’t
actually set out how to define that, and I think there
probably is room for discussion about whether the federal
long test or aspects of the federal long test may be used
to determine what are the duties.

But as to the allocation of time between those duties and nonexempt duties, I think AB 60 is absolutely clear on its face that it is a strict quantitative test, and that you can’t count, ever, nonexempt duties as exempt duties or presume them to be exempt duties, or discount them because you’re thinking of something else at the same time, or anything of the sort. That statute was written clearly, and the legislative history is clear, and the language is clear on its face, to codify existing IWC practice as -- with a strictly quantitative test that is the subject of numerous court decisions that have interpreted that, and not to introduce change to presumptions or alter the burden of proof in litigation or anything of the sort.

So, I think the last paragraph of this proposal, at the very minimum, should probably disappear. And if there’s something to discuss at the next hearing on this matter, it should be confined to what are the duties that meet the test of the exemption.

Now, let me also point out that we are allowed to consider, only in this context, what is the definition of exempt versus nonexempt duties. We have no legal ability to consider, without convening wage boards,
anything having to do with time devoted to one versus
time devoted to the other. So I don’t even think that
that paragraph is properly before the Commission, even if
it was lawful, which it’s not.

So I have a fundamental problem with it. And I
appreciate the work that’s been done on it, and I think
that there’s a possibility of reaching some issue
compromise here with respect to the definition of duties,
importing the federal long test, which I think we have
done all these years, but not to fundamentally change the
law.

MR. YOUNG: Mr. Chairman, with that, we’ll
conclude our presentation and take to heart what
Commissioner Broad said and continue to try to work with
him and others to try to craft something that perhaps we
can bring before you in June, with some -- I know it
would be precedential for this -- for this Commission,
but with some degree of unanimity in it.

Thanks.

COMMISSIONER DOMBROWSKI: Mr. Abrams.

MR. ABRAMS: Mr. Chairman, a question of process
and procedure. Jim Abrams, with the California Hotel and
Motel Association.

And we too applaud the efforts of the Commission
to try and get some clarity as to what does and what does not constitute exempt duties. As you know from our prior testimony, we have a lot of people in the industry -- there apparently is a proposal before the Commission at this point in time. Is that something -- did I infer correctly from the testimony that was just given?

COMMISSIONER DOMBROWSKI: Yeah.

MR. ABRAMS: Okay. I mean, I don’t quibble with that. You know, I just --

COMMISSIONER DOMBROWSKI: We’re having discussions back and forth. We’ve noticed it three times, and we’ll be happy to give you a copy of what we have at this point.

MR. ABRAMS: No, no. I don’t quarrel with the fact that there’s something there. I just think that people -- not only my association, my employer, but other employer and employee groups, just need to know what the process is.

So, if -- is this something that’s going to be made available so -- well, several questions.

First of all --

COMMISSIONER DOMBROWSKI: Yes, Jim.

MR. ABRAMS: First of all, is this a work in process on behalf of the Retailers Association or -- and
the reason -- the reason -- let me finish the question so you can maybe understand. I -- I want to make sure that, to the extent that there are issues specifically relevant to lodging, food service, or any other group of employment situations, that they are --

COMMISSIONER DOMBROWSKI: Jim, I’ll be happy -- in the interests of -- I’d be happy to give you the proposal and let you look at it, and we’ll receive your comments as part of the process over the next 30 days.

MR. ABRAMS: Thank you.

COMMISSIONER BOSCO: Could I interject here for a second? One of the things that really concerns me is that there seems to be an issue over how much of this, if any, is within our jurisdiction vis-à-vis -- vis-à-vis AB 60. Can we, before such time as we really take this up in earnest, which I’m sure we’re going to, have substantive opinions on that so -- because it doesn’t seem to me that it’s wise to, you know, waste anyone’s time if we --

COMMISSIONER DOMBROWSKI: Sure, yeah.

COMMISSIONER BOSCO: -- if we really aren’t sure that we’re on pretty firm legal ground.

COMMISSIONER DOMBROWSKI: Duly noted.

Mr. Rankin.
MR. RANKIN: Well, I’m glad to know that labor wasn’t the only one that didn’t get everything before the meeting, although, actually, we got this proposal yesterday. But again, I must say, procedurally, this doesn’t work. And I’m glad that at least you put this over.

But we got this yesterday. And what we got today, you didn’t put over. So there are basic procedural problems with the Commission. I thought it was going to be different under this administration, but it apparently has gotten worse than it used to be, because I’ve been dealing with this Commission for many, many, years.

In terms of this proposal, in terms of the federal long test -- we have some attorneys here who will probably speak to that -- I’d like to make one comment. It doesn’t work to do IWC orders by referencing the CFR. If you’re going to do a regulation and it’s supposed to be posted there for the workers to see, you’d better damn well spell out what you’re talking about instead of saying, “29 CFR blah-blah-blah, ABCD 551,” and so forth and so on. The purpose of the wage orders is to inform the employees of what their rights are. This does nothing to do that.
So, we have lawyers, luckily, who’ve read it.

But on the second page of the proposal, what this basically represents is a much more sophisticated way of doing what you were trying to do a couple months ago when we had 800 people here objecting to it. You are trying to get around the “primarily engaged in” test that is now enshrined in the statute and substitute something else for it.

AB 60 gave you the authority to look at the duties. It didn’t give you authority to change the “primarily engaged in” test. And this cute little backdoor method, this proposal, does exactly that. First of all, it says you’re supposed to be -- when you’re looking at the work performed by the employee, you’re supposed to consider the employer’s expectations. What do the employer’s expectations have to do with the actual work that’s being performed? Maybe nothing, maybe a lot. But the employer’s expectations are irrelevant.

Then, in the second paragraph, Mr. Broad pointed out the problem there. You can be simultaneously engaged in production -- and it says production -- you can be working on the assembly line and thinking managerial thoughts, doing managerial things in the back of your mind, and that time, according to this proposal, is
managerial time. Simply another way, a more sophisticated way, of trying to do what we rejected and I thought you rejected last time.

So, that’s all I have to say. But one other thing procedurally: I mean, if you’re going to work on this, I presume you post -- you post this proposal, you put it out in a public notice, and you take amendments to it. It’s not just some proposal that’s floating around that a few people happen to get. That doesn’t work.

MS. BERMAN: My name is Marcie Berman, and I’m here as a representative of the California Employment Lawyers Association.

I did get a copy of this proposal yesterday, and I very quickly ran off a letter to you all, which I delivered this morning that, hopefully, you have copies of. And I’m not going to reiterate the points that I made in there. I just want to quickly note for the record that I’m upset and concerned about the lack of notice, and so I am glad that the Commission has put off any kind of decision-making until next time around. And I would hope that whatever is going to be under serious consideration will be noticed to the public before that hearing.

A couple things about the federal, quote, “long
test” that people have been talking about. I just want
to point out that there are a few respects in which the,
quote, “long test” itself differs from California law, so
that importing it wholesale -- we wouldn’t be importing
it because most of it already is what’s used by the DLSE
and the courts, it’s just not specifically stated in the
wage order -- but it is what was originally intended and
what is used to define the law. But there are a couple
aspects of it that are different.

   And in particular, the professional exemption
under California law has long been different than what’s
under the federal law by enumerating the specific
licensed professions. And this proposal doesn’t take
account of that, so that’s a problem. And in particular,
it would have severe consequences legally in terms of
nurses and pharmacists, who statutorily now are
specifically made not professionals. That’s one issue.

   Another issue is the California -- the wage
orders have always applied the discretion and independent
judgment test, which is something that’s in addition to
defining the duties. They’ve always applied that
discretion and independent judgment test to the
executive, administrative, and professional exemption,
whereas, under the federal regulations, they’ve used that
particular test only with respect to the administrative
exemption. And the good thing about that test, as
compared to the ones that the federal law uses for
executive and professional, is that there’s quite a
lengthy, detailed, comprehensive definition of it in the
regulations and the cases. So as the speaker for the
employers’ group said, it’s nice to have a definition
where we all know what it means. And California has
always used discretion and independent judgment with
respect to all three of those exemptions.

And I wanted -- I did actually bring some
archives from the basement of the Division of Industrial
Relations’ old wage orders, starting with 1943, and then
the minutes from 1947 where these three exemptions were
first adopted, and then wage orders spanning from 1947
through ’57. And I just want to give them to you for the
record to show that the discretion and independent
judgment has been there, applied to executive,
administrative, and professional, all along.

And the other thing that this proposal doesn’t
mention is the salary test, which I’m sure was just an
oversight. But that would have to -- to be in there.

I’m not going to reiterate what my letter
addresses with respect to these two paragraphs at the top
of the second page, and also with respect to the
“Statement of Basis,” but I would ask that you read my
comments.

I do want to note, though, that there’s, I’m
sure, an inadvertent factual predicate error in here.
There’s a reference in here, on the last page of the
proposal, to DLSE Memorandum 93.5, and it specifically
references Page 46.6. Yesterday, scrounging around to
try and find a copy of this, I was able to put my hands
on two different versions, one which is -- appears to be
official, and one which appears to be something other
than official, which is the one that is referenced in
here, and they are dramatically different with respect to
this point that you’ve cited it for.

The -- Page 3, the last paragraph, cites to Page
46.6, and the version of that that’s got those pages on
it comes from a commercially published employer-oriented
legal manual that’s drafted by Albry and Long on
California overtime law. And that’s the version that’s
got the language that you’re relying on for your last
paragraph.

However, I -- I also contacted the Division of
Labor Standards Enforcement, the legal office, and asked
them for a copy, and what I was given as their official
copy is something that’s in their 1995 -- it’s from their 1995 Hearing Officers Training Manual. It’s got the same memorandum number on it, same date, and, lo and behold, the last page of it doesn’t have that language.

COMMISSIONER DOMBROWSKI: Can we have copies of that, please?

MS. BERMAN: Yes.

COMMISSIONER DOMBROWSKI: Okay.

MS. BERMAN: I’ll give you both copies.

COMMISSIONER DOMBROWSKI: All right.

MS. BERMAN: So, I have a feeling that, perhaps inadvertently, the version of it that was relied on here was maybe a draft or some unofficial version. I don’t know.

That’s it.

MR. WETCH: Mr. Chairman --

COMMISSIONER DOMBROWSKI: It’s not going to affect the construction industry.

MR. WETCH: Pardon me?

COMMISSIONER DOMBROWSKI: Whatever we have is not going to affect the construction industry.

MR. WETCH: Well --

COMMISSIONER DOMBROWSKI: If we ever end up with anything, it will exclude the construction industry.
MR. WETCH: On behalf of the State Building and Construction Trades Council, we welcome the narrowing of this amendment, and we’ll reserve the right to make comment if it should ever change in the future.

And thank you.

MR. McKINNON: Have you excluded manufacturing?

MR. RANKIN: What is covered?

COMMISSIONER DOMBROWSKI: I haven’t figured that one out yet, so we’ll keep you at the table for now.

MR. RANKIN: But seriously, what are you saying -- is this covers which wage orders?

COMMISSIONER DOMBROWSKI: No, Tom. We haven’t figured that out yet. It’s not coming up for a vote.

MR. McKINNON: My name is Matthew McKinnon. I work for the California Conference of Machinists. It’s a state council of the machinists union representing about 100,000 folks here in the state.

And I guess I’d like to talk about this a couple of different ways.

First of all, as you’ve heard over and over today, on procedural grounds, I have a lot of difficulty with what’s gone on today. I got a copy of this this morning. I did not get it from this agency; I received it from someone else. My original notice, I did not
receive, and I have difficulty with the process. I think
we’ve talked about that over and over today. I’m sure
you get the point.

But part of the difficulty is analyzing this
proposal for whether or not it works. It makes it very
difficult to testify with any intelligence about what
this does, in effect, to our members and to people that
work in the industries that we represent.

So I’m going to -- I’m going to tell you that I
think you should not move on anything if the public has
not had a chance to look at it and talk about it. That’s
first.

Second is more of a -- kind of a discussion
about the orientation of how we’re forming policy in this
state. We’re a state -- and I think somebody talked
about it a few minutes ago -- this is -- you know, this
is the age of the Internet and -- and so on. We’re
forming public policy here on how workers relate -- how
management and workers are separated based upon retail --
a retailer’s objective -- this is the retailers’
proposal. Did I miss something, or is that what this is?
Or is it fast food or -- I’m not sure what it is.

But I’ll tell you something. In manufacturing,
if we want to be good at manufacturing, if we want to
have any left in this state long-term -- and I don’t mean
design in Silicon Valley, I mean manufacturing, where
people make things -- part of the clue there is that the
workers are able to shift production quickly and make
good products fast and new products fast into the market.
And in the machinists union, there’s a number of places
where workers do lots of what would be considered exempt
work in saving companies. Harley-Davidson was saved that
way. United Airlines, bit strides have been made that
way. U.S. Air wouldn’t be here if the workers hadn’t
taken over many of the salaried kind of jobs in
reinventing that corporation, and now -- now United
Airlines is going to pick it up. H.R. Textron, in
southern California, the workers engineered, by
purchasing the equipment, by thinking about how they
would buy the new equipment, they engineered a doubling
of the workforce and more than doubling of the product
sold, in that facility.

So, essentially, this public policy that’s being
developed here is backwards. We should want -- we should
want hourly workers to be encouraged to be part of the
process of thinking and deciding and making things work
in a company. And they should never have to fear
economic loss for -- for participation in processes that
help guide a company into more modern manufacturing. So, this is actually policy that would take us back to the days when Taylor was inventing the way industrial processes should be done. This is backwards. This is going backwards to the beginning of the century, the beginning of last century, not forward.

So, with that, I think that there should not be any action today. I don’t think there’s been notice. I haven’t seen the federal list in years. I didn’t know you were negotiating on that. And -- but frankly, I think the outlook and the approach is one that takes us backwards, not forward.

MS. GATES: My name is Patricia Gates, and I’m with the Law Offices of Van Bourg, Weinberg, Roger, and Rosenfeld.

And as a matter of basic due process and fundamental fairness, the IWC must refrain from acting on a new proposal until after it has been noticed to the public and there has been an appropriate period for public comment. This Commission should have refrained today from acting on the regulations it adopted on the alternative workweek and on the secret-ballot elections. AB 60 did not expand this Commission’s powers to act contrary to the interests of working people in this
I am pleased to see that it is now refraining from acting on a proposal to expand the definition of managerial duties. I am very displeased that it has already acted in a way that is contrary to the intent of the Legislature, contrary to the interests of the working people of this state, and contrary to the construction -- the statutory construction that remedial legislation should be interpreted so that it is in the interests of the people intended to be protected by that legislation.

MR. HOLOBER: Richard Holober, California Nurses Association.

We're opposed to the proposal. We're opposed to the entire concept behind the proposal, for a couple reasons.

One, I think AB 60 clearly states out the "primarily engaged in" standard. There's a reason we did that. We put it in the statute because it was in the old wage orders, but there were efforts to eliminate it from the old wage orders. So, when we wrote AB 60, we decided to take it out of the hands of the Industrial Welfare
Commission. This is an effort to put that back in your hands, and I think your hands are very clearly tied by the law.

What we’re talking about here is this kind of fiction, you know, this dream-world notion that while you’re, you know, flipping hamburgers, or -- or, you know, shoveling dirt, or whatever it is, in your mind, you’re a manager, that what’s happening in your mind defies the logic -- the real-life work that you’re performing, and if you’re thinking about some managerial duty, you know, “Gee, I’m going to assign this person to do this or that person to do that,” forget what you’re actually doing, what your -- what your body is actually doing; all that matters is what’s going on in your mind.

If that was true, I think everyone would be a manager, because, in our minds, we would all not really want to have to be doing the kind of, you know, physical labor that many people do. But you can’t really make that change, because the law is very clear under AB 60. And you look at the actual work you’re doing, not some theoretical concept, “Gee, what is this person thinking about while they’re actually performing some other duty?”

The purpose of the Industrial Welfare Commission is to protect the health and welfare of workers. And
before you change things, it has to be based upon some
evidence that the current status quo is detrimental to
the health and welfare of workers. That’s the only
reason the IWC exists, is to protect workers. It is not
a commission to give management goodies. There -- you
know, there are other agencies here that promote all
kinds of industries in California. That’s not your job.

So, I haven’t heard any evidence that says that
workers are being screwed or shafted because they are
getting overtime pay. What you’d need to -- to show
here, I think, is that someone who makes twice the
minimum wage -- we’re talking about like a $20,000-a-year
worker -- really needs to work 60 or 70 or 80 hours,
because working only 40 hours is really bad for them.
And that’s the basis that you would need to proceed.

In fact, the last time around when there was a
proposal like this, it was voted down by the Wilson IWC
because there was no basis and evidence that workers were
clamoring for this change.

I’d just add one other point, which is that, as
it affects nurses, from what I heard from the employer
side, I think this would provide an end run for employers
to reclassify nurses not as professionals, but as
administrators or executives. Now, the law clearly says
that a registered nurse is protected, has overtime, even though that nurse is a professional, unless the nurse is also functioning as an administrator, like the director of nursing for a hospital, someone who clearly is high in the hierarchy, with the ability to hire, fire, and so forth.

But the testimony I heard that speaks to things like directing work of other workers, that’s part of the professional duties of a nurse. Nurses work with LVN’s and unlicensed assistive personnel, and part of their job and part of their license requires that they direct the work of those other employees, not in the sense of hiring and firing, but of understanding what’s going on with the patients, and on occasions, on a regular basis, assigning who should be doing what or who should be covering what assignment. That’s clearly part of their professional definition. It is not a managerial definition, but if I’m hearing correctly from the employer testimony, that would be reclassified here as part of the managerial function, and nurses would lose exemption if this kind of proposal went through.

Thank you.

COMMISSIONER DOMBROWSKI: Thank you.

MR. CAMP: Mr. Chairman and members, my name is
Bill Camp. I’m here representing the Sacramento Central Labor Council.

The concern I wanted to raise is partly a broader perspective on what Mr. McKinnon has raised, which is you do set workforce investment policy, that the Industrial Welfare Commission, in this particular area, is really setting policy for how we develop the workforce. And we come, in today’s employment arena, with this notion that we’ve got to change the way we manage and develop and grow the workforce. Part of the concept that we bring to the table is a sense of partnership, and there’s a real sense of “gotcha” that got played today with this health plan. And so, it breeds a sense of suspicion and questioning about our government when we feel like they are playing “gotcha,” and when we’re, on the other hand, saying if we don’t develop this economy and grow this economy as workers, we need to develop some sense of a partnership with those people in government and with those people in the employment sector who are trying to change the economy and grow it -- build it in a way that makes it a flexible economy that creates high skills and high wages.

We can’t build a high-skill and a high-wage economy when we’re -- when there’s not that underlying
sense of trust. And so, the way in which this issue gets raised with us undermines the notion of what we’re trying to build here as we grow this economy.

So, I appreciate the fact you’re not going to decide on it today, but I’m worried about the fact -- am I going to get a notice that tells me who it is going to affect? Because I represent workers in this area and can go to them and say, “The Commission’s going to meet today and talk about your issue,” and they said, “Well, I don’t know whether they’re going to talk about something that affects my work or not,” so that as we think about the kind of notice and the kind of preparation that we need, as a group of workers, we’re looking for a way to engage our members in this process. And we appreciate any effort you can make to help us accommodate that.

Thank you.

COMMISSIONER DOMBROWSKI: Item Number 6, consideration of whether to extend the provisions of Interim Wage Order 2000 to the effective date of amendments adopted at this hearing or at a hearing concluded on or before July 1st, 2000, pursuant to Labor Code 517(a).

Mr. Baron.

MR. BARON: The issue is under -- relating to AB
60, in a number of areas, talks about the issue of July 1. 517(a) says, “The Industrial Welfare Commission, shall, at a public hearing to be concluded by July 1, 2000, adopt wages, hours, and working conditions,” so it’s -- however, there’s -- there’s clearly time from the time that you adopt to the time that -- dealing the “Statement as to the Basis,” dealing with publishing, all those things can affect -- can deal with the effective date. So there’s language here being proposed that would relate both to actions taken at this hearing and actions taken -- whatever action that would be taken at a June -- at any other hearing before July 1st, which the Commission needs to adopt.

And what the -- what has certainly been learned from the time that it took to deal with one wage order, the interim wage order, here the Commission now is facing making changes in Orders 1 through 15, as well as the interim, so that’s 16 wage orders. Clearly, there will be a lot involved in making sure that that, in the end, is put in the proper form and issued through the proper entities.

So, the language here says that:

“Any action taken by the Commission at this hearing to adopt wages, hours, and working
conditions orders will be taken pursuant to the provisions of Labor Code Section 517(a). In furtherance of that section, the effective date of such actions taken at this public hearing as well as at a public hearing to be held in June, will be October 1, 2000. The remaining provisions of Interim Wage Order 2000, as well as Wage Orders 1 to 15 as are currently in effect, shall remain operative until that effective date. If the IWC takes action to amend the interim wage order, Sections 5(K), (L), (M) and/or (N) -- that relates to the specifically delineated occupations and industries, such as fishing, skiing, stable employees -- so if the IWC takes action to amend the interim wage order in those sections, the provisions of those subsections currently in effect shall not expire on July 1st.

COMMISSIONER DOMBROWSKI: Okay. Any questions?

COMMISSIONER BROAD: Yes. Mr. Baron, my question is -- a couple questions.

First, this motion that we’re adopting, is this intended to be part of any wage order, or we’re just
adopting this as a motion? It’s not going to appear in print anywhere?

MR. BARON: No.

COMMISSIONER BROAD: Okay.

MR. BARON: It is just -- it is just the Commission issuing its will in terms of the -- making clear the timing of the effective dates.

COMMISSIONER BROAD: Okay. Let me ask you this question. We conclude on June 30th our deliberations of AB 60, and we do whatever we do on that wild day --

MR. BARON: Right.

COMMISSIONER BROAD: -- and it’s done. And therefore, you know, 15 wage orders have to be changed. Is it possible that they will be rolled out serially, between that time and October 1st?

MR. BARON: I don’t -- I don’t know the answer. At that point we’ll have to see when --

COMMISSIONER BROAD: Well, here’s -- well, because I -- because, it seems to me, like as you complete them, they would be -- so, I guess what I’m suggesting is that maybe it should say -- taking -- in Line 5 --

MR. BARON: Okay. So, what do you want to say? “Up until” --
COMMISSIONER BROAD: “Be no later than October 1, 2000.”

MR. BARON: Okay.

COMMISSIONER BROAD: Would that be --

MR. BARON: I think that’s fine.

COMMISSIONER BROAD: Okay.

COMMISSIONER DOMBROWSKI: Any other questions? Do we just adopt this?

MR. BARON: Yeah, just make it a motion.

COMMISSIONER DOMBROWSKI: Wake up, people. Can I get a motion?

COMMISSIONER BROAD: I’ll move this item as amended.

COMMISSIONER DOMBROWSKI: Second?

COMMISSIONER COLEMAN: Second.

COMMISSIONER DOMBROWSKI: All in favor, say “aye.”

(Chorus of “ayes”)

COMMISSIONER DOMBROWSKI: Item 7, consideration of appointment of members to the Wage Board established to review the adequacy of the minimum wage, in accordance with Labor Code Section 1178.5.

I think, Andy, you have the names. Could you just read those off for the record?
MR. BARON: For the employee representatives:

Rosalina Garcia, Christine Vasquez, Janet Wright, Maximo Carbuccia, Tho Do -- please, I apologize if I’m mispronouncing any of the names -- Rosalinda Guillen, Tom Rankin -- I think I pronounced his name right -- Ron Lind, and the alternates would be James Duval and Roy Hong.

And the employer representatives: Roy Gabriel, Willie Washington, Sam Manolakas, Lee Vierra, Julianne Broyles, Tom Luevano, Jim Abrams, Douglas Cornford, and the alternates, Bruce Young and JoLinda Thompson, and the chair, Fred Galves.

COMMISSIONER DOMBROWSKI: Anything else?

MR. BARON: You need to approve the --

COMMISSIONER DOMBROWSKI: Need a motion?

COMMISSIONER BROAD: I can just say there will not be any lobbyists left in Sacramento, if anything happens --

(Laughter)

COMMISSIONER DOMBROWSKI: Which may be an advantage.

COMMISSIONER BROAD: So moved.

MR. RANKIN: (Not using microphone) I have a question.
My understanding is that there was a deadline
for getting nominations in to this wage board, and that
there was not -- there was some unhappiness with some of
the employer nominees, and others were added after that
deadline. I just have a question about this whole
procedure, given all the other procedural problems we’re
facing today.

How does this work? The deadlines for getting
in nominations mean nothing?

COMMISSIONER DOMBROWSKI: We, on the past wage
order, took nominations as well -- up to the time,
because we -- we didn’t have enough names. So, we have,
procedurally, done this on the previous wage order that
we formed -- or wage board -- I’m sorry.

The question was either we would have to take a
vote to extend the deadline to get more names, which I
understood was not desired by organized labor, so we
tried to accommodate, to move this thing forward, with
the
right --

MR. RANKIN: No, because we want to get the
minimum wage increased as expeditiously as possible. But
there were a number of names. What do you mean,
“adequate number of names”? I mean --
COMMISSIONER DOMBROWSKI: Frankly --

MR. RANKIN: -- if you’re -- if you’re going to operate this way, you’d better say to the whole world, “We’re going to take nominations up until the minute we meet, or up until two hours after we start meeting,” so the world knows, not just one side knows. I mean, this - - this whole thing about the way a public body operates is just very, very disconcerting.

COMMISSIONER DOMBROWSKI: The reality was that if we didn’t take names today, we were going to have a smaller board, and I was informed that organized labor wanted more people on the wage board.

MR. RANKIN: We do want more people on the wage board, and you had at least, from us, I think, ten or twelve names. You had at least ten or eleven from the employers. Are you making a wage board that’s bigger than that?

COMMISSIONER DOMBROWSKI: The qualifications of some of the employer reps were disputed.

MR. RANKIN: Well -- well, let’s discuss that, then. What is a “qualified” employer representative? Let’s hear the qualifications. Does the fact that a person works for a small business in San Francisco disqualify that person? Does the fact that an employer
happens to manage a nonprofit organization disqualify that person? Those are probably the employers who actually employ minimum-wage workers, unlike the lobbyists who’ve been named to this wage board.

COMMISSIONER COLEMAN: Well, one option is, then, that we can publicly extend the deadline and postpone voting on wage board members till next month.

MR. RANKIN: Well, the other option is you simply name wage board members from the list you got legitimately that was presented to you by the deadline for making nominations.

COMMISSIONER BOSCO: Well, it looks to me like there’s two complaints here. One is the content of the list and whether it’s lobbyists or people that are representing minimum-wage employers or not, and that’s one category. The other is the timing of when the list is decided on. Is that correct?

MR. RANKIN: Well --

COMMISSIONER BOSCO: Did you want us to exclude all lobbyists from the list?

MR. RANKIN: I’m not -- I’m not proposing that. I’m proposing that if you’re going to -- if you’re going to set out -- just now I just heard that the objection to the original list was people weren’t qualified. Well, if
you’re going to have qualifications for being on a wage board, other than the broad qualification of representing employers or representing labor, then they’d better be spelled out so that a lot of people don’t waste their time putting in their nominations, to find out, “Oh, my God, because I happen to manage a nonprofit organization, I’m not qualified.”

COMMISSIONER BOSCO: Well, that’s probably a good commentary. I mean, do we have any qualifications to be on a wage board?

(Laughter)

COMMISSIONER BOSCO: Other than general employee-employer breakdown?

COMMISSIONER DOMBROWSKI: No.

COMMISSIONER BOSCO: I didn’t think so.

COMMISSIONER BROAD: At the risk of telling the truth about how this has always worked, the way it has worked is that typically, in the twenty years I’ve been around the process, is that names are -- come forth from sort of the labor side, and the labor representatives pick those people, and names come forth from the employer side, and the employer representatives on the Commission tend to pick those. And the poor public member picks the chair. That has been kind of the custom, though not a
rule. And that is a custom intended to make sure that one side doesn’t try to appoint people to the other side that would skew the process sort of inappropriately or something.

What occurred here is that the employer community dropped the ball and didn’t -- and no one -- not enough people sent in -- enough employers sent in, but not enough employers sent in that the organized employer community approved of. And so, they -- what their -- I think their concern is, is that the people that met -- that some of the people that met the appropriate deadline as employers, it’s not that they’re not employers, but they may not be employers who are as unsympathetic to raising the minimum wage, or changing the minimum wage or whatever, as the organized employer community would prefer. That’s the truth.

Now, having said that, we now -- we are faced with sort of a choice of whether we move forward with the motion to name the people that we have named, or we delay this. It is my view, as someone who believes the minimum wage needs to go up and needs to go up as soon as possible, that at this time I would like to pursue the motion that I made. However, I think a cautionary message is sent out to the employers: Don’t do that
again. When we’re setting wage boards, get your names in and, you know, take care of the problem, and then the issue will not arise.

COMMISSIONER BOSCO: Maybe we should have a voir dire process like they do in choosing juries, you know --

COMMISSIONER COLEMAN: There you go.

MS. BROYLES: If I might be permitted, Mr. Chairman, Julianne Broyles, from the California Chamber of Commerce, also a member, along with Mr. Rankin, of the minimum wage board that is being discussed -- potential member.

I would have no problem with the minimum wage board being renoticed, having the notices go back out, and reappointing, and underneath all of the rules, tacit or otherwise, that have been done here today. So, just so you know that the organized employer community, if that’s what you really want to call us, can be more organized in the future. We would be happy to see that happen.

COMMISSIONER DOMBROWSKI: I believe we have a motion. Do we have a second?

COMMISSIONER COLEMAN: Second.

COMMISSIONER DOMBROWSKI: All in favor, say “aye.”
(Chorus of “ayes”)

COMMISSIONER BROAD: Mr. Chairman, if I may be recognized.

COMMISSIONER DOMBROWSKI: Sure.

COMMISSIONER BROAD: You have in your packets a draft charge to the minimum wage board.

COMMISSIONER DOMBROWSKI: Right.

COMMISSIONER BROAD: I would ask whether it’s necessary to read that into the record or we can just move its adoption.

COMMISSIONER DOMBROWSKI: I believe we can just move it.

COMMISSIONER BROAD: Okay. Therefore, I would move the adoption of the charge to the minimum wage board as it appears in your packets.

COMMISSIONER BOSCO: Second.

COMMISSIONER DOMBROWSKI: All in favor, say “aye.”

(Chorus of “ayes”)

COMMISSIONER DOMBROWSKI: Item Number 8, reconsideration of actions whereby the IWC voted to convene a wage board regarding employees who work as certain computer industry consultants and voted to appoint wage board members.
COMMISSIONER COLEMAN: Mr. Chairman, I would move that we table this in light of the pending legislation on this topic.

COMMISSIONER BROAD: Mr. Chairman, point of order. I don’t think we want to “table” the motion for reconsideration. I think you want to make the motion for reconsideration.

COMMISSIONER COLEMAN: Okay. So that just postpones it?

COMMISSIONER BROAD: That means that the action that we took is reconsidered, whether -- if we take no further action, the matter is concluded --

COMMISSIONER COLEMAN: Okay.

COMMISSIONER BROAD: -- from the Commission’s point of view. Is that correct?

COMMISSIONER DOMBROWSKI: Correct.

COMMISSIONER COLEMAN: Okay. So that’s the motion for reconsideration.

COMMISSIONER DOMBROWSKI: Is there a second?

COMMISSIONER BROAD: Second.

COMMISSIONER DOMBROWSKI: All in favor, say “aye.”

(Chorus of “ayes”)

COMMISSIONER DOMBROWSKI: Item Number 9 in your
packets, there's a reference to further review of the wages, hours, and conditions of labor and employment of the stable employees in the horseracing industry. We received a letter, basically from the industry, requesting that we do not pursue their exemption.

Mr. Davenport?

MR. DAVENPORT: Mr. Chairman, Allen Davenport, representing the Service Employees. You also received a letter from us supporting the exemption. We'd like to withdraw that letter.

COMMISSIONER DOMBROWSKI: Okay. I can understand that.

Do we need to take any action on this?

COMMISSIONER BROAD: Well, Mr. Chair, I would move that we close our investigation of this matter. And by way of explanation, that would mean that backstretch employees at racetracks would be covered under Order 10, Amusement and Recreation, as all other employees are at racetracks, and would be subject to the normal daily and weekly overtime provisions established by AB 60.

COMMISSIONER DOMBROWSKI: So what do we need --

COMMISSIONER BOSCO: Second it.

COMMISSIONER DOMBROWSKI: Moved, second, vote.

All in favor, say “aye.”
(Chorus of “ayes”)

COMMISSIONER DOMBROWSKI: Any other business any
of the commissioners want to raise?

Mr. Abrams?

MR. ABRAMS: Mr. Chairman, Jim Abrams, with the
California Hotel and Motel Association.

The charge that was just approved --

MR. BARON: It’ll be on the Web.

MR. ABRAMS: It is or will be?

MR. BARON: No. It will be -- now that it’s
been approved, it will be put on the Web.

MR. ABRAMS: Just a question of process. If, in
fact, anybody, whether they are on the wage board or not,
has an issue to raise with regard to something that
either should be or, arguably, shouldn’t be -- I’m more
worried about things that might not be in the charge --
is that something -- are you going to have the wage board
before your June 30th meeting?

AUDIENCE MEMBER: Speak into the microphone.

COMMISSIONER DOMBROWSKI: Turn the mike on.

MR. ABRAMS: I’m sorry. Forgive me.

Is it your intent to have the wage board meet
before your meeting on June 30th? Because what I’m
concerned about --
MR. BARON: They won’t -- they won’t end up
meeting before then. You have to have thirty days’
notice for a wage board, so --

MR. ABRAMS: I would like to recommend that the
Commission put on the agenda for June 30th possible
consideration of the charge, just to make sure -- for
example, I’m -- we were always concerned whether the meal
and lodging credits are part of the charge. I haven’t
seen the charge that you approved, and if -- if adjusting
the meal and lodging credits is not in there, as an
example, that is something we would like to have added
in.

COMMISSIONER BROAD: It is.

MR. ABRAMS: Okay.

COMMISSIONER BROAD: I would -- given the fact
that the Commission needs to move forward on this, I
would not like to do that, Mr. Abrams. I think that this
charge is appropriate. And any matter that you would --
employers wish to raise regarding the minimum wage can
certainly be raised on this issue.

MR. ABRAMS: And if we do so, Mr. Broad, and
it’s beyond the charge, will the Commission, before it
adopts any minimum wage order, be willing to consider
issues that are raised outside of the charge?
COMMISSIONER BROAD: Speaking only for myself, I would consider any issue you would wish to raise regarding the minimum wage.

MR. ABRAMS: If that’s the Commission’s position, then fine, that’s -- I’m happy. If that’s not the Commission’s position, then not having -- the public has not seen the charge, so --

COMMISSIONER BOSCO: We seem to have no shortage of issues that are raised, so I don’t -- I can’t imagine you being foreclosed on one of them.

COMMISSIONER DOMBROWSKI: All right. Can I have a motion to adjourn?

MR. HUET: (Not using microphone) I’d like to speak.

COMMISSIONER DOMBROWSKI: Oh, I’m sorry. Come up.

MR. HUET: My name is Timothy Huet. I’m with the Association of Arizmendi Cooperatives and Rainbow Grocery Cooperative.

I guess worker cooperatives have never addressed your assembly before, and we’re not really family with lobbying. I just called up and asked how to get on the agenda and how to come speak to you, and I was told if I signed up I’d have five minutes. So, I know you spent a
lot of time, but if you’ll just bear with me, five

minutes.

I don’t believe this issue has ever come up

before you before. I don’t know if you are planning to

write regulations explaining what is an employee and what

is not an employee. That is our big consideration. We

are -- when you talk about having employer

representatives and employee representatives, we are both

the workers and the owners of the business, and we’re

confused by the statutory scheme and how we fit into it.

There is classifications for partners, saying

partners, under California law, are not considered to be

under the overtime law, although that’s not in the

regulations; you have to find that in the DLSE manual.

Our issue is that most -- is that people who are worker-

owners of worker co-ops do not consider themselves to be

employees. We only consider the people that have not

gotten a vote and have not bought into the business to be

employees. So we are only paying overtime for those

people who have not become owners of the business at this

point.

What that puts us under is a great danger that

if the state ever finds that that’s not the case, that we

could be wiped out by the penalties that would be
involved, because most of our workers actually schedule themselves. They do not -- we have no supervisors, we have no managers, and thus, overtime doesn’t actually work for us. Our workers have voted overwhelmingly that they don’t want overtime, because overtime would have the exact opposite effect of what’s intended under the statute. The intention of the statute is to discourage people from working long hours. In our case, since people schedule themselves to work, by paying them a premium to work overtime, you would actually be encouraging them to work overtime, encouraging accidents.

So we are looking for regulatory guidance from either this body -- and we’re also looking to DLSE at the same time -- about what is considered a worker, what is considered an employee.

COMMISSIONER BROAD: Mr. Chair?

I would suggest that you solicit an opinion from the Division of Labor Standards Enforcement. The Labor Code sets out the definition of “employee” and “employer,” and we are bound by that definition, which I think has been the same for many, many years. The question of whether someone loses their employee status because it is an employee-owned enterprise is one that is -- is probably -- raises
considerable issues of potential abuse. And, for example, sharecroppers and -- a lot of these issues have been litigated to a considerable degree in California, and it is not something that the Commission would appropriately address by way of regulation without you first posing your question, at the very minimum, to the Labor Commissioner as to what your problem is, what your circumstances are, what is the -- what are the relationships in your particular enterprise.

MR. HUET: We are taking that approach as well. Unfortunately, if we do get an opinion letter, it won’t be anything anyone else will be able to see, just as the partnership thing is not something you can find in the regulations. So we’re taking all avenues, including bringing it up to your board.

I understand that it’s not something you’re necessarily contemplating, but we’re taking all avenues too.

Thank you for your time.

COMMISSIONER DOMBROWSKI: Thank you.

Okay. I need a motion to adjourn.

COMMISSIONER BROAD: So moved.

COMMISSIONER DOMBROWSKI: Second?

COMMISSIONER COLEMAN: Second.
COMMISSIONER DOMBROWSKI: All in favor, say “aye.”

(Chorus of “ayes”)

(Thereupon, at 4:34 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 four tapes recorded at the Public Hearing of the Industrial Welfare Commission, held on May 26, 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: June 11, 2000

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CYNTHIA M. JUDY
Reporter/Transcriber