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DEPARTMENT OF INDUSTRIAL RELATIONS
INDUSTRIAL WELFARE COMMISSION

Public Meeting

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San Francisco Department of Public Health Building
101 Grove Street, Auditorium, Room 300
San Francisco, California
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Proceedings

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

Commissioner Dombrowski: Okay. We'll call the meeting to order.

Do we need to take the roll or anything? First we'll have the roll, to establish a quorum.

Mr. Baron: Bosco.

Commissioner Bosco: Here.

Mr. Baron: Broad.

Commissioner Broad: Here.

Mr. Baron: Center is absent.

Coleman.

Commissioner Coleman: Here.

Mr. Baron: Dombrowski.

Commissioner Dombrowski: Here.

The first item on the agenda is approval of the minutes from the November, December, January meetings and hearings.

Can I get a motion?

Commissioner Coleman: So moved.

Commissioner Broad: Second.

Commissioner Dombrowski: All in favor?

(Chorus of "ayes")
COMMISSIONER DOMBROWSKI: The second item on the agenda is closed session, personnel matters. I believe we need to vacate the room.

(Thereupon, at 10:12 a.m., a short recess was taken, during which the Industrial Welfare Commission met in closed session. The public meeting was reconvened at 10:25 a.m.)

COMMISSIONER COLEMAN: For everyone in attendance, just or information, we do not have a particularly large number of speakers so far, so while it’s always risky to project how long we’ll be meeting today, it doesn’t look like it’s going to be one of our more extensive meetings.

The next item on the agenda is Item Number 3, public comment and Commission discussion regarding the impact upon the following industries and occupations resulting from the enactment of the Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999, otherwise known as AB 60. First up will be the stable employees in the horseracing industry.

Okay. We’ll start with the speakers first. The first speaker is Allen Davenport.

MR. DAVENPORT: Good morning, Mr. Chairman, members of the Commission. My name is Allen Davenport.
I’m here representing the Service Employees International Union. We’re the largest union in the horseracing industry.

I’m going to give you a little bit of background, if that’s all right.

We represent 2,000 pari-mutuel clerks in SEIU Local 280, and about 1,500 assistant starters, jockey valets, veterinarian assistants, janitors, maids, ushers. We’re basically the people who bring you the horseracing show in California. And we are also the largest union of immigrant workers in California. We represent over 30,000 janitors, almost all of whom are recent immigrants to California.

We -- our employers in horseracing are the racing associations who lease the California horseracing tracks and the satellite wagering facilities. We’re basically the union representing the grandstand, the front-side workers. The back-side workers are not represented by us or by anybody else. Those are the people in question today. Those are the stable employees. They’re the ones who take care of the horses and prepare them for the racing. They work for the trainers on a daily wage basis. And there are about 1,000 different trainers who work as independent
contractors, essentially, for the horseracing owners themselves.

We are, however, of the view that these workers need a union to represent them in the working environment, especially in the changing horseracing industry. We believe that these workers can be represented by a union, but it’s going to take us a little time to do that.

We think -- stepping back, my view of the Commission and the way the statute structures the Commission is that a collective bargaining agreement supersedes any rule of the Commission or any law, unless specifically prohibited by that, so that -- so that the laws of California say that the best way for workers to make sure -- to have their rights achieved in the workplace is through a union. And that is what we would like to achieve with these workers.

Now, for a variety of reasons, mostly having to do with the structure of the workplace and the nature of the work and the types of workers who are in it, these workers have not been organized. But we are engaged currently in an effort to organize those workers.

So, with -- in that regard, it would be very useful to us to develop a good working relationship with
the employers of these workers. And we are here to ask for the Commission to issue, I guess, what would amount to a special order of some kind that would allow the currently existing exemption to continue for an additional year, another one-year time limit, during which time we’re going to make a bona fide effort to organize these workers. We’re going to be sitting down with the horseracing owners, the horseracing trainers, the racehorse trainers, and attempt to work out an agreement whereby we can talk to the workers and determine their interest in -- their majority interest in having a union to represent them.

We think it will be better for everyone concerned if we take time to do this rather than rush into it.

We had -- we were supportive of the extension that was created in the law. Unlike a lot of other laws that were sunsetted on January 1st, this law was extended. We need a little more time here. This is -- as representatives of the employers will tell you, this is not something that they’re looking at particularly with favor as an alternative right now, but, in fact, I think that we’re hopeful that we can have a peaceful and productive way of organizing the union in the workplace
here, if we have the time to do it.

Given that this industry has never been
organized and that the conditions under which the workers
work have not substantially changed over those years, we
think an additional year will not be a particular
hardship, given that we’re hopeful of a positive outcome
here.

I would not deny -- and I know that there are
wage and hour violations of even the existing 56-hour
week situation that exists there, and that -- so -- and
that those are more difficult to enforce in the absence
of a union contract.

So, I don’t have any -- I know that your job is
to take care of the welfare of the workers and that
you’re creating some kind of additional risk here for the
workers in this environment, and I wouldn’t deny that.
But I would say that the benefit of the potential of
having a union represent these workers in the future is
worth trying to do this peacefully. We represent a lot
of other workers in the industry. We don’t want to see a
lot of disruption that can occur when we don’t have an
agreeable way to meet and confer with the workers and
determine a majority for the union.

That’s the essential pitch I want to make here
today, is to ask for that special order.

COMMISSIONER DOMBROWSKI: Okay. Any questions?

(No response)

COMMISSIONER DOMBROWSKI: We’ll have -- I think it’s Charles Dougherty, California Thoroughbred Trainers, and Bob Fox, if you want to come up next.

MR. DOUGHERTY: Yes. Charles Dougherty. I’m the northern manager of the California Thoroughbred Trainers. And we are the official, recognized association that represents thoroughbred trainers in California. And we too are here to ask that the extension for an additional year be granted.

And I’m basically here to answer any questions in regards to the industry. But I'd like to turn it over to Bob Fox for a brief presentation.

COMMISSIONER DOMBROWSKI: Okay.

MR. FOX: Good morning. My name is Bob Fox, and I’m here on behalf of the California Thoroughbred Trainers Association.

I just wanted to echo what Allen Davenport said, and that is that we have developed a relationship with SEIU. We think it’s developing very, very positively. We’ve invited representatives of the union to go to two different racetracks. They had a meeting at Bay Meadows
about six months ago, and then, about a month and a half ago, we took them to the back side of Santa Anita.

I think probably many people who make presentations to this group talk about the unique characteristics of the employee-employer relationship, and that is true in this case as well, because, as Allen said, the trainers -- excuse me -- are the employers of the people on the back side of the racetrack. But the trainers are also employed on a contractual basis by the owners. And so, it will be very, very difficult for us to work out an agreement without having the involvement of the owners of the racehorses as well.

And in a meeting that we had yesterday, one of the things that we agreed was that we would put together a meeting with a representative group of the board of directors of the California Thoroughbred Trainers, our organization, and the Thoroughbred Owners of California, which is the group that represents the owners of horses on the racetrack, so that we can help make sure that when the union does begin to make contacts with employees, that they have a pretty good understanding of the characteristics of the employment setting.

And so, we would urge the Commission to grant the extension. We have committed to the union to work
with them in a cooperative fashion, to provide them with
all information that they need to answer their questions,
and, when the time comes, to assist them in their efforts
to meet with the employees to determine whether or not
they do, in fact, want to organize them.

Any questions?

COMMISSIONER DOMBROWSKI: Questions?

Barry.

COMMISSIONER BROAD: I have questions for Mr. Dougherty. I just -- or Bob -- I mean, either of you,
maybe both of you. I don’t know how to address it. I just have some questions, just general questions, about
the industry.

In your letter, it says that there’s 800 trainers. About how many back-stretch employees are
covered by this exemption? Do you have an idea, just
generally?

MR. DOUGHERTY: I’d -- statewide, I’d approximate there would be about 1,500.

COMMISSIONER BROAD: Okay. And the one question I’ve always had about this issue -- and it’s pointed out
in your letter -- is that most of your employees work, basically, for one hour or so in the morning, and then
for some time in the afternoon. Is that what it is,
where you have a morning shift and they come back?

MR. DOUGHERTY: No. The general timeframe is they would report to work in the morning for approximately four to five hours in the morning, and then generally leave, and come back to feed the horses in the afternoon. And it would be some extension of hours if the particular horses that they groomed were running in that afternoon.

COMMISSIONER BROAD: So, do they generally work more than 8 hours in that workday?

MR. DOUGHERTY: It would -- it would generally be a very rare exception.

COMMISSIONER BROAD: Okay. So that -- and let me preface this by saying I’ll support this one-year extension, but I have never quite understood what the problem is with this overtime rule, because it seems like, in this industry, you have people that basically work less than 8 hours a day, except in rare occasions, in which case, you know, the overtime costs would be relatively small. Is that true?

MR. FOX: I think, as a general rule, that’s true. But as Charlie said, it depends on whether or not the horse is running or how many horses that that particular trainer has in races during the week. There
may be instances where they would come in at five or six, they’d work their three or four hours, and then, in addition to coming back for that hour to feed, they may also have to do additional work to take care of a horse that may be in the race.

Now, I think one of the unique -- another unique characteristic is, is that not only are these people employed at the major racetracks, but also at the fairs. And they travel from one fair to the next in northern California. So, there’s a whole variety of situations. And there are some when they only work five, six, seven hours, but there are some instances when -- when significant numbers of them may spend more than 8 hours a day or two a week.

COMMISSIONER BROAD: Okay. Now, the other question I had is, of these 1,500 people, do you have a sense, like, how many of them live at the facility, how many of them commute to the facility to work? What’s your sort of sense of that?

MR. DOUGHERTY: I would guess approximately more than -- about half of them live on -- at the facilities of the racetracks.

COMMISSIONER BROAD: And the housing that’s provided for them, is it owned by the trainers, by the
track? How does that work?

MR. DOUGHERTY: It is provided by the racetrack facilities.

COMMISSIONER BROAD: Okay. Thank you.

COMMISSIONER DOMBROWSKI: Any other questions?

(No response)

COMMISSIONER DOMBROWSKI: Miles Locker, the chief counsel for the Department of Labor -- Miles, do you want to make any comments about this?

MR. LOCKER: (Not using microphone) About the stable employees?

COMMISSIONER DOMBROWSKI: Right.

MR. LOCKER: (Not using microphone) Well, on stable employees --

THE REPORTER: Please use the microphone.

MR. LOCKER: Yeah. I think, specifically, as to the stable employees, no. I know that there was a question that I know I had gotten in a voicemail earlier this week that may relate to all these exemptions that I don’t know if you want me to address now or not.

COMMISSIONER DOMBROWSKI: Go ahead.

MR. LOCKER: Yes. Okay. And that was how DLSE views the effect of the Living Wage Act of 1996, the -- which is in Labor Code Section 1182.11. And the issue
there is that that was adopted by proposition, and the
language of it -- it says, "Notwithstanding any other
provision of this part, on or after March 1st, 1997, all
employees shall be paid the minimum wage." And this, I
think -- much of this goes specifically to the stable --
this probably goes more to commercial fishing, I believe,
and I don’t know if you want me to deal with that now or
hold that.

COMMISSIONER DOMBROWSKI: Go ahead. I mean,
let’s just get this into the record now.

MR. LOCKER: Okay, fine.

COMMISSIONER BOSCO: Mr. Chairman, could the
witness identify himself? I didn’t catch the name and
title.

COMMISSIONER DOMBROWSKI: Oh, I’m sorry.

MR. LOCKER: Miles Locker, chief counsel for the
Division of Labor Standards Enforcement.

And basically, we’ve taken the position -- and
this is in our current Operations and Procedures Manual --
that a careful reading of the analysis that was
prepared by the legislative analyst and contained in the
ballot pamphlet mailed to all voters prior to the
election indicates that it was not the intent of the
proposition to abolish those exemptions. The analysis
states, in part, who is covered by the minimum wage. The categories of workers in California covered by the minimum wage have increased over the years, so that most employees are now subject to the law. Some exceptions are actors and actresses, personal attendants, such as babysitters, and employers’ family members. Our analysis assumes that the proposal would have no impact on who is covered by the minimum wage in California.

And we go on to state, in the manual that we adopted in October, 1998, that it is the position of DLSE, based on this ballot language, that the provisions of the Living Wage Act did not act to deny the exemptions from the minimum wage requirements currently applied. It goes on to say this conclusion is consistent with the views expressed in a letter from Deputy Attorney General Randall Borcherding, counsel to the IWC, dated April 16th, 1997. Mr. Borcherding opined that, quote, “Proposition 210 did not change the applicability of the IWC orders.”

So, that, I think, you know, addresses that. In terms of the stable industry, in terms of the stable employees, that -- the issue there is simply, I believe, different rules on overtime.

COMMISSIONER DOMBROWSKI: Right.
MR. LOCKER: So, you know, this issue on minimum wage doesn’t even come up there. In terms of that, basically, we’ve, you know, been enforcing the statute as it’s written. And in terms of the stable employees, obviously, we will enforce whatever the statute provides and whatever the IWC does to either extend that or not. So, that’s -- that’s not really a DLSE issue per se.

COMMISSIONER DOMBROWSKI: Okay. Questions?

COMMISSIONER BROAD: Yeah. Okay, so here’s the question. Can the -- after Prop. 210, can the Commission establish new minimum wage exemptions? I don’t believe any of this is -- relates to overtime; this is just to minimum wage.

MR. LOCKER: In terms of whether the Commission could do that after Prop. 210 came into effect, that is, create a lower-than-existing minimum wage under Prop. 210, I believe that, looking at the ballot analysis of 210, it talks about that 210 was not intended to do away with the existing exemptions to the minimum wage. And I might add -- you know, obviously, commercial fishing being one of them, and another one that I know we were very concerned about, actually, was the -- in Labor Code Section 1191, at 1191.5, that would be the special
licenses for people who are mentally or physically handicapped, and also the special licenses for sheltered workshops or rehabilitation facilities, that the Labor Commissioner issues these licenses pursuant to those sections of the Labor Code, and that allows these types of people and these types of facilities to provide -- you want to say employment, but really more in the nature of rehabilitative training, to people who might otherwise not be able to get work at all, because, simply, it’s not going to be economically viable for any employer to pay the minimum wage. And I know we were very concerned about, you know, how Prop. 210 was going to impact on that.

In terms of your question, which is what the IWC can now do prospectively, with a minimum wage lower than what Prop. 210 would allow, looking at the ballot analysis, it seems to only talk about existing exemptions from the minimum wage; that is, that the intent was not to upset those existing provisions. So, you know, I hesitate to take a position on that, because, really, it’s more in the nature of a policy question.

COMMISSIONER DOMBROWSKI: We won’t -- and we won’t put you too much on the spot right now. But I guess we can talk about this when we get to the
commercial fishing, because that’s really where it’s
germane.

Thank you, Miles.

MR. LOCKER: Yes.

COMMISSIONER DOMBROWSKI: I believe we do not --
this is -- we cannot vote today to grant your extension.
I think it’s -- speaking for myself, the sentiment is to,
obviously, do that. And I don’t know what the other
commissioners’ positions are. We will have a formal
hearing in late March and schedule this for a vote at
that time.

And I don’t think we need to do anything else to
get that on the agenda, do we?

COMMISSIONER BROAD: Do we need to take a vote
just to put that on the agenda?

Okay.

COMMISSIONER DOMBROWSKI: Okay. Thank you.

The next industry is commercial fishing. And
the first speaker I have is Peggy Beckett.

Before you -- there are four speakers on this
subject that we have listed.

MS. BECKETT: Good morning. My name is Peggy
Beckett, and I grew up in the Midwest and came to
California as a young adult in the early ‘70’s. In 1974,
my father came to town, and he took me sportfishing on
one of the passenger boats. And that was in Sausalito.
It was one of those moments that really defined
my life. I know it sounds silly, but it’s really true.
I had never been on the ocean, the weather was less than
desirable, and I loved every minute of being there. I
came back several times on my own, begging the deck hand
to show me how to make baits and do the work. With a
grumbly kind of “Girls don’t do this kind of stuff”
thing, he finally broke down and started showing me how
to do a little of what it took to do this.
I did a lot of fancy talking, and I finally got
someone to take me on and come along so that I could try
out. My persistence won out. It’s since led to a life
involvement for me for fishing on the ocean and in many
other forms.

When I started, we fished a salmon season that
started about February 15th and went through November
15th. We didn’t do much rock fishing, but I knew that
the season was year-round.

There have been a lot of factors that have led
to the reduction of the fishing seasons we have now, and
there are other forums in which we discuss those. The
pertinent factors to this item are about wages and how
they relate to making a living in this industry and how wages are paid.

I’ve had a lot of jobs, and all jobs have had different pay scales. One of the things I found out about working on the ocean was that it wasn’t a job to be done if you didn’t like doing it. I could sit in an office, even if I didn’t want to, but, really, you had to want to be on the ocean to fish in order to be able to make the job work day after day. Every day I was out there, I was really grateful for the opportunity. There were many days I really didn’t want to come home. But we didn’t work every day, and unstable weather conditions and fishing conditions forced me to find another job to be able to pay my bills when I first started. I know that sounds counter to what I’m about to say, but it really isn’t.

The work’s not hard. There were times when it was fast and furious. The days can be long, and there were years when I worked three months straight without a day off. But those were my choices. I could take the time off, but I chose not to. I wanted to be there. I wanted that opportunity to be able to learn the trade, or rather, the fishing traditions and the ocean. And being there every day was the only way that I could accomplish
that. I didn’t have the advantage of having grown up in an ocean environment.

It’s been a good life for me. I started as a deckhand in 1974, got my captain’s license in the early ‘80’s, bought a boat in 1987, and traded the ocean life for a sportfishing center in 1990. I did both for a while, but I couldn’t do both well, and I sold the boat in 1994. The outlook for the fishing seasons was grim, and given the projected reductions in the seasons, selling the boat seemed like the better choice.

Salmon season now starts the beginning to the middle of April and ends in October, and the rock fishing, this year for the first time, will not be a full season, but will be closed during the months of March and April. That means that we’ve lost, in my time here, about a third of the opportunity timewise to make a living salmon fishing. And that was seasonal to start with.

And then there’s the weather and the conditions that come along with that. It’s important in this industry to work as much as you can while it’s happening. And when you add in varying weather conditions that take another significant piece of time away, out of the six and a half months of salmon season, that includes
whatever is left.

So, after all that, the crux of my comments are there -- here are this. If the law was in place for this industry that required me to get paid by the hour or overtime for over 8 hours a day or worked or for over 40 hours a week, I wouldn’t have been able to learn the job the way I could by being there daily and seeing the constant changes in the ocean conditions and the things that taught me how to do my job right. The economics and the demands of the work don’t lend to that kind of thinking.

It would be a lie to say that it wouldn’t be nice to make more money. Every one of us has that element of greed in our soul. But in those days, I got $40 or $50 a day as a deckhand, and I received tips, and sometimes fish-cleaning money. During the times I had to supplement with other work, it wasn’t because of what or how I was paid, but it was because of the seasonal nature and the daily uncertainties of the work.

As a captain, I was paid based on a percentage of the people we carried. These days the crew gets $70 to $85 as a deckhand, plus tips and fish-cleaning money. The captains, on a whole, still work on a percentage-based type of thing, and the wages run from $100 to $200
a day. It’s common practice these days for the captains and the deckhands to split the tip money. It’s a good living when you can work.

There are existing regulations via the Coast Guard which require alternate crew after 12 hours working time, so the day can never be longer than that. Most all of the trips I’ve worked have been day trips, four or five hours to maybe 10 hours. And in any given day, there was ample time to sit around, eat, chat with the customers. And when the fishing was good, the days could be really short -- early limits, and we’d come home. So, the flip side of this is, if I had been getting paid by the hour rather than by the day, on those short days I would have lost money.

I really think the system, the way it’s been, has evolved into something that needs to continue to be accommodated. It works well. I hope you will continue to grant the industry request for exemption from the minimum wage overtime requirement.

A lot of the people in the business are like my husband; they grew up near the ocean. It was all he did as a child and a young man. He lived to fish. His history is similar to mine, except he started earlier. He got his license as soon as they let him; that was at
the age of 17, and he's 66 now.

I think that the point that I really want to stress is that this really is a way of life. It’s not just a way to earn money.

Thank you.

COMMISSIONER DOMBROWSKI: Questions?

COMMISSIONER BROAD: Yeah, I have questions.

So, now, what sort of fishing boat do you work on? Sportfishing or --

MS. BECKETT: I have a charter boat landing, and I do part-time work as a skipper on one of the boats, and sometimes I do some deckhand work. So, my -- my jobs are varied. Mostly I work as a charter boat landing operator. I do all the --

COMMISSIONER BROAD: Okay. So, you’re like -- it’s like a party boat, not a --

MS. BECKETT: Yeah.

COMMISSIONER BROAD: -- commercial fishing boat.

MS. BECKETT: It’s a commercial passenger fishing vessel.

COMMISSIONER BROAD: Okay. I’m mostly troubled by the minimum wage exemption, because this is like the one industry where there’s -- where there’s a sort of across-the-board minimum wage exemption. The minimum
wage is $5.75 an hour. If people were paid 10 hours at $5.75 an hour, it’s, you know, not a lot of money. What would be so disruptive about applying the minimum wage and guaranteeing that workers in this industry would get the same minimum hourly wage as every other worker in the state?

MS. BECKETT: Well, rounding it off to $6 an hour, if I was to work a four-hour day, I’d be making $24, as opposed to $60 or $70 now. And the same would hold true if I was working as a skipper. I mean, there’s nothing to preclude that the owner of an operation couldn’t pay me more, but --

COMMISSIONER BROAD: Well, would you be supportive of us establishing a day rate, then?

MS. BECKETT: I think that varies from fishery to fishery. You know, there -- there are different kinds of fisheries in which they get different kinds of income. In salmon fishing, it may be the wage and the tip; in rock fishing, it may be the wage and the tip and fish-cleaning money. And I think that one blanket wage doesn’t cover the different types of fishing that we do. I don’t -- I guess I don’t know how to explain that right.

COMMISSIONER BROAD: Thank you.
MS. BECKETT: Okay.

COMMISSIONER DOMBROWSKI: Roger Thomas.

Again, please identify yourself and your affiliation.

MR. THOMAS: Good morning, Mr. Chairman, commissioners. For the record, my name is Roger Thomas. I represent the Golden Gate Fishermen’s Association. We represent the commercial passenger fishing vessels from Fort Bragg through Monterey. Our membership consists of approximately 70 member boats, and there’s probably another 30 commercial passenger fishing vessels in this area that we don’t represent. But, obviously, what we gain for our membership also applies to the other vessels.

Our fleet is quite unique. It differs from other parts of the marine industry. Peggy talked about seasons. When I first started deckhanding back in the late ’50’s and the early ’60’s, we worked for nothing to learn the trade -- actually, not for nothing. We got a spot to go fishing, to stick our rod out and catch a fish. And most people started that way, just like Peggy said. She had a heck of a time getting going and getting somebody to teach her.

And that’s what’s happened throughout our whole
industry, is people start out for the love of fishing, and they become deckhands. And they work at that for a number of years, get their skipper’s license, become boat owners. The boat owners that I represent, I would say, out of the 70 vessels, there’s probably maybe three or four owners that didn’t start out as a deckhand and work their way up through the business to learn the business. And it’s for a love of that business that we’re in it.

Our association used to represent 185 vessels. We’re now down to 70 vessels that we represent. When we represented those 185, there was probably about 250 in northern California.

Peggy mentioned the seasons. We used to have a nine-month salmon season. Because of the Endangered Species Act on salmon, which we’re all familiar with, we’re down to a six-and-a-half-month season. And it’s vital for the people in the industry, both the owners and the skippers and the deckhands, that we have the opportunity to work when we can work. Sometimes we work seven days a week in the summertime, for two or three months, weather permitting. And it’s just a way of life and a fact of what we’re facing out there, with the weather conditions and fishery regulations.

In regards to the minimum wage, in northern
California our vessels pay from $75 to $85, and sometimes
$100 per day, for deckhands. And that more than meets
the minimum wage requirement. So, they’re presently
making that, plus having the opportunity to work and to
make the tips and fish-cleaning money. And they have to
try to earn a living in the six and a half to seven
months that we have the opportunity to work, less weather
days that we can’t get out.

Today I had asked several members of our
association to ask their deckhands to appear to talk to
you folks today. They agreed to that, with the condition
that if they had an opportunity to go to work today, that
they wouldn’t be here. I received two phone calls this
morning, and the weather condition was good enough that
they could get out to go fishing today. So,
unfortunately, they’re not here. But I will ask them to
submit some letters to you folks for your consideration.

COMMISSIONER DOMBROWSKI: Thank you.

MR. THOMAS: Thank you.

COMMISSIONER DOMBROWSKI: Just so I heard you
right, the reaffirmation of the exemption is what you
really need, that you’re already meeting the minimum wage
threshold.

MR. THOMAS: Yes, sir. That’s correct.
COMMISSIONER DOMBROWSKI: Okay.

MR. THOMAS: Thank you.

COMMISSIONER DOMBROWSKI: Zeke Grader.

MR. GRADER: Thank you, Mr. Chairman and members of the Commission. My name is Zeke Grader. I’m the executive director for the Pacific Coast Federation of Fishermen’s Associations. I thank you for this opportunity to talk to the need of our industry, the commercial fishing industry, on the need for the continuation of the current exemption.

Let me just tell you a little bit about what type of people we represent. Ours is a federation of fish marketing associations, primarily up and down the coast. And the reason I say fish marketing associations is, at one time, most all of our membership was unionized. This was back in the ‘40’s. Unfortunately, the U.S. Justice Department decided that, in its union-busting binge at the time, to break up the fishermen’s unions, and that’s exactly what happened. They ruled that owner-operators, such as we represent, could not be union members. That’s different than our counterparts in Canada, who still are -- remain as union members.

But our membership, now in the ‘50’s, organized as fish marketing associations under agricultural codes,
allowing them to collectively bargain with fish buyers, because they were dealing with a perishable product and it allowed them around the monopoly situations.

Now, our boats themselves that we represent range anywhere from one-man operations, one-person operations -- oftentimes it was generally the owner-operator -- sometimes two people, oftentimes husband and wife, on a number of our boats, father and son, brothers. And it’s really only when we get into two to five members on board the boats that we get into any sort of crew relationships at all. For the most part, where we have the most crewers, such things as on our squid fleet, which is now California’s largest fishery, we have maybe up to five persons on board those boats.

The typical way that crew are paid in our industry -- it’s not just here in California, it’s throughout North America, and indeed, much of the world -- is they’re paid by a percentage of the catch. This is recognized in federal tax codes and elsewhere. And a person going on board a boat takes a risk. They have a chance of perhaps doing less, making less money than, say, somebody working in a McDonald’s or a fast-food place. On the other hand, they have an opportunity to make big money, depending on the skill of their captain.
and the fish being available.

I know as I was growing up, the best jobs where I grew up, in the Fort Bragg area, were in the fishing industry, for kids. My counterparts who worked on board the fishing boats did much better than any of the people working ashore, being paid the minimum wage and working a straight 8 hours. In fact, most of those people went on and were able to pay their way through college and got out -- which is unheard of today -- with no debts and without any -- hurting their parents financially. So, it has been a way, at times, for people to do much better than they might ordinarily would have done on shore, but there was that type of risk.

Now, I think the problem we run into, and I think the reason that we do pay people a percentage on the fishing vessels, is just the uncertainty of fishing itself. It’s not the same as, typically, an owner of a store or a factory has some idea every day when they open the doors what type of income flow they might be able to expect. In fishing, it’s just unknown. There will be days when there’s absolutely no fish, that no fish are taken, and you can be out all day. Other times, the fishing will be fantastic. So, the question begins is what constitutes a working day on a fishing boat. If
they’re sitting -- sitting back in the cabin reading a
book waiting for the fish to bite, is that working?
Oftentimes they’re working on board these boats -- on
albacore boats, they can be out -- you can out at sea as
much as two months at a time.

This is great fun for a lot of people. It’s a
sense of adventure. But the assured -- I guess the
tradeoff is, is the assurance that you’re going to have a
set amount of money every day. You put that aside for
the chance of making bigger money and a sense of
adventure. That’s the nature of the tradeoff here.

But for the most part, people who choose to go
on have the option. Most of them are highly skilled, so
they could get jobs on shore. It’s just that they prefer
the life at sea. There’s more adventure and the chance
of making more money.

So, I think, from that standpoint, you know,
trying to apply, as we could, 8-hour standards to the
fishing industry, trying to apply overtime, I’m here to
say that’s not going to break our industry. What it
simply will mean is that there will be no more crew
members taken. People will either go with their spouses
fishing, if they have to have an extra person on board,
or a fishing partner, as they do now with crab, where a
couple fishing vessel owners will sometimes team up on one boat and go fishing together, it’ll be family members going. And I think that would be a real loss, because the people in particular that are going to lose from that are going to be young people who have a chance of adventure, particularly in the salmon fishery, going fishing for a summer and making some big money and having -- doing something that they might never get a chance to do again in their life.

Probably worse yet is for minorities, people trying to break into the fishing industry that has historically been a sort of ethnic industry. And for new people to try and break in, break through these families, the only way really to do that is for an opportunity to be a crew member. And this will be lost. And I think that’s a real tragedy.

So, that’s really what we’re up against. Will this break our industry? No. It’ll simply eliminate opportunities for crew. And I don’t think you would want to do that, as this Commission. You know, it seems to me that that would be really counterproductive to looking out for the welfare of workers.

COMMISSIONER DOMBROWSKI: Assume --

MR. GRADER: Yeah.
COMMISSIONER DOMBROWSKI: Assume that, just for
-- assume that you have your exemption for overtime.

MR. GRADER: Sure.

COMMISSIONER DOMBROWSKI: What about the minimum
wage issue?

MR. GRADER: Well, again, it’s the minimum wage.
Sometimes the captain won’t make the minimum, the boat
owner. Other days somebody will be making, you know,
five, ten times what the minimum wage would be, in an
hour. If you have a great day, if you have -- go out --
and the typical crewman is paid 15 percent -- they come
in with a $5,000 salmon trip for five, seven days, that’s
far greater than you’d ever get. On the same hand, that
same captain, going out, may not have any fish that week,
and may blow the whole season. They may be on anchor,
sitting on anchor, not able to do anything because the
weather is so bad that they can’t -- can’t get an
opportunity to fish.

Now, is he, then, to pay that person the minimum
wage for their being out there during that week and then
try and recoup it by lowering the percentage during the
week when the fishing is real good? That’s the problem.
It’s a pragmatic problem that we run up against. So,
that’s -- you know, how do you -- how do you do that?
And like I say, yeah, you could require those type of things. I think what the practical effect would be, though, is that people would just stop taking crew. And, you know, they would get around it by -- it would be husband-and-wife teams solely, or it would be fathers and sons. And that’s the way much -- much of our situation is right now, is many of them are spouses and brothers and fathers and sons.

COMMISSIONER DOMBROWSKI: Commissioner Coleman?

COMMISSIONER COLEMAN: I think Barry had a question.

COMMISSIONER BROAD: Well, let me just understand this. In the commercial fishing for food part of the commercial fishing industry, it’s done as a percentage of the take.

MR. GRADER: That’s correct.

COMMISSIONER BROAD: In commercial sportfishing, Mr. Fletcher’s group, it’s really done on a kind of day rate.

MR. GRADER: That’s right.

COMMISSIONER BROAD: Okay. So, there are actually -- there isn’t variation within your sector; it’s all done by a percentage of the take for crew members.
MR. GRADER: Yeah.

COMMISSIONER BROAD: Okay.

MR. GRADER: Well, in some of the -- on the East Coast, they do a little bit on a point system. But basically, it’s like a percentage. It’s essentially the same thing.

COMMISSIONER BROAD: Okay. Let me pose this question to you.

MR. GRADER: Sure.

COMMISSIONER BROAD: You know, generally -- obviously, the captain and the owner is the person taking the entrepreneurial risk, not the worker. The worker is giving his labor for a return for that. Now, I understand what you’re saying, that this has a kind of feast-or-famine sort of cycle. Would it be possible for us to fashion a minimum wage for your portion of the industry that was based on an average over the period of the appropriate season, you know, essentially by saying you have to achieve a minimum wage equivalent over a month period or a two-month period, for the hours that are worked, and, in other words, and say that, okay, the person is guaranteed at least that amount of money for the season?

MR. GRADER: That might be possible. Let me say
that, that in some of the fisheries right now, that
something like that might be doable. I wouldn’t say it
wouldn’t be.

The concern I would have, though, would be most
likely as people looking at -- and the captain looking at
it and simply saying, you know, “I don’t know for sure
that I’m going to be able to do this.” We just had the
situation in the squid fishery, which has been our most
profitable fishery, El Niño came along and there was no --
-- there were no squid landings for a year. Yet they had
-- you know, what are they to do when those types of
situations arise?

I think the practical effect would be,
unfortunately, is that people would just simply say, “I
can’t -- I don’t know if I can guarantee that right” --
now, some people might be able to do that, but I think a
lot would simply say, “I can’t take that chance. I don’t
know it. I’m not going to take any crew; I’m going to
bring my family members on board, I’m going to partner up
and just establish partnerships with people and do it
that way,” basically getting around the crew situation.
And I think the loss that we would incur then, the
practical effect, would be the loss for minority
employment and youth employment, is what my risk is.
I mean, it goes more to the social effects of what happens to the industry. I’m not going to say it’s going to break us. I’m not going to.

COMMISSIONER DOMBROWSKI: Right.

MR. GRADER: But I think that would be the practical effect.

Now, I think if we saw a lot of abuses, where people weren’t making good money in the fishing industry, then obviously this Commission ought to be taking action. That hasn’t really been the case, I mean, where the people haven’t been making any money. It’s been that the skippers, the owners themselves, looking for the government to buy back their boats.

COMMISSIONER BROAD: Right. I just think that it seems like it’s one thing to say, you know, you go out there one week and you make nothing, but the next week you make $5,000 and you average it out. You know, you’re clearly above the minimum wage for --

MR. GRADER: Yeah.

COMMISSIONER BROAD: -- for two weeks. The question is whether, if the squid fishery collapses and a boat operator asks a crew person to work every day for three months and the person makes no money and is paid nothing, whether we could say we’re adequately protecting
the sort of health and welfare of those workers, that
they’re sharing in the risk, the entrepreneurial risk, to
the extent that they could go for a significant amount of
time and work many, many hours and not earn even a dime.

MR. GRADER: I think, you know, this would be
something that almost -- and I don’t -- I can’t answer
that -- but, you know, warrant almost this type of study
to determine whether, in fact, those abuses are
occurring. I don’t know of them. Most of the time, a
crew member can get work elsewhere. If the situation
gets that bad, where they’re not making anything, the
owner’s not even going out because he’s not -- not paying
for the fuel or anything else. The boat is sitting at
the dock.

COMMISSIONER BROAD: Well, I guess, Zeke, what
I’d like you to think about, because I think you make,
you know, a -- for your segment of the industry, you make
a compelling argument about the way -- you know, you
can’t control whether there’s fish out there, and you
have a system where the workers that we regulate, which
isn’t everybody on that boat -- it’s just the employees --
do have an opportunity to make significant amounts of
money -- I would like you to think about, and perhaps
come back to us with, whether there is some way to
fashion coverage under the minimum wage that might not be based on an hourly approach, but perhaps an approach over a period of time that guarantees a minimum wage equivalent --

MR. GRADER: Sure.

COMMISSIONER BROAD: -- in pay, because I -- for my own part, I’m uncomfortable with that notion. And if there’s no real problem out there, if this is not an issue and people are being paid well above it, then we’re just creating a baseline protection for people that isn’t going to have substantial impact on anybody’s bottom line.

MR. GRADER: Let me do this. Yeah, I would be glad to look into that, because we don’t want to have those -- any examples of those type of abuses. I can check. There are, on board our boats in southern California -- not on the people we represent, but there are a couple of unions that are involved -- I can certainly talk to them and see, you know, how they’ve been working to deal with that, because on board even the boats where they’re unionized, with the big crews such as on the tuna boats and the fast -- the wet fish fleet and that, there have been some unions. And I can -- I can talk to them and see how they’ve handled it.
Like I say, in our industry, for the most part, we lost people. I mean, most of our people, members, particularly in the salmon fishery, just let crew go because they couldn’t afford to hire anybody on, irregardless (sic) of any standards here, just because it was just -- the downturn we saw in the salmon fishery.

I would say, however -- and I hope nobody here misinterprets it, particularly in the labor sector -- that because of the Endangered Species Act and the Clean Water Act, we’re going to get our salmon back. So don’t anybody that the ESA or Clean Water Act are anti-labor. They’re not. They’re going to save a bunch of jobs in the future.

COMMISSIONER BOSCO: Could I ask a question?

MR. GRADER: Sure.

COMMISSIONER BOSCO: Relative to Mr. Broad’s line of questioning, I think that would assume that the same deckhands are pretty much on the same boats. But my experience in the fishing industry, which -- you know, I’ve been around it all my life, although I never catch anything, but --

MR. GRADER: It’s the reason you were never hired on, Mr. Bosco.

(Laughter)
COMMISSIONER BOSCO: I’m always on those boats that stay out all day, never come back early with their catch.

But anyway, isn’t it true that most of these deckhands kind of come and go and go on the different boats, and show up sometimes and not others, to where I think it would be hard to have a season standard for them. I mean, just the recordkeeping alone, it seems, would be next to impossible.

MR. GRADER: Well, that’s been one of the reasons that I’ll -- that there hasn’t been a lot of hiring of crew, particularly in the smaller boat fleet. I mean, we’ve just -- crew have been let go over the years. But there are some cases. A good crew person on a boat, and particularly on a boat that’s making money, I mean, the captain’s going to go out of their way to make sure that persons sticks on board, because this is a person that can run the boat when they want to go down below to get some sleep, they know where the fish are, and that.

But you’re right. There is a transient nature to part of it. There’s also the youth element that you particularly see in Alaska, to work the summertime jobs in that, which I think is a great opportunity. And then
there are the steady people that are crew members for
twenty, thirty years, on the same boat, because they’re
invaluable, they’re paid well, and they’re -- it’s good
for the boat and it’s good for the crew member.

COMMISSIONER BOSCO: What percentage, Zeke,
would you say are what you’d call stable employees of the
same boat, to where maybe we could work something out on
those lines?

MR. GRADER: Again, I think that would probably
almost go to a Sea Grant or somebody like that and do --
do some research. And we have had some economic studies
recently, trying to get into this industry. I can’t say
for sure. I would say it would probably be in the
neighborhood of 20, 25 percent, at most.

You know, we certainly -- I think what
Commissioner Broad has brought out is a good issue to
take a look and I think, probably, talk to the unions
about that. But, again, I think right now is -- is we
would like this exemption. That’s not to say that if
people can’t find -- if we do find abuses or problems,
that they ought not to be rectified.

COMMISSIONER BOSCO: Thank you.

COMMISSIONER COLEMAN: To sort of follow on the
question of the captains of these boats are sort of
operating on a risk-reward incentive, it sounds to me the way you’re describing this is that the crew members are also operating on that --

MR. GRADER: Exactly.

COMMISSIONER COLEMAN: -- in the sense that they forego the hourly wage for the opportunity.

MR. GRADER: Exactly.

COMMISSIONER COLEMAN: And I have some personal experience with this too, not any fishing experience, but a good friend of mine put himself through college by going up to Alaska every year and coming back smelling like fish and paying for college.

MR. GRADER: Yeah.

COMMISSIONER COLEMAN: So, that type of worker, I don’t think -- he would never have gone to Alaska for a minimum wage job with a small commission attached to it. So, any kind of testimony that you can get from the affected workers, or some input from them, about, you know, why this is beneficial to them, I think, would be useful.

MR. GRADER: Yeah, I can do that.

Unfortunately, over the course of the years, particularly with the downturn in the salmon fishery, we just -- we don’t have many crew really left, except for in a couple
of our fisheries. But, you know, I’m hopeful. And frankly, it was because of Mr. Bosco’s work when he was in the Legislature and that -- now we’ve got some good programs going on in California. So, we’re pretty optimistic about, you know, the rebirth of the salmon -- or the return of the salmon fishery in the next couple decades.

COMMISSIONER DOMBROWSKI: Any other questions?
MR. GRADER: Thank you.
COMMISSIONER DOMBROWSKI: Thank you.

Tom Rankin.

COMMISSIONER DOMBROWSKI: Tom, you’re the last speaker on this one. And then I see you’re on outside sales, so I’ll let you just stay up and segue to -- oh, do we have another speaker?

I’m sorry.

MR. FLETCHER: (Not using microphone) I submitted a card, sir. Bob Fletcher.

COMMISSIONER DOMBROWSKI: Did I miss it?

Well, Tom, why don’t you talk? And then we’ll go to Bob.

MR. RANKIN: Sure.

COMMISSIONER DOMBROWSKI: Sorry about that.

MR. RANKIN: Okay.
Tom Rankin, California Labor Federation.

Sorry I was -- I attempted to get some folks from the fishermen’s union here and was unable to, for today. But I understand this will probably come up at another meeting, so we’ll definitely make an even greater effort to get them here. They’re basically located, as Zeke said, in southern California.

So, I’m going to be talking on a more abstract level.

The first point I want to make is that, obviously, the purpose of the minimum wage and overtime laws, at least a large purpose, is to avoid exploitation of the workers. And I’d also like to point out that, up until 1986, when this industry was able to go to the Legislature and get an exemption, they were covered. So, somehow or another, this industry worked with minimum wage and overtime prior to 1986.

In terms of the issues, I think the biggest one is the minimum wage. We don’t require workers in any other industry -- and there are many risky businesses in this state -- to bear the risk of the business. And I don’t think that we should make an exception for this industry. The minimum wage is simply a floor. They can certainly figure out how to give people, you know, the
benefits of a good catch and at the same time pay them a minimum wage. So, I would say that is an essential, to somehow figure out how to craft a minimum wage for this industry.

In terms of working out the details, we would be happy to meet and, hopefully, get some fishermen up here to meet with the folks in this industry. That’s the function usually performed by a wage board, but I know that, in this case, wage boards aren’t required. But hopefully, we can figure out how to do that, at least informally, because it always, I think, makes sense to try to get the people involved, who really know the industry, to figure out the rules.

Thank you.

COMMISSIONER DOMBROWSKI: Bob Fletcher. Sorry.

Your card got stuck.

MR. FLETCHER: Thank you, Mr. Chairman, members of the Commission. For the record, my name is Bob Fletcher. I’m the president of the Sportfishing Association of California.

SAC was founded in 1972 by members of the industry who recognized the need to have someone working on issues of common interest and concern for the industry. Our fleet operates between the ports of Santa
Barbara in the north and San Diego in the south, and I represent about 175 commercial passenger fishing vessels. The industry is struggling statewide. And I didn’t provide the information, but the Department of Fish and Game provides a breakdown. And I only have one copy, Mr. Chairman and others, but I didn’t provide that -- this is the only copy. But I thought, later, that this might be of value.

What it does is show the number of licensed commercial fishermen, the number of -- oh, you have it? Okay.

And the only point I wanted to bring up here is that it shows that there’s a steady decline.

I also happen to be a member of the Pacific Fishery Management Council. And Mr. Thomas talked about the loss of seasons. The Council is the management entity that establishes seasons, and we have taken some very, very restrictive actions in the last year relative to bottom fish or ground fish that cuts way back on the opportunity of both commercial fishermen and commercial passenger fishing vessels. So, there’s been a significant reduction in the opportunity for fishermen, and that just further squeezes an already declining number of small businesses in California. And I wanted
to just bring that up before I continue.

In my segment of the industry in southern California -- and I think you have a letter that I had provided --

COMMISSIONER DOMBROWSKI: Yes.

MR. FLETCHER: -- dated January 27th that talks about the variety of the kinds of fishing trips that my fleet operates, anywhere from a couple-hour whale-watching trip all the way up to a 17- to 20-day long-range trip. And the reason I bring this up is, in part, to respond to Commissioner Broad’s comment about could not we work somehow a minimum wage into the framework of the industry. And the problem that we face in my portion of the industry is this variety of trip lengths. And I don’t know how we could identify the number of hours during one of those trips that you would identify as hours worked, because sometimes -- this time of year, we have a large fleet of very big boats -- not a large -- it’s about fifteen boats, but they’re the biggest boats in our fleet -- that travel 1,500 miles to the fishing grounds. It takes them three days or more to get there, and then they’re fishing for nine or ten days, and then they come back. During that trip down, there’s almost nothing to do except just make sure that
the trash is not all over the deck, or that passengers are cared for. But there’s almost no activity.

Now, during that time, if minimum wage was applied to that kind of a trip and enforced, there would be no more fishing by that fleet. They could not afford that long trip and all that time. And I’m kind of at a loss to understand how we could come up with a formula, because on trips like that, you run for a period of time and then you fish for a while, or you may get into the grounds and the fish aren’t biting and you’re just traveling.

As I go on to say in this letter -- I talk about the compensation -- and I think, on average, the compensation is fair and the individuals in the industry are comfortable with the compensation. And I provided some letters from some crew members. Unfortunately, the crews that I represent are a long ways away, so they weren’t able to come here in person, but they did provide some letters that I handed out this morning talking about how this job is not a job, it’s an adventure, it’s a love.

I was born and raised in San Diego. I’m a native son. I grew up on sportfishing boats. I would go out as much as I could force my father and mother to let
me go, because it was the thing that I wanted to do more than anything else in my life, so much so that I would put up with being seasick on the way out every day, just because I wanted to catch some fish. I loved it so much. And I went on to become a crew member, then a captain, I was a commercial fisherman, I harpooned swordfish, I caught tuna, I went on, bought a sportfishing boat, operate a sportfishing boat for other people, and then went on from there and now represent the industry. And the people that are there love what they do.

And I think we see, in light of the very unique kinds of operation we run, a very and, I think, in some cases, a very good compensation. And I know that most all of them love being on the boats, are very proud of what they’ve learned to do, and feel that the existing system works.

And one question that Commissioner Broad brought up to me was, “Why was it necessary, in your mind, for the industry to receive the exemption in the first place?” And I will point out that I left the industry in 1983 so was not involved directly. But I would believe that the industry felt that because of these very unique operations that it ran, it needed the protection from minimum wage that the exemption provided. And there was
never a thought by the industry to get out from under paying a fair wage; it was just to reflect the kinds of unique operations, where a boat may go out for six hours or overnight or for five days. And it would be difficult, if not impossible, for those industries -- and many of them were small businesses -- to be able to pay those crew members minimum wage for that period of time. So, I think it’s just very, very difficult.

And as I said, I have provided you with letters from some of the crew members describing why they really feel that they’re fine the way they are. They enjoy what they do. We get seasonal workers -- Commissioner Coleman talked about a friend that went to Alaska because he was able to put himself through college. Many of our crew members work seasonally on the boats during the summer in order to put themselves through college too, so this works to their benefit. They’re in a healthy environment, they love being on the boats, and they make what I think is a very fair compensation.

So, one -- one point in closing that I would like to bring up is that this is a very small industry. I think, in the whole state, there may be 4,000 individuals who are working on the boats in the fleet. And that number is, unfortunately, on the decline because
of restrictions, as Roger Thomas talked about. The Council restricted two months of the season for the whole state, for commercial fishermen as well as the recreational passenger fishing fleet. And if additional stocks prove to be identified as depressed, that may increase, those kinds of restrictions. So, there are less opportunities to be on the water.

I think the industry believes that it is paying in a way that compensates fairly, and the people that are in the industry love what they’re doing and would hope that you would recognize the value of this exemption to the minimum wage.

And I’ll be more than happy to respond to any questions.

COMMISSIONER BROAD: So, let me make sure that your and Zeke’s testimony is consistent. In your part of the industry, the party boat part, you pay people a day rate.

MR. FLETCHER: Or an annual salary. For some key crew members on some of the boats, such as the ones I described that run the long trips, most all of those employees receive an annual -- annual wage. And then, in addition to that, they receive tips and fish-cleaning money. But they are paid an annual salary.
COMMISSIONER BROAD: Does that annual salary exceed the minimum wage?

MR. FLETCHER: Well, once again, Commissioner Broad, I’d question how you would determine that, in light of the fact that while the fellow is on board the vessel for long periods of time, he’s not working for long periods of time. We try to get the crews down for rest. They’re fed three meals a day, they have accommodations. And so, while they’re on the boat, they’re not working. How do you define, for the purposes of minimum wage, the number of hours on that trip that they work?

COMMISSIONER BROAD: Well, let me ask you a question. Would they be paid -- if you figured it as -- on the basis of 40 hours a week, a normal 40-hour workweek, are they paid a salary equivalent that’s equal to or exceeds that, over the course of that year?

MR. FLETCHER: Absolutely.

COMMISSIONER BROAD: So, at least those people actually meet a minimum wage test.

MR. FLETCHER: Yes, sir.

COMMISSIONER BROAD: That would be the -- if we fashioned it that way, if we said that they have --

MR. FLETCHER: If you fashioned it --
COMMISSIONER BROAD: Right.

MR. FLETCHER: Absolutely.

COMMISSIONER BROAD: Okay. So, you wouldn’t have an objection, then, if we said that they had an annual salary that was equal to the minimum wage for full-time employment at 40 -- you know, 40 hours a week times a year, essentially?

MR. FLETCHER: I would like -- excuse me, Mr. Chairman.

I would like to bring up a caveat, Commissioner Broad, and that is that as these restrictions kick in, the boats are unable to fish. And as this gets further -- and there’s another issue. Part of my fleet fishes in Mexico, and there’s recently been some movement by the Mexican government to start to restrict our operations down there. And so, as we are cranked down in terms of our opportunities, then this idea of an annual -- meeting minimum wage on an annual basis maybe becomes more problematic than it might have been in other years when the boats were operating more on a year-round basis.

But if you looked at it from a weekly standard, I think we could -- we could say that that shouldn’t be a problem.

COMMISSIONER BROAD: Okay. Yeah. Well, that
would be -- I mean, generally, you wouldn’t say they have
to be paid a guaranteed wage for the year, but it would
be based on some weekly basis or monthly basis, or
something that’s more restrictive in time. Obviously, if
people are not working six months out of the year, you
can’t employ -- you know, hold the employer to paying
them for that time on a minimum wage basis.

Well, I’d like you to think about whether that’s
something that you folks could live with, because I --
I’ll tell you what -- and I guess this goes back to the
legal question here, and I think it’s a complicated one.
But the -- we have a proposition that established a
minimum wage for all industries, with an argument that at
least with respect to exemptions that existed at that
time, the exemptions, in the view of the Department of
Labor Standards Enforcement, those exemptions survived,
but no -- with an open question, at the very minimum,
about the creation of new minimum wage exemptions.

The Legislature eliminated the exemption and
empowered the Commission to convene a public hearing “to
adopt or modify regulations at that hearing pertaining to
the industries herein,” without convening wage boards.
It didn’t say that we can -- we could create minimum wage
exemptions, new minimum wage exemptions.
And what I would be concerned about here, for your industry, which I think you should take a look at with your industry’s lawyers, is that if the Commission were to vote to extend your minimum wage exemption and somebody were to bring that to court and it was found to be unlawful, you would be required to pay the minimum wage on an hourly basis for everybody in this industry. And so, it might behoove you -- and it’s up to you -- I’m not suggesting that you accept this view -- but it might behoove you to think about whether we can craft a minimum wage equivalent that works for your industry, your part and Mr. Grader’s part, that works for your industry but that does not constitute a full-blown minimum wage exemption.

MR. FLETCHER: Commissioner Broad, I appreciate what you’re saying, and I think that could work. The only point I would like to respond is that some of our crews, due to weather, are not able sometimes to get in four, five, six days in a row. And so, if you are going to require that a boat owner pay his crew whether they fish or not, that creates a problem. And we don’t know from one day to the next whether they’ll be able to get out or not. So, if it could be flexible so that it could be either based on an 8-hour day equivalent or a weekly
equivalent or an annual equivalent, some way that we could look at it from that standpoint that takes into account the vagaries of weather and the closures that we’re faced with on some of our fisheries, that would really be helpful.

But I understand the points you’re bringing.

COMMISSIONER BROAD: Thank you.

MR. FLETCHER: Thank you.

COMMISSIONER DOMBROWSKI: Thank you.

Okay. Once again, I think --

COMMISSIONER BROAD: Can we have Miles?

COMMISSIONER DOMBROWSKI: Oh, I’m sorry.

MR. LOCKER: Yes. Miles Locker again, chief counsel for the State Labor Commissioner.

Just a couple of points I just wanted to add, in listening to this discussion.

There may be a little bit of a misconception that some people have in terms of, you know, a minimum wage obligation, that it is something that we would look at on a day-to-day basis. That would only be true if a worker is paid every day. That is, if you have a pay period of each day, then you look each day whether the work did make the minimum wage that day. But generally, in enforcing the minimum wage, we do it on a pay period
basis. You take the entire pay period, so that if -- let's say -- let's say the worker is paid by a piece rate type system. And let's say, for whatever reason, the piece rate just wasn't happening, there was nothing going on, but the pay period is, let's say, semi-monthly, under Labor Code Section 204. Then what you would do is you would take that entire pay period. And the fact that maybe on other days in that pay period the worker far exceeded the piece rate, hopefully, it would even things out so that you would take the total number of hours worked during that pay period, and then -- you'd have a total number of hours worked, and then apply the minimum wage to that. And as long as the worker was paid the minimum wage for the total number of hours worked in the pay period, there wouldn't be any minimum wage violation.

In terms of getting back to how you define hours worked, we would look to, you know, the base definition of hours worked, whether the employer suffered or permitted the work, or whether or not the worker was subject to the employer's control. So, certainly in a situation, let's say, where -- if commercial fishing was subject to the minimum wage, then if you had a situation where a boat is sitting on the dock and the workers aren't on the boat, there's nothing happening that day,
you wouldn’t have any hours worked that day. It’s only when the workers get called to work that the hours worked would start kicking in.

So, I just wanted to explain that from an enforcement perspective.

COMMISSIONER BROAD: I have two technical questions. Mr. Fletcher raised the issue of taking a long-range trip, you know, to Mexico. And my question goes to what is the jurisdictional limit of California law?

MR. LOCKER: We would look to the California Supreme Court decision in the Tidewater case on that. And certainly, if you had -- we -- I believe if you had a boat going out from a California port and returning to a California port, and while it was gone, there was fishing or whatever, but you have a California employer going out and returning to the port with, you know, California residents, I believe the entire time that the workers would be engaged in the fishing operations would be subject to California law.

COMMISSIONER BROAD: And then my second question is, Mr. Fletcher mentioned that you have a situation where, in a long-range trip like that, you may have crew members who are performing no work, but they’re obviously
stuck on the boat, they can’t go home. How do you
generally treat those type of situations?

MR. LOCKER: We, on that, would look to how the
IWC defines what would be considered work time or not.
For example, you have, let’s say, in other IWC orders a
situation where you have 24-hour shifts, and the IWC has
carved out from that, let’s say, 8 hours of sleep time
and one hour for each of three meals. And then you would
say, even though -- without that, you might say the
employee is subject to the employer’s control by virtue
of being on this boat, from which there’s no escape --
because the IWC can carve out from that, certainly, areas
where the employee is not subject to control by virtue of
sleep time or meal time or time where just the worker is
-- you know, the IWC can do what it wants on that to say,
“No, we view this as being non-work time.” Then that’s
how DLSE would enforce that. We would look to what the
IWC did there.

COMMISSIONER BROAD: So, then, we would be free,
in your view, to say that if a person in this industry
was on a boat and was relieved of all duties for a period
of time and was just, you know, in their cabin reading a
book, that that could be considered non-working time,
notwithstanding the fact that they’re stuck on the boat.
MR. LOCKER: I believe the IWC has probably already done that with respect to, you know, the -- let’s say the motel industry, where you have a special definition for hours worked there that differs from the general definition. Yes, the IWC could do that.

COMMISSIONER BROAD: Thank you.

COMMISSIONER COLEMAN: That was my question.

Thanks.

COMMISSIONER BROAD: Great minds think alike.

COMMISSIONER DOMBROWSKI: Thanks, Miles.

Well, we would encourage the parties to try to get together and see if we can resolve this -- I think it’s really the minimum wage issue -- and then communicate back through the IWC offices where you stand after a certain period. I mean, it really sounds like that’s the only stumbling block to holding this thing up. So, if you can come to some resolution on that, that would be helpful, and then we can schedule this at a future hearing for the formal vote.

All right. Next subject is outside sales.

Did Tom walk out? Oh.

I looked down there and I thought you had walked out of the room.

MR. RANKIN: Tom Rankin, California Labor
As you know, you were required by AB 60 to conduct a review of the question of outside salespeople. And as you probably also know, the -- Section 1171 of the Labor Code explicitly exempts outside sales from coverage. But it was up to the IWC to define what an outside salesperson was. And the IWC basically found -- you know, came up with the definition of an outside salesperson as one who regularly works more than half of his or her working time in sales outside the workplace.

This was brought to court by, probably, several cases, but the one that went to the Supreme Court was the Yosemite case, Yosemite Water Company. And the Supreme Court actually came up with somewhat more detailed definition, basically upheld the IWC’s definition and added a few provisions to it. And what we would like to see is to have the IWC -- and Patty Gates is here, from the Van Bourg Law Office, who actually has some proposed language on this -- we would like to see the IWC meld the definition that it had previously to the Supreme Court case with the additions that -- the additional clarifications made by the Supreme Court. We feel that would -- that it’s a fair definition, and it would also give both workers and employers what they need in terms
of clarity, so they could tell when someone actually was
working as an outside salesperson and when the person
wasn’t and was due overtime pay.

So, that would be our suggestion. And I don’t
want to presume to take over your order, but Patty Gates
has --

COMMISSIONER DOMBROWSKI: No, she’s -- Patty,
why don’t you come up next?

MR. RANKIN: Thank you.

MS. GATES: Hi. I’m Patty Gates. I’m with the
law office of Victor Van Bourg, Weinberg, Roger &
Rosenfeld.

And we have, over the past -- really, over the
past four years -- had an increasing number of workers
come in to our office to complain that they used to be
delivery people, and suddenly they’re -- first, their
name was changed to route salesperson, and then after
their name got changed, they were suddenly working 12-
and 14-hour days and given routes where they were really
delivering, delivering products, but expected at the same
time, and usually by a sort of memo, expected to do sales
along the way.

One of these fact situations has worked its way
to the California Supreme Court, and the California
Supreme Court looked at -- very carefully looked at the IWC definition of outside sales and really clarified and expanded upon the definition in a way that I think would be valuable to people -- both to the people who hire delivery people and expect them to do some amount of sales as part of their delivery work, and also to the workers who have been prevented from having any overtime protection at all if they’re considered outside salespeople.

And I think when the Legislature asked that this be reviewed, that the IWC review this, it was because the Legislature was aware that there had been some misclassifying going on in order to fit people who really didn’t fit into the exemption. And the Supreme Court has clarified it.

I’m proposing -- and I’ve given you each a copy of the California Supreme Court decision, Peter Ramirez v. Yosemite Water Company, the case that Tom Rankin just referred to, and also just a very brief -- for me, a very brief, two-page testimony and -- containing both the current definition under the IWC orders and the proposed definition. And what I’m hoping is, with the proposed definition we can take some of the reasoning and -- in fact, the holding of the California Supreme Court, and
expand the definition with those exact words. And I
gleaned those words from the decision. You can check me
on it, because I’ve given you the decision. But I would
-- I would make the proposal that the Industrial Welfare
Commission consider redefining their outside sales
definition to make it clearer, and also to distinguish
tasks that are really delivery tasks from sales tasks.

And the final -- the final thing I wanted to say
is that what I’m asking for is not something new. In the
past, the Commission has referenced judicial decisions
that relate to interpretation of wage orders. And I
refer you to the cash shortage and breakage section in
each of the wage orders that references a court case that
interpreted in a very specific way when and -- when
employers could and could not charge workers for cash
shortage or breakage that occurred on the job. And the
IWC referenced a court opinion in its definition.

So, I’m happy to answer questions if you have
any.

COMMISSIONER DOMBROWSKI: Any questions?

Ron McKune.

MR. McKUNE: (Not using microphone) I wonder if
we might change the order. I’m here in support of
another presentation.
COMMISSIONER DOMBROWSKI: Okay. Well, your choice.

MR. TOLLEN: Thank you. I’m Bob Tollen. I’m with the Seyfarth, Shaw, Fairweather & Geraldson law firm. I’m speaking in support of an amendment to the definition -- excuse me -- I have a cold.

I’ve distributed or made available copies of this yesterday, which I think are in your packets.

I didn’t specify a particular client that we were -- that was supporting this because we found, as we were discussing it, that so many clients had the same concern that is expressed here.

We’re supporting -- I’m proposing an amendment to the existing definition of outside salesperson that would read as follows, including the present language:

“Outside salesperson means any person who customarily and regularly works more than half their working time” --

-- so far, that’s what’s in there --

“ -- away from the employer’s place of business, selling,” --

-- et cetera, et cetera. That’s what’s in there so far.

And then, the addition would be:

“ -- or, regardless of location, engages in
activities closely related to and supporting his
or her outside selling activities, such as
writing up orders, writing sales reports,
revising the salesperson’s own catalog,
contacting prospective customers to arrange
meetings away from the employer’s place of
business, planning itineraries, and attending
sales meetings and sales conferences.”

This does not propose to affect the category of
employee that was involved in the Ramirez case and that
Patty Gates is addressing. The person who engages in
servicing a customer or stocking shelves or what have
you, in the Ramirez case, it was bottled water delivery
service people who not only sold it, but they delivered
the bottled water and they did a lot of activity. And
the Supreme Court said that that was not selling
activity. And that’s fine. I’m not proposing to change
that.

I’m not quite sure why it is necessary to amend
the definition to cover that non-selling activity,
because the Supreme Court clearly addressed it and ruled
that that kind of activity does not come within the
existing definition. As I say, we’re not opposed to
excluding those kinds of people from the exemption.
And it -- you know, what it sounds like -- I’ve wondered until today why the Legislature made a point of putting the outside sales exemption -- making a special point about it. There are so many exemptions in the statute that didn’t get that kind of attention. And I guess the explanation is what I heard here today, that the Ramirez case was coming along at the same time as this legislation was coming along, and probably had not been decided when this legislation was finally enacted, so people weren’t sure where the Supreme Court was going to go with the Ramirez decision and wanted to affect that kind of category.

Well, the Supreme Court did it. I mean, the Supreme Court has given you a very clear ruling that people who engage in service activities -- that the service activities are not selling, and if they don’t put 50 percent of their time into genuine selling, they’re not entitled to the exemption.

The Ramirez decision also, however -- and this is the point of my concern -- emphasized 50 percent of the individual’s time away from the employer’s place of business. Now, there are a lot of activities that a legitimate outside salesperson engages in that can be engaged in at his or her employer’s place of business.
Those are the kinds of activities, like writing up sales reports, phoning prospective customers, and so forth, those are the kind of activities that I am suggesting here should be included in the definition of an outside salesperson, so that you look at the time that that person spends on the road visiting customers, and then, when that person comes back into the office and writes up a sales report or attends a sales meeting or what have you, that that individual is still engaged in outside selling, and you don’t exclude that time.

COMMISSIONER DOMBROWSKI: Barry?

COMMISSIONER BROAD: Well, looking at your definition, what it would mean -- let me just ask you a series of questions.

It refers -- leaves the definition the way it is, and it says, “or b) regardless of location.” So, that means an outside salesperson could be engaged in activity which, 100 percent of their time, is not outside.

MR. TOLLEN: I don’t think so.

COMMISSIONER BROAD: Well, it says that.

MR. TOLLEN: I don’t think so. They have to be activities, as I wrote it -- and this is why I wrote it this way -- they have to be activities closely related to
and supporting his or her outside selling activities.

Now, if the person doesn’t engage in any outside selling activities, doesn’t go out on the road and try to sell, then there can’t be any activities that support it.

COMMISSIONER BROAD: Well, it could be a very small percentage, then, right?

MR. TOLLEN: They -- but they all -- it all has to be activity that supports outside selling. I mean, if it -- if you’re suggesting a possibility that writing up sales reports and developing itineraries and so forth takes so much time that it is large in comparison to the actual amount of time spent on the road, yes, the definition would include that situation in the definition of an outside salesperson.

You know, a lot of this, a person could do outside the employer’s place of business. As I said in the letter, he could do it in his car, he could do it in his home. And the present language in the Ramirez case forces employers to tell outside salespeople, “Don’t come into the office to do this kind of work. Write your reports out -- you know, go home and write your reports or whatever, just don’t come into the office to do it.” And that’s silly. If the work is really closely related and supportive of the outside sales activity, it ought to
be included in the definition and in the quantitative
measure.

COMMISSIONER BROAD: Yes, but the minimum wage –
- this is an exemption from everything, if you’re an
outside salesperson. It’s not a little thing. It’s a
major exemption from pretty much the whole Labor Code and
all the provisions of the IWC orders.

And I think it was intended originally to deal
with real outside salespersons, people that were
traveling salespersons outside -- taking orders and
servicing people outside of a central office. And it
seems to me that your definition, while you don’t say it,
is an attempt to undermine the Supreme Court’s decision
in the Yosemite Water case, the same bottled water
workers. I mean, it brings back the same argument. The
argument of the employer in that case is that even though
they spent 90 percent of their time loading bottled water
into trucks and delivering it, they were attending
meetings and they were doing activities that were closely
related and supporting their sales -- so-called sales
activities, such as taking orders from customers and
reviewing the lists of customers and contacting the
customers to figure out when they were going to deliver
the bottled water. But basically, these are truck
drivers, and they are not outside salespersons.

And I don’t believe that we should be undermining Supreme Court decisions. The court has spoken, and I think that we should effectuate what the court stated in its case. And I have a problem with this, major problem.

MR. TOLLEN: This is -- this is really not intended to undermine the Supreme Court’s decision. And if it has that effect, we should play with the language and try to prevent it from doing that. That’s not what we’re trying to do.

But the activities that were involved in the Ramirez case, the delivery of bottled water, the -- bringing the bottled water onto the premises, the setting it up in the cooler, I don’t think that’s activity that is supportive of a selling activity. I didn’t intend to include it. I truly intended this language to exclude that kind of activity from the exemption.

COMMISSIONER COLEMAN: I have a question. And I’m not sure if your language was attempting to address this, but there’s a huge body of sales right now that is done on the Internet that could be considered outside sales. For example, there’s a company that does video conferencing on the Internet, so that you can actually do
your presentation to your client in Romania with your
computer, and you’re actually talking to them at the same
time via video conference. And I think that’s something
we’re actually -- we should think about in this
definition of outside sales, because this is the fastest
growing level of Internet service. The fastest growing
type of sales on the Internet is actually business to
business, e-commerce. And there’s a huge body of
Internet companies that -- their sales forces are both
virtual and real. They’re not necessarily getting in
their cars to sell, but the sales are outside.

So, I think that’s something, as we look at the
language here, we need to take a serious look at.

MR. TOLLEN: That’s real interesting. I
certainly hadn’t thought of that or tried to address it
here.

You might think also -- suppose you have a
salesperson who operates from that person’s own home and
just uses the telephone and engages in selling
activities. It would be very similar to your example.
And I’m not sure what the correct answer to it is.

COMMISSIONER COLEMAN: We need to think -- we
might want to get some testimony from some Internet
companies on this.
MR. TOLLEN: But I want to come back to the point on the outside salespeople, that it -- these are activities that the salesperson has control over himself. The salesperson can decide to go back to the office to write the reports or can decide to write the reports at home or in any location. And it just doesn’t make sense to say that you’re going to force these people to do this kind of activity away from the employer’s place of business when it truly is a legitimate part of the selling activity.

COMMISSIONER DOMBROWSKI: Thank you.

Ron, do you want to speak now?

MR. McKUNE: It’s two minutes to twelve, so good morning. Good morning to members of the Commission. I’m Ron McKune, with The Employers Group. And we’re an employers association. We have some 4,500-plus member companies here in California, and those companies employ over two million employees.

And I’m here on behalf of the association to speak in favor of the definition that has been crafted by Mr. Tollen. Let me also say that we’re happy to work further with him and with others -- pardon me -- on revising the definition further. We have concerns in the area of e-commerce. This is a new era, a new economy --
pardon me -- and the definition should reflect the current state of the economy and the direction which the economy is taking.

Thank you.

COMMISSIONER DOMBROWSKI: Questions?

(No response)

COMMISSIONER DOMBROWSKI: Thank you.

Guy Halgren.

MR. HALGREN: Good morning, Mr. Chairman and members of the Commission.

Can you hear me okay?

My name is Guy Halgren. I’m with the law firm of Sheppard, Mullin, Richter & Hampton. And my practice is in the wage and hour area, and I represent employers. I’m not here on behalf of any particular employer today, but rather on behalf of myself and areas of concern that I have from practicing in this area, probably from the opposite side of the table as Ms. Gates, but probably with the same concerns.

First of all, I wouldn’t necessarily discard the idea of becoming consistent with the federal exemption. Yosemite didn’t say the federal exemption was less favorable to employees. And if it had, and if you had concluded that, I could understand why you might not want
to go with the federal exemption. But whenever the state
can be consistent with the federal, it’s a lot easier for
employers, as you know, and it’s a lot easier for
commerce. You don’t have to follow two sets of rules.
The federal exemption has an 80 percent
requirement. You’ve got to be doing sales-related
activities 80 percent of the time, but it broadly defines
--- more broadly defines what a sales activity is. The
state goes with a 50 percent requirement, more narrowly
defines what a sales activity is. I’m not sure either
one is more protective of employees. It depends probably
on the employee in question. But if it’s a wash, maybe
we could have the same standard, state and federal, in
the State of California.

Second, I have not seen Mr. Tollen’s proposal,
but I would have a proposal along the same lines, to the
extent what you want to do is put some flesh on the
Yosemite case and keep your existing definition. I would
want to make sure that the definition included time spent
planning the sale. And that’s looking at sales reports,
looking at sales histories, thinking about what promotion
my company is running right now, what this customer might
need, reviewing sales opportunities at the location.

Let’s say I’m selling windshield wiper displays
to a gas station. I’ve got to go around that gas
station, see where I might put that display, see if any
other displays are already there. But we’ve got to look
at the physical location to determine what I can do and
maybe what’s been sold since the last time. We need to
talk to the managers in the company. And as anybody
who’s ever been faced with a salesperson knows, that’s a
lot of rapport building and getting to know the person.
It’s not just like, “Will you buy this from me?” We need
to write the order. And these days, that’s all done on
computers, at least with my clients, not on paper. We
need to include time -- if I’m selling you a display of
screwdrivers, I’ve got to put the display in there, set
up the display. A lot of follow-up time is involved,
getting back to the customer. “Was it delivered? Are
you happy with it?” So, it’s not just making the sale,
it’s following up on the sale. And then, of course, a
proportionate amount of the driving time, as set forth by
**Yosemite**, and then the sales meetings issue.

And maybe I could address Mr. Broad’s concern,
because I have a way to approach that, I think. I’ve
always read **Yosemite** and the IWC definition found in the
wage orders more in the disjunctive, that you needed to
spend more than half your time away from the employer’s
place of business, and you needed to spend more than half
your time on sales activity. And I think that’s the way
to do this, is simply to make that more plain, if it
wasn’t plain already. You need to spend more than half
your time away from the business, and more than half your
time on sales activities, some of which activities can be
taking place back at the shop, for example, a sales
meeting or writing up your orders, communicating by e-
mail, which you could do on your laptop at home just as
easily as you could be doing it in the employer’s
facility. And then I think we take care of that concern.
It’s still outside salespeople, and it’s still over half
the time in sales activities.

Any questions that I could respond to?

Thank you.

COMMISSIONER DOMBROWSKI: Thank you.

Miles, do you have any comments on this subject?

MR. LOCKER: I think we had some role -- I don’t
recall -- I think we might have done an amicus brief in
the Ramirez case. I know we worked with the attorney who
represented Mr. Ramirez. And we are very pleased with
the Ramirez v. Yosemite Water decision. We feel it
creates a bright-line test that is very useful for
enforcement purposes.
And, you know, one of our concerns with the different approach taken under the federal law, which allows for incidental activities to be included as sales activities, is it kind of does away with that bright-line approach. We’d like a bright-line approach for enforcement purposes, so, certainly, we’re happy with Ramirez v. Yosemite Water and it’s -- we think it’s very good for our enforcement staff.

COMMISSIONER BROAD: I just had one question. Now, there -- in addition to the outside sales exemption, there’s also a commissioned sales exemption. Isn’t that correct?

MR. LOCKER: That’s correct. That’s a separate thing contained in certain IWC orders. Yes.

COMMISSIONER BROAD: And how does that work?

MR. LOCKER: Okay. That is based on employees who would be working -- this would be generally employees in inside sales now, because if you come within the definition of an outside salesperson, you’re out of the picture to start with, so this would be employees engaged in inside sales, and this would be under some of the IWC orders, the mercantile order, for example. And it provides that if the employee is paid on a commission basis and is -- let’s see
-- paid at least one and a half times the minimum wage, 
that that employee would then be exempt from overtime.

And one of the issues that comes up in terms of enforcement of that is a situation where you have, let’s say, a guaranteed draw. And we generally view a guaranteed draw as -- okay, it’s one and a half -- a person’s paid on a commission basis, and at least -- let me -- let me rephrase that. I believe it’s half of the compensation is paid on a commission basis.

Now, what we encounter is with -- a situation where an employee is paid a guaranteed draw. If it’s -- we would generally view that as a -- as not a commission situation, but as a salary, because a guaranteed draw would generally be a salary. You could have a situation where, if the guaranteed draw is recoverable against future commissions, then you get into a situation where it might be construed as commissions rather than salary. But in general, if it’s a nonrecoverable guaranteed draw, then we would view that portion of the compensation as salary rather than commissions. So, in terms of meeting the test of half of the compensation has to be in the form of commissions to come within that exemption, that guaranteed draw would not be commissions.

So, I hope I’m making myself somewhat clear.
COMMISSIONER BROAD: It’s complex.

MR. LOCKER: Yes.

MS. STRICKLIN: So, is that based on the employee’s actual sales record as opposed to what the group of the work unit does on sales?

MR. LOCKER: There -- in general, it would be based on the specific employee. There -- I think maybe -- and I’d have to -- I’d really want to take a look at this a little bit closer -- I know we’ve kind of been addressing this question on some, you know, opinion letters that we’ve done recently and some cases that we’ve done investigation on recently. I think there may have been one or two opinion letters in the past where we talked about, in certain stores, let’s say, where commissions are paid based on departmental sales, that we would -- we would look to that as, you know, each employee’s commission. So, I think it could be done that way, but there has to be some actual relationship between sales and the commission.

So, I think, you know, the Ramirez case does go into that in terms of the definition of what a commission is. So --

COMMISSIONER BOSCO: Could I ask, Mr. Chairman?

The prior speaker had raised the prospect of
conforming California law to the federal law, which, on its face, has some advantages, I guess. Well, could you comment on that?

MR. LOCKER: Well, one of the -- I think, in terms of just going through DLSE opinion letters over the years, one of the things that I think we’ve always pointed out to employers, to employers’ attorneys, to the public, is that there are many areas where California law does differ from federal law. And the intent was clearly to create a higher floor than what would otherwise exist under federal law. And certainly, I think, if you look at AB 60 and the whole idea of daily overtime, that daily overtime does not exist under federal law. So, the Legislature, in many areas, has made determinations that California law should have higher standards and greater protections for workers than what would otherwise be available under federal law.

The IWC has repeatedly made those determinations, and there are various situations, just in terms of, for example, in enforcement of overtime law, and how you would compute, let’s say -- what would -- how you would get to one and a half times the regular rate of pay, that the hours you use for salaried non-exempt employee, where state law is different than --
COMMISSIONER BOSCO: No, I’m aware there’s many differences between state and federal law. But I think the premise that the prior speaker had used was that it really -- it all comes out in the wash here, that neither the federal nor the state law is any better or worse than the other.

MR. LOCKER: No.

COMMISSIONER BOSCO: That’s what I sort of wanted you to comment on.

MR. LOCKER: You know, I think the other speaker -- while he’s correct in saying that, with respect to the outside sales, state law uses a 50 percent standard and federal law uses an 80 percent standard, the difference, though -- I think, you know, he pointed to that -- was that there’s all kinds of other activities, other than the outside sales, that go in -- that are subsumed within sales activity under federal law. You have this huge area of what I think the federal regulations call “incidental activities.” And so, despite an 80 percent level that seems to be more favorable to workers, what you get -- and I think the court in Ramirez addressed that -- is that you could have a situation under federal law where a worker is, in fact, spending very little time
away from the employer’s premises or engaged in outside
sales, and nonetheless, that worker would be considered
an outside salesperson under federal law.

COMMISSIONER BOSCO: So, would it be your

conclusion that California workers in this regard are
better protected than --

MR. LOCKER: I believe so. And I believe that --

although I think the Ramirez court did not expressly
say that California law is more favorable, I think that’s
what animated the decision. I think the discussion they
had about other areas of California law, where California
law creates a higher standard, that’s the only way you
could read that decision, I think. Yes.

COMMISSIONER BOSCO: Okay. Thank you.

COMMISSIONER BROAD: Well, Mr. Chairman, I’d
like to comment on that.

Having looked at the Ramirez case very closely,
in fact, the fact pattern which gave rise to that is very
offensive, in my view. That was an effort by an employer
-- and I think it appears to have been an effort by a
part of the industry to convert driver salespersons, who
deliver potato chips and water, who stock supermarkets,
to convert them wholesale into outside salespersons, when
everybody in America knows that this is blue-collar
delivery work that truck drivers perform. And it is not
outside sales work.

And the underlying court effectively -- which
was reversed by the Supreme Court -- tried to apply
federal law. That was one of the things that the Supreme
Court found offensive about the underlying court’s
decision, that they basically threw out California law
and applied federal law. And the position that the
employer took was that, “Yeah, okay, this guy spends, you
know, 90-something percent of his time delivering bottled
water, but we call him a salesperson, and just because he
doesn’t spend the other 16 hours a day drumming up new
sales, that just means he’s a bad salesperson.”

And so, it created a situation in which it
turned a duck into a dog, really, is the problem. And
the court recognized that and, I think, created a bright-
line test. And it’s my view that this Commission should
not depart from that standard.

COMMISSIONER DOMBROWSKI: And the next subject
we have up is the computer industry.

Robert Jones.

We have two speakers on this topic.

MR. JONES: Good afternoon again. My name is
Robert Jones. I’m with the firm of Jones Durant. I’m
here representing the Northern and Southern California
Chapters of the National Association of Computer
Consulting Businesses.

In my testimony, which was my second testimony, last month, I made several alternative proposals to the Commission to act on a problem concerning highly paid, skilled computer consultants in the California high-tech industry. And I want to apologize for not, at the end of that proposal, making it clear or asking the Commission specifically to at least convene a wage board to address the issue of the trade of skilled computer industry employees under 1178.5(b).

And I’m not going to go back through all of the testimony that we’ve already provided as to what the impact is on employees as well as the industry. But what I would like to do is today request that this Commission convene a wage board under 1178.5(b) to address the issue of skilled computer industry employees.

And that’s my entire presentation.

COMMISSIONER DOMBROWSKI: Any questions?

COMMISSIONER BROAD: Yeah.

COMMISSIONER DOMBROWSKI: Barry?

COMMISSIONER BROAD: Can we -- can you narrow the definition of who you’re talking about here?
MR. JONES: Yes.

COMMISSIONER BROAD: I mean, who exactly are we talking about, because --

MR. JONES: Yes.

COMMISSIONER BROAD: -- skilled computer industry employees is a lot of people.

MR. JONES: Right. And I would love to narrow this as narrow as we can. I can tell you a very narrow -- employees who meet the federal test as computer professionals. And that test has been set forth, and I’ve given you the language for the exemption we’re proposing in the past. And I’m not going to read the whole exemption, but I think that the one criteria that jumps out is that these are people who earn over $27.63 an hour, on an hourly basis. And then there are a set of federal -- Code of Federal Regulation provisions which specifically set forth who qualifies as a computer professional under the Fair Labor Standards Act test that we’re proposing for the exemption here. And those people, just for general information, are people who are computer engineers, software engineers, programmers, those types of people.

So, I could -- if you would like, rather than convene a wage board in the trade of skilled computer
industry employees, but to convene a wage board in the area of computer professionals. And I don’t want to confuse that with any other type of professional exemption. That’s the title that has been used under the federal law for a completely separate exemption, and it’s, quote, “computer professionals.” And it’s the language that we’ve provided in the past, software engineers and programmers.

COMMISSIONER BROAD: So, we could say that -- convene a wage board with regard to those employees that meet the test of the federal exemption --

MR. JONES: For computer professionals.

COMMISSIONER BROAD: -- to discuss that?

MR. JONES: Yes.

COMMISSIONER BROAD: Now I have one other question.

MR. JONES: Yes.

COMMISSIONER BROAD: Which wage order would you want to see this happen?

MR. JONES: Well, I think that’s something for the wage board to take a look at, because I think you can create a wage board that’s specific to an industry or a trade or an occupation, and it doesn’t have to be a wage board that specifically address an entire wage order.
And that’s -- and I’ve taken a look at that, and it
doesn’t -- I know that the regulations that you’ve put
out said that you have to have a wage board for every
wage order. That’s fine. But it also, under 1178.5(b),
says you can have -- if you want to take an action based
on the welfare of the employees, that it can be as to a
trade, occupation -- and you have the language there, Mr.
Broad.

COMMISSIONER BROAD: Well, I’d like our legal
counsel to address this, because I thought 1178.5 related
to the minimum wage.

MR. JONES: No, (b).

MS. STRICKLIN: No.

COMMISSIONER BROAD: Oh, (b). (b), okay.

MR. JONES: (b). This is the parallel language
from 515(b)(1).

So, all I’m asking is that the wage board look
to the one issue of whether or not this exemption should
be created and recommended back to the committee. And
obviously, I think that the -- where it would end up
would be in the 4— well, the old 4-89.

But you could put it in any order you wanted to.

COMMISSIONER COLEMAN: If I may, under

1178.5(b), it says, “If the Commission finds that the
hours or conditions of labor may be prejudicial to the
health or welfare of employees in any occupation, trade,
or industry, it shall select a wage board composed of
equal numbers," et cetera. So --

MS. STRICKLIN: You might decide to create an
entire new wage order. I mean, it would depend on what
charge you’re sending to that wage board and what
recommendations they send back.

MR. JONES: Right.

COMMISSIONER BROAD: Yeah. Well, see, that’s
the question I have. I mean, that would presume that
what we were going to do was create a special wage order
just for these employees.

MR. JONES: Well, I think you’d --

COMMISSIONER BROAD: As a -- and then, if we
wanted to affect Wage Order 4, we would have to convene a
wage board on Wage Order 4.

MR. JONES: Well, I -- you know, I respectfully
disagree with that, because it says you can create -- the
only -- let me step back once a little bit, because we’ve
discussed this and I don’t want to redo all this. But
under 515(b)(1), you can create an exemption, period. It
doesn’t talk about a wage order, it doesn’t talk about
anything else.
MS. STRICKLIN: Yeah.

MR. JONES: The position has been that a wage board is required before you can adopt an exemption. We’re just asking you to adopt an exemption. If you need a wage board to make a recommendation on that, in that trade and occupation, we would ask that you create a special wage board to look at this one issue and make a recommendation back to you. You can adopt the exemption, under 515(b)(1), and you could place it in any wage order that you found appropriate. That’s the basis of our request.

MS. STRICKLIN: 4 refers to computer programmers, not referring specifically to the people he’s necessarily talking about. And even if you were referring specifically to computer programmers, you can -- under 1178.5, you could look at them as a group of workers or an industry separate from Wage Order 4.

MR. JONES: That’s our position.

COMMISSIONER BROAD: I understand, but that would require -- what I’m -- I’m not sure about legally is, that suppose we convene this wage board and it comes back and says we ought to do X, Y, and Z. I’m not certain that we could just start inserting that language into wage orders that were not the subject of that wage
1 board.
2 MR. JONES: We aren’t asking -- we aren’t asking
3 that you insert it in any order. We’d just ask you to
4 create the exemption.
5 MS. STRICKLIN: You could do just as it was done
6 in the interim order.
7 MR. JONES: Sure.
8 MS. STRICKLIN: There are certain exemptions
9 there. It could be another -- another separate order as
10 to that exemption, or various exemptions that may come up
11 in all these hearings.
12 MR. JONES: We’d ask that you put it in the
13 interim wage order if it gets acted on before you create
14 other wage orders. And at the time you create the other
15 wage orders, you’re going to have to move those interim
16 wage order exemptions into either all of them or some of
17 them, in any event.
18 COMMISSIONER BROAD: Well, it seems to me that
19 the appropriate thing, if there’s going to be a wage
20 board on this, is that it should be done in Order 4,
21 because that’s the catch-all wage order.
22 I think the difference here is that -- I think
23 you and I may have -- and I don’t know how anybody else
24 feels -- I think you and I may have a difference in view
of what AB 60 permits and doesn’t permit the Commission
to do with regard to these wage orders. But there has,
in the past, been considerable concern that the
Commission actually not keep creating more and more and
more wage orders, but rather move in the other direction.
And so, I’m concerned that if we kind of start down this
ting, we’re going to have a little thing for -- like a
little special wage order for computer professionals,
followed by fishermen, followed by horseracing people,
followed by outside salespersons, you know, and that it
could get to be a lot, and that the appropriate motion,
in my view, would be to convene -- to open Wage Order 4
for the limited purpose of discussing this, because
that’s where -- that’s the professional, technical, and
clerical wage order.
Would that -- does that suit your purpose?
MR. JONES: It would suit our purpose if it’s
for that limited purpose. If, in fact, the -- what I
don’t understand is, are you going to require the same
wage board review all of 4 later on, or could the wage
board be convened in a different form at that point in
time? That’s the problem that --
MS. STRICKLIN: It’s up to the Commission.
MR. BARON: It’s up to the charge.
COMMISSIONER COLEMAN: It seems to me we could charge this wage board with looking very specifically at this exemption.

COMMISSIONER BROAD: As well as anything else that we would want to charge that wage board to look at.

COMMISSIONER COLEMAN: Right.

COMMISSIONER BROAD: I --

MR. JONES: All right. Well, if that’s -- if it’s to look at this exemption and it’s in Wage Order 4, we certainly don’t have any problem with where you put it.

COMMISSIONER DOMBROWSKI: Some others might.

Let’s --

MR. JONES: I’m sorry.

COMMISSIONER DOMBROWSKI: Do you have more questions, Barry?

COMMISSIONER BROAD: No.

COMMISSIONER DOMBROWSKI: Let’s have Keith Honda.

MR. HONDA: Good afternoon. My name is Keith Honda. I’m representing Assemblyman Mike Honda.

By way of background, our attention was brought to this issue by Congressman Zoe Lofgren. And she raised with us major concerns about the impact of the interim
wage order on the class of computer professionals that Mr. Johnson (sic) was speaking with. In particular, she put our office in touch with employees, who related to us their concerns about the detrimental effect on their ability to earn their livelihood that the interim wage order would have. And based on that, I’m here today to urge you to hear from these computer professionals and to look at the issue of an exemption for these professionals, and in the forum that we think is best would be to convene a wage board.

COMMISSIONER DOMBROWSKI: Any questions?
(No response)
COMMISSIONER DOMBROWSKI: Thank you.
Tom, you want to talk? There’s one other speaker who wants to come up.
MR. RANKIN: Yeah, on this whole -- Tom Rankin, California Labor Federation.
I’d like to point out a couple things. First of all, if you are going to convene a wage board -- and I’m not convinced that you can deal with this problem, as the IWC, of the computer professionals -- but if you are going to convene a wage board, you are required, under 1178 of the Labor Code, to make some findings after an investigation. And the findings are that you have to
find that, in this case, either that wages paid to employees may be inadequate to supply the necessary costs of proper living -- that’s the minimum wage -- or that the hours or conditions of labor may be prejudicial to the health, morals, or welfare of employees. And you have to include at least one public hearing in that investigation.

So, that’s a procedural thing that you would have to go through before you’re going to convene a wage board on this matter.

Secondly, I’d just like to point out, we’ve heard mostly from the -- at least I have -- from the people who run businesses that employ these computer professionals, not from the computer professionals themselves. And certainly, we would need to hear from them.

The other point is that federal -- the federal dollar figure here, for the exemption that they’re proposing, is only $27.63 an hour. There are many, many people covered by AB 60 and by the IWC wage orders who make a whole lot more than that who are covered by overtime. So, the question is, why should we make an exemption for one group just because they happen to be high paid? There are a lot of high-paid workers who are
covered by overtime.

Thank you.

COMMISSIONER COLEMAN: I have a quick question for the speaker. I’m not finding, in Section 1178.5(b) -- it may just be I can’t find it -- the portion where it requires a hearing. I see the portion where it talks about “consider the findings of the Commission,” but I don’t -- I don’t see the procedural requirement for a hearing, but I might be missing that.

MR. RANKIN: 1178.

COMMISSIONER COLEMAN: It’s 1178 --

MR. RANKIN: 1178, period.

COMMISSIONER COLEMAN: Got it. Got it. 1178.

Thank you.

MR. RANKIN: It’s before -- yes. It’s the previous section to the one that goes into more detail.

COMMISSIONER COLEMAN: Yes, okay. Thank you.

And if I recall correctly, the gentleman who spoke today was at the public hearing, the last public hearing.

MR. JONES: (Not using microphone) Yes. There was a hearing on this, and there was a wage order adopted at that hearing. And one could be adopted at this hearing in the same way that one was adopted last time.
MR. BARON: Well, this is a meeting.

COMMISSIONER COLEMAN: This is a meeting, however.

MR. JONES: Well, I mean --

COMMISSIONER COLEMAN: You were at the hearing, and you testified.

MR. JONES: I was at the hearing and I did testify.

COMMISSIONER COLEMAN: Thank you.

COMMISSIONER BROAD: Can I just ask a question?

COMMISSIONER DOMBROWSKI: Barry.

COMMISSIONER BROAD: I -- you know, I -- I know there appears to be some rush to do this, but it seems to me that the point at which Mr. Jones spoke, he spoke just generally, as a member of the public, during a public comment period. There was no agenda item investigating this matter for possible action, which occurred at a public hearing. And it would seem to me that if you want to cover your bases legally, you set this for a public hearing, put it on the agenda, and consider it then. Otherwise, it’s possible that if this does not meet the legal standard, and I -- perhaps we should have our legal counsel -- maybe there’s some existing law about what is the legal standard.
-- but if it doesn’t meet the legal standard for an
investigation that includes at least one public hearing,
then we could go all the way down the line of having a
wage board meet and the Commission adopt regulations,
which were then -- which was then subject to legal
challenge, when we could clearly cover our bases legally
by setting this thing for a public hearing one month from
today, or, you know, in the next month’s -- make it a
public hearing, put the matter on for an agenda, and then
take action, if that’s the will of the Commission.

MS. STRICKLIN: You’ve just had some testimony
with regard to computer professionals, or skilled
computer employees. There’s no real definition of what
constitutes an investigation, any court decision, but I
think if you did want to cover your bases, you’d want to
have a full hearing where you’d get at least some
testimony from both sides of the issue, I would think.
But that’s the Commission’s decision.

COMMISSIONER BOSCO: It seems to me that we’re,
you know, just getting tangled up and condemning
ourselves to a lifetime of these hearings.
(Laughter)

COMMISSIONER BOSCO: And it’s -- as I understand
it, the wage board would go in far more depth on this and
make a recommendation to us, and we could do whatever we want. But the stumbling point is what is the threshold that we have to go through to appoint the wage board to begin with. And as I read the code, it simply is that we have to conduct an investigation. Now, how does a commission conduct an investigation? I’m not sure that these hearings are really investigations either. We certainly hear both sides of something, or at least most of the time we do. But the -- our counsel has advised us that nowhere is it defined what an investigation consists of. And whether it’s Mr. Anderson (sic) standing up and making a statement and someone else making the opposite statement, if that’s an investigation, then I don’t know. But I would suggest that we -- because this isn’t the only time this is going to come up, especially with all the work we have ahead of us, we’d probably better think of setting some standard as to what our investigation is going to be. And hopefully, it won’t be, at least at the outset, these lengthy hearings.

I think we -- you know, if we have to pass some legal threshold, we should decide how we’re going to do that in each one of these cases, and when we’ve conformed to that, then we go ahead with the wage board. My own preference would be to let the wage board do most of the
heavy lifting, as far as really investigating what needs
to be accomplished, and then we receive our input from
them, rather than to presume that these hearings are
really going to accomplish too much for us.

COMMISSIONER DOMBROWSKI: Thank you.

COMMISSIONER BOSCO: So maybe -- I’d like to
propose -- well, you know, I’d like to say maybe we have,
you know, from time to time, a half-hour hearing on every
one of these things, fifteen minutes on each side, and
consider that to be our investigation. Would that pass
legal muster, do you think? Or -- you don’t know?

MS. STRICKLIN: It’s hard to say. I think -- I
would think that it would be -- it would certainly be
something better than having just one or two people
testify on the issues. What are you going to base your
finding on if you don’t have both sides, or at least some
more comments, on a particular issue?

COMMISSIONER BOSCO: Can’t we ask any given
industry to provide two speakers and the labor people
provide two speakers, and that --

MS. STRICKLIN: You don’t even have to have
speakers. You could have written statements.

COMMISSIONER BOSCO: Well, there’s another
possibility. Maybe we should adopt that sort of an
approach.

But I think we do have to adopt an approach, or we’re going to go through this every single time we want to do a wage board. And I know Ms. Coleman has business she wants to present, and we’re going to get to the same thing with that, I would guess.

COMMISSIONER COLEMAN: Did we have another speaker?

COMMISSIONER DOMBROWSKI: Are there any others who want to speak on this subject?


MR. ABRAMS: Thank you, Mr. Chair and members of the Commission. I’m Jim Abrams, with the California Hotel and Motel Association.

In listening to the dialogue, the one thing I would like to urge the Commission to consider is that whatever you do in this regard -- I’m not here to propose that you adopt a particular standard or not -- but what I was concerned about was the point Mr. Broad made, about this all ought to be in Wage Order 4.

There are plenty of people in the lodging industry who probably qualify as computer professionals who work on reservation systems and things like that. If they are hired as independent contractors -- okay, and I
think that’s perhaps what Mr. Broad was referring to -- then they would probably be covered under Wage Order 4.

If they -- if they are employees, though, and work for Hilton or Marriott or somebody like that, they are almost certainly covered under Wage Order 5, regardless of the fact that they may be doing a task that, in and of itself, is covered by Wage Order 4 or some other wage order, because they are working for a hotel.

And so, whatever you do in this regard, I would urge that you either have a wage board to look into the whole question of who is and who is not subject to this exemption -- and I have no point of view to offer on that -- but to make it clear that if you come up with an exemption, that people who do this job and meet these criteria are, in fact, going to be exempt or not, whatever your criteria -- whatever your decision is, wherever they might do it, whether it’s in a department store, whether it’s in a hotel, a movie theater, whatever it happens to be. And that’s the only request that I would make in that regard.

COMMISSIONER COLEMAN: And from what I can tell from the federal exemption, it doesn’t specify -- it specifies duties, but it doesn’t specify particular locations or industries where those duties are performed.
COMMISSIONER BROAD: I would actually like Mr. Jones to come back up and comment on that, because the explanation that I had was that these were people that worked for temporary service entities that supplied highly paid computer professionals to service other industries and were paid in the $80-an-hour range and up, not front desk people or reservation people in motels. I mean, I didn’t even know that the breadth of this even covered them.

MR. JONES: That’s not --

MR. ABRAMS: (Not using microphone) There are people, Mr. Broad, who are computer programmers who will develop, for the example, the Hilton’s --

MR. JONES: Excuse me. Jim, please --

MR. ABRAMS: (Not using microphone) I apologize.

MR. JONES: I’ve got it, though.

What he’s -- what we’re talking about are skilled computer professionals that do exactly what it is that he has just mentioned, and that is, they design computer programs, they design software programs, they do systems analysis. Most of the hourly people who do this do it through brokerage firms, through companies that hire them as temporary employees because of the problems
that have arisen as these employees wish to work as
independent contractors.

So, it does, in fact, impact that industry. If, in fact, the Hilton is hiring people who work for them
directly, not through third parties, to provide that same
high level of service, and they were to pay them hourly,
I could see that there could be a problem. If, though --
we haven’t -- the situation that we run into is, is that
in these other industries where these people are employed
full-time, they tend to be salaried employees, and this
doesn’t --

COMMISSIONER BROAD: They’re already exempt.

MR. JONES: They’re already exempt, as
administrative employees.

COMMISSIONER DOMBROWSKI: All right.

COMMISSIONER COLEMAN: Since we’ve received both
written and oral testimony on this at a public hearing as
well as today, I feel that we’ve sufficiently gathered
enough data to send this to a wage board at this point.
So, I’m willing to make that motion.

COMMISSIONER DOMBROWSKI: Who’ll make a second?

COMMISSIONER BOSCO: I’ll second.

COMMISSIONER DOMBROWSKI: Call the roll.

MR. BARON: Bosco.
COMMISSIONER BOSCO: Aye.

MR. BARON: Broad.

COMMISSIONER BROAD: Not voting.

MR. BARON: Coleman.

COMMISSIONER COLEMAN: Aye.

MR. BARON: Dombrowski.

COMMISSIONER DOMBROWSKI: Aye.

MR. BARON: The ayes --

COMMISSIONER DOMBROWSKI: Ayes have it.

COMMISSIONER COLEMAN: Okay. So, procedurally, Andy, then what we do is, at the next hearing is when we actually appoint wage board members. So, between now and then, we take applicants for the wage board. Is that how it works?

COMMISSIONER BROAD: Did we clarify whether we’re doing this in Wage Order 4 or some -- what --

COMMISSIONER DOMBROWSKI: Yeah, we -- I -- according to what I’m being advised, that’s what the wage board can be charged to do, is to determine which wage order or orders this needs to go into.

Anything else?

All right.

MR. BARON: I think that the issue of what you -- how you would -- how and what you would charge the wage
board -- you know, I could see that, at this point, coming up, really, at the meeting when you’re actually selecting the wage board. For instance, we’re now in the process of soliciting nominations for the construction, logging, mining, and drilling. The deadline for, let’s say, submitting those are like March 15th. And so, like at the next -- at the next meeting or hearing, I would assume that, let’s say, relative to those -- relative to that, that the Commission would issue a charge. The Commission could do the same type of thing, issuing a charge to a wage board, at the same time when you get -- when you make the appointments to the wage board.

Right now you don’t have members of a wage board to charge.

COMMISSIONER COLEMAN: So, if we want --

MR. BARON: I mean, if you want -- I mean, I could -- I could be -- the process could go forward from here that soliciting nominations to the wage board, I guess, and that the Commission would, at its next -- at its next scheduled meeting or hearing, could then -- would make the appointments to the wage board, and at the same time, you can issue a charge to the wage board. And it is true that the wage board has to act very -- very much within the confines of that charge.
COMMISSIONER COLEMAN: So, perhaps between now and then, we might be able to work with staff to determine --

MR. BARON: What the charge is.

COMMISSIONER COLEMAN: -- what the charge is, in terms of which wage order this falls under.

MR. BARON: We can certainly have those discussions.

COMMISSIONER DOMBROWSKI: I’m going to assume we should try to get through our speakers and try to wrap this -- if everybody wants to just postpone and try to get this done before lunch, right?

All right. The next subject is river outfitting. Nathan Rangell.

MR. RANGELL: Mr. Chairman and members of the Commission, thank you for your time. My name is Nathan Rangell. I’m a professional river outfitter who resides and works on the American River in Coloma, California. And I’m coming here to talk to you about our effort to secure an exemption from overtime laws as they relate to our operations personnel on the river.

I’ll make the point, Commissioner Broad, that I’m not talking about an exemption from minimum wage.

That’s not a problem at all for us.
I’ll try to be brief. I believe that -- I’m hopeful that the letter that I sent your Commission last week is in your packets.

Specifically, we’re kind of hanging out in the wind, if you will. We’ve been operating with, essentially, the assumption of an exemption since our industry started in this state, and indeed, throughout the United States. Our employees are paid a daily wage. If you were to break down the hourly amount of that wage, it would range from about eight dollars on the low end, up to about fifteen to twenty on the high end.

We feel that an exemption is a prudent and an equitable request, given the nature of our industry. When I look at, as I’m learning about this, the exemptions that are currently out there, specifically as they relate to, for example, the sportfishing industry or the ski industry, many, if not all, of the same requirements and situations exist for us. We are completely dependent upon weather. We have very short seasons. Ninety percent of our business takes place during the months of July and August. Our employees, by and large, need to make a living during that period of time. And as such, the more work they can get, the happier they are.
Given an 8-hour day or a 40-hour week as a standard would make it very difficult for my employees to be able to continue to make the kinds of dollars that they make now.

The impact on the employees is perhaps, as I pointed out, greater than the impact would be to -- to, for example, me as a business owner. As I pointed out, our minimum -- our daily wages range from a low end of about $50, on up to $150 per day.

In California, just to give you a quick sort of thumb sketch, in California you’ve got about thirty rivers that are run commercially. About 250,000 people go down those rivers. And as I pointed out, our membership takes those folks down the rivers. There’s about fifty of us. Those folks are generally working either -- anything from a half-day to a two-day trip. So, in some cases, they might work four or five hours; in other cases they’ll be working maybe eight to twelve hours. And it’s that flexibility that causes us grief, in terms of the overtime issue.

We are small businesses. I -- my own business, we do about $350,000 a year. I’m considered big in my industry. Our smallest -- our largest outfitter doesn’t come close to the smallest ski industry or ski operator
or ski resort in California. But we do have a huge impact in the economies of the local areas that we reside in. River rafting drives the economy in Coloma, it drives the economy in Groveland, it drives the economy in Lake Isabella and Kernville. And absent those types of activities and that kind of recreation, those economies would essentially dry up.

So, in effect, what I’m asking your Commission to do, I guess -- because this is all new to me -- is to agendize a formal hearing to take a look at the possibility of putting into effect an overtime exemption for our on-river personnel. And that’s the extent of my testimony.

I’m open to any questions that you might have, or concerns.

COMMISSIONER DOMBROWSKI: Questions?

(No response)

COMMISSIONER DOMBROWSKI: Thank you.

MR. RANGELL: Thank you.

COMMISSIONER DOMBROWSKI: Next new business is residential care. We have five speakers. Tony Martinno.

MR. JACKSON: (Not using microphone) My name is Wardell Jackson. We do have five speakers, but only two of us will speak to you for the time being, since we are
not on the agenda today.

COMMISSIONER DOMBROWSKI: Okay.

MR. JACKSON: My name is Wardell Jackson, and I am the president of the Association of California Care Home Operators. And I represent providers who own, operate, and work in homes for adults and children with developmental disabilities, mental illness, and the elderly.

We have a unique problem because we contract with nonprofit agencies, such as the Regional Centers of California, to provide residential services. This is basically our set-up: The Department of Public Health contracts with the Department of Developmental Services, who vendorizes us to cover contracts to provide services for people with developmental disabilities. We are licensed by the Department of Social Services. Then the Regional Centers -- we contract with the Regional Centers of the East Bay to provide those services. We have private homes, some are nonprofit, some are for-profit, and then we have direct-care staff.

Our job is to deal with people 24 hours a day. What -- and our situation is that we work in our facilities ourselves. And since we’re required by law to give 24-hour service, therefore we -- 24 hours a day,
seven days a week, 365 days a year as a provider -- some
of us only work in our homes ourselves, with our mates or
whatever else, and we don’t have staff. But then there
are others of us who may have to have -- like I have two
Level 4-R facilities, which is the consumers that have to
have one staff per two -- per two consumers. So,
therefore, usually when I have six consumers in my home,
I have three staff and a supervisor.

Now, the way we’ve basically been paid in the
last few years, our industry, because of -- we have -- we
are -- we have -- we don’t have a mandate as far as
residential rates are concerned. Basically, if there’s
money in the budget for the state, we get raises.
Between the time from 1985 to 1995, we had no raises at
all, no cost-of-living increases at all. There was even
a portion where our consumers got a pass -- a raise in
Social Security rates. Those raises were taken from us --
we never got them at all -- until the last two years.
The last three years, we have gotten a 3.5
percent raise every year. Twelve years, we got no raises
at all, so we’re about 40 to 50 percent underpaid.

Now, I do -- I did pass -- I did pass you a lot
of information. First of all, there’s an audit from the
state auditor showing how our staff, basically, is
underpaid by 40 to 50 percent. The average wage in California is about $18,000. And we’re saying that those wages for our staff should be about $18,000. This includes, basically, a minimum wage, as far as 40 hours per week is concerned, but our special circumstances, our employees quite often do not work 40 hours.

A typical day is when a consumer gets up in the morning, they go out to a program for six hours, they come back to our facility. If they don’t have to go to a day program, we have to have a staff there 24 hours a day to take care of them. Our staff sometimes sleeps at night. We have to pay them according to the time that they sleep. They may be on call. We have 24-hour-a-day -- sometimes some people have staff working 24 hours a day, three days on and four days off. If we were to pay our staff, according to regulations, overtime time and a half, we would be out of business.

Like I said -- there is a chart. My vice president, Tony Martinno, will go over some figures as far -- and you have those figures too -- as to the amount of income we have. And we ourselves, if we do the facility ourselves, we get paid much less than minimum wage per hour for the services we give to our consumers.
So, what our problem is, is that we don’t get enough rates from the state to pay our staff. And with the time and a half and having to pay staff for time that is slept while they’re on call, or having to limit our facilities when they’re not -- and to pay them because they’re on call when they’re not working, there are those of us who will go out of business, because we are not getting enough money.

We are working on this with the state.

Attached to this that I gave you also, there’s a California Rehabilitation Association -- there’s a reform committee that’s going on with the state, wherein they’re working on rates for our facilities. This association walked out of the meeting because there was no raise in our rates for 2000. The governor wrote it out of the budget.

So, therefore, like I said, the last few -- last year we got a 3 percent raise. This coming year, there is no raise at all, and we are about 40 to 50 percent under.

So, how do we -- how do we run a facility, taking care of people -- like, when we talked with the governor years ago, people at the SPCA get paid sometimes $12 an hour for washing feces out of the cage for dogs
and cats, yet we pay our staff minimum wage -- six
dollars is sometimes -- well, the average right now is
like seven dollars or eight dollars an hour -- and we’re
taking care of -- we have the life of human beings in our
hands.

We cannot pay any more. And our problem is not
that we don’t want to pay more, but we cannot pay more
because of the rates.

Right now I know I’m rambling. I’m not sure
exactly -- because I am new at this too -- I’m not sure
exactly what we want. The problem with the time and a
half is a problem with us because we can’t pay it. We
cannot pay staff to work 24 hours a day. We cannot pay
staff when they’re sleeping, when our facilities are
asleep, and we have to pay -- these new regulations state
that we basically have to do that.

So, like I said, I’m not sure exactly what we
want. We need some kind of exemption in place so that we
can stay open, we can continue doing the job that we
love, and not be in violation of labor law. That’s
basically -- and so, like I said, the main purpose of my
speech is written to you.

And Tony Martinno would like to make some
comments too. And if you have any questions for me, I --
COMMISSIONER DOMBROWSKI: Any questions?

(No response)

COMMISSIONER DOMBROWSKI: Thank you.

COMMISSIONER BOSCO: Can I just ask what the status of this is? Because I think we had some testimony like this at the last meeting. Are we going to do some sort of a wage board on this or take some action on it?

MR. BARON: I guess a question I would have had is in terms of how these employees are classified. If we’re talking about personal attendants, they’re already in two different wage orders, situations dealing with personal attendants, both of which -- one of which, if you’re like a personal attendant in a home, you have a blanket exemption. And then, the other one, if you’re a personal attendant in, let’s say, a facility, you have a -- you’re not under the 8-hour, you’re not under the 40-hour. As a matter of fact, under the -- going back to the earlier orders for the time being, you’re under a 54-hour, so -- before you have to get into overtime.

So, that’s why I guess my question would have been in terms of the exact nature of these employees. But if they are personal attendants -- and I think it was also mentioned earlier, this issue of -- on some of these, in terms of sleeping of when you’re on and when
you’re not, in terms of computing, whether or not you’re
in -- frankly, the -- in terms of what the Commission has
done so far in the interim wage order, it is -- frankly,
those weren’t touched.

So, I mean -- so, I was saying, if you were
demeing -- if these employees are deemed personal
attendants, in both ways they’ve been dealt with under
wage orders.

MR. JACKSON: Well, these are not personal
attendants.

MR. BARON: These are not personal attendants?

MR. JACKSON: And we’ve been -- our lobbyists
and our consultants have been trained -- they’ve gone to
federal labor hearings or whatever, and they’ve been
trained. They’re telling us now that we have to abide by
the time and a half.

And as far as the state law is concerned, the
federal law basically says something different from the
state law.

MR. BARON: Exactly. And the state -- yeah, the
state will carry the day.

MR. JACKSON: And so, we could pay, like, for
five hours of sleep, uninterrupted sleep, under the state
law, and I think the federal law says something
MR. BARON: Well, I’ll tell you what I’d be more than happy to do, if you want to leave for me your, you know, name, address, and phone number, I’ll be happy to go -- you know, provide you with more in-depth viewpoint in terms of where the -- in terms of the state and the federal.

Frankly, you start off from the premise that it’s what it says in the state, and not -- and not in terms of the federal. But I would be happy to go into detail with you relative to what’s presently sitting in wage orders, and what’s presently sitting, as well, in the interim wage order, and see -- see where -- what we’re left with at that point. And if it’s a matter of proceeding further, I’d be happy to report back to the Commission on it.

MR. JACKSON: Well, that would help, because what’s happening now is the federal government has started, in California -- they’ve started with the Oregon border, and they are coming into our facilities, auditing our facilities. They have, so far, come up with a million dollars of fines, in homes like ours, so far. They’re doing it now in San Francisco, but I understand
they’ll be moving to the East Bay, where most of us are coming from right now, from the East Bay.

And we’re concerned -- like I said, if I’m hit with a $10,000 fine and I have a small facility that I’m taking care of six consumers in, and I have a $10,000 fine, and I get $10,000 a month in to take care of staff, rent, food, I’m going to have to close my facility. And I’ve been trying to do the best I can do, paying my staff as much as I can with the rates that I have coming in.

So, this has been happening. There’s been like a million dollars of fines already. We’re afraid, when we’re hit with these fines, we have no -- and our -- the people who we get our monies from, the Department of Developmental Services, we brought this to them, and they are in touch with your office, I believe, also. Margaret Anderson promised that she will be calling someone from your office regarding this.

But we just wanted to have -- go on the record now --

COMMISSIONER DOMBROWSKI: The IWC staff will work with you to figure out where the -- where the problem is. If there’s anything else that you need to say --

MR. JACKSON: No, sir.
COMMISSIONER DOMBROWSKI: Okay.

MR. MARTINNO: No, I -- like Wardell was saying -- my name is Tony Martinno. And you’ll see in the letter that I presented to you exactly what’s going on. And our concern is the sleeping time and the on-call, with people on call. That’s our big concern, as you can see.

We’re going to put, in our area, 20,000 kids on the streets. I think we have enough in San Francisco -- I’m sorry to say that -- but we’re going to put a lot of people. There’s already facilities for sale. I get flyers, and a lot of facilities have been for sale because we cannot do our job and -- with the money that we get.

I appreciate what you are saying. You say you want to work with us, and I would thank you very much for your time.

MR. BARON: Right. And what I would say is you can -- please provide staff with -- and staff will be able to provide name, addresses, and phone numbers, and you can send us, you know, any further material you want, and we’ll go through the wage orders. And we’ll be happy to have a discussion with you in terms of what the situation is.
MR. MARTINNO: Well, thank you.

COMMISSIONER DOMBROWSKI: Barry?

COMMISSIONER BROAD: I was just wondering if Mr. Davenport would care to comment on what the Governor has proposed, in terms of increasing the budget in this area, so that we just have some sense of what’s happening there.

MR. DAVENPORT: I agree with the testimony. There’s a desperate need for a rate increase in this industry, okay? And there is not a rate increase in the budget.

COMMISSIONER BROAD: Oh.

MR. DAVENPORT: I believe that the reason for that was somebody said they’re working on it, okay? So, that’s what I have.

COMMISSIONER BROAD: Thank you.

COMMISSIONER DOMBROWSKI: I have three more speakers. First, Jim Abrams. Assuming meal and lodging credits?

MR. ABRAMS: Thank you, Mr. Chairman. And also, I want to, first of all, apologize for my outburst a little bit ago. It was uncalled for. I apologize for that.

At your last meeting, there was a bit --
COMMISSIONER DOMBROWSKI: We’re all friends here.

MR. ABRAMS: Nonetheless, you --

COMMISSIONER BROAD: We’ve been yelling at each other for years. There’s no reason to stop now.

COMMISSIONER DOMBROWSKI: The only problem is, we didn’t -- we wanted to make sure they could pick it up in the transcript.

MR. ABRAMS: Of course. I appreciate that. No, you’re -- you’re running an orderly meeting, and you don’t need people like me to foul it up.

At your last meeting, there was discussion relative to exempt employees and to what extent, if any, there could be a credit against the double the minimum wage requirement for meals and lodging that employers might provide. And during that dialogue, Commissioner Broad raised the issue of the extent to which perhaps Proposition 210 had either done away with the meal and lodging credits, which is a possible interpretation -- that’s not what you said, but that was an interpretation -- or the extent to which perhaps the meal and lodging credits should not have gone up when the minimum wage went up in accordance with Proposition 210.

And because there are so many people in the
public housekeeping industry -- hotels, camps, hospitals, dormitories, whatever -- employers who provide complimentary free lodging and meals to their employees, the issue of to what extent the minimum wage -- excuse me -- the meal and lodging credits exist and what their exact maximum amounts can be at this time is very, very important, because there are many employees against whom the employers take the meal or lodging credit in meeting their minimum wage obligation.

So, I had sent to Mr. Baron on Tuesday, in response to that, a petition as a way to raise this before you today. I appreciate you can’t take action on it today, under the open meeting law, to, a) clarify to what extent the meal and lodging credits exist today -- I assume that they still exist -- and the main question, then, is: are they the same meal and lodging credits that existed -- the same amounts -- that existed as of December 31st last year, or are they the meal and lodging credits under Wage Order 5-89, as amended in 1993, which are the amounts that the Commission adopted in 1988? And if you conclude that, a) there is no meal and lodging credit, or it is less than it was last December 31st -- this was worded in the alternative as a petition -- to please raise the meal and lodging credits back to where
they were on December 31st, retroactively to the 1st of this year, so we don’t have thousands of employers who have been crediting certain amounts against their minimum wage obligations for meals and lodging finding, at the end of this year or next year, that they’ve been in violation.

That’s the substance of the petition.

COMMISSIONER DOMBROWSKI: Okay.

Do you have any questions?

COMMISSIONER BROAD: Yeah, I had a question, Jim. Have you tried to obtain any kind of formal opinion from the Labor Commissioner about any of this?

MR. ABRAMS: I have, via voicemail -- I think it was very recent. And I mean no disrespect in that regard --

COMMISSIONER BROAD: No, no, I understand.

MR. ABRAMS: -- there’s no -- there’s not been an answer.

The thing that concerns me is that I think -- I’m just going to -- I’m going to defeat my own case here a little bit -- I think the fairest reading of Assembly Bill 60 is that the -- the wage order 5-98, which has the highest, most recent meal and lodging credits, is no longer in effect. AB 60 says Wage Orders 1, 4 -- or 1, 4, 5, 7, and 8, whatever it is, -98, the ones that the
Commission adopted, is null and void. And in the case of
the public housekeeping industry, it’s replaced by Wage
Order 5-89, as amended in 1993.

And in here, I have both of the pertinent
provisions, both from Wage Order 5-98 and 5-89, and the
only difference is the amount of the meal and lodging
credit. 5-89 is the value of meals and lodging that an
employer could take as of July of 1998. That has been
increased over the years every time the minimum wage has
gone up, by the IWC. And the most recent increases,
which were in response to Prop. 210, were encompassed
within Wage Order 5-98, which no longer exists.

If you conclude that those were valid amounts
which an employer who provides free meals and/or lodging
to his or her employees should be entitled to take, then
they don’t exist any longer, and I suspect you have
thousands and thousands of employers assuming that they
can just go on. And they are going to find out that
there is a difference.

COMMISSIONER BROAD: Right.

MR. ABRAMS: The request, therefore, if that is
your conclusion, and your legal counsel says, “Yes,
that’s right,” is that you take action. If you feel you
need to appoint a wage board, I would suggest to you that
the meal and lodging credit doesn’t exist just in Wage Order 5. It’s in others too; you might want to have a broader wage board. But the request is that you raise the meal and lodging credits back to where they were as of December 31st of last year, and do it retroactively to the 1st of this year.

COMMISSIONER DOMBROWSKI: I think Andy has a --

MR. BARON: I have just a -- I had a couple of comments.

One is, is that, on the other hand, the overriding minimum wage order, which is still in effect, includes in it the higher meal and lodging credits.

MR. ABRAMS: If that’s the case -- I started out saying please clarify what the circumstance is. And if the IWC takes that position, I would love dearly just to have a motion saying, “We hereby confirm that the meal and lodging credits are as set forth in” -- yackety-yak.

MR. BARON: A couple things. One, I would agree with Barry’s approach in terms of the degree to which you have contacted DLSE to issue an interpretation.

I must tell you that, looking at the relevant Labor Code sections on petitions, petitions -- the way the IWC -- the kind of proper petitions are petitions that are asking for an amendment, be it a change, be it
an adoption. A petition asking for a clarification is not within the general purview of IWC petitions.

Now --

MR. ABRAMS: I understand.

MR. BARON: So, it’s either a matter of -- you know, and that’s why it sounds like you’re kind of talking about -- it’s almost kind of like a contingent petition -- and, you know, the Commission has a couple of options here. I mean, they could -- they could rule it out of order based on the fact that, again, your -- what you’re looking for in here. On the other hand, the Commission has 120 days to look at it.

I guess, in terms of the discussion that I’ve had, though, relative to counsel, that you still do have -- there is this minimum wage order. This is -- this does affect all the orders.

MR. ABRAMS: If that’s -- if that is the case --

COMMISSIONER DOMBROWSKI: Is there a way that we can accelerate getting the opinion from the Labor Department?

MR. ABRAMS: Well, a suggestion, based on what Mr. Baron just said, if it is -- if it is the opinion of the Commission --

MR. BARON: I think, though, that -- I was going
to say, I think, though, that the proper approach in terms of interpretation or enforcement of what’s in there already would involve at least reaching out for the Department of Labor Standards Enforcement. I mean, if you want to --

COMMISSIONER DOMBROWSKI: We don’t want to -- we don’t want to be sitting up here making motions and votes on everything, every question that comes along.


COMMISSIONER BROAD: Yeah. Jim, my suggestion is that you formally write the Labor Commissioner and ask for an opinion very specifically regarding the minimum wage order and whether that is still in effect and that overrides these other issues.

I share Commissioner Dombrowski’s concern that over the last -- over the last months that all of us have been members of this Commission, we’ve had a lot of people come up here and say, “Could you just clarify something for us?” And it -- I think we’ve learned, maybe somewhat slowly, that it’s probably not our job to sit up here and, you know, sort of vote on clarifications, that there’s a division of authority between the Labor Commissioner, which interprets the law, and the Commission, which adopts regulations and changes
regulations, but doesn’t sit up here and issue
clarifications of its own regulations.

And I think I share the concern that it’s kind
of an inappropriate or -- you know, I know what you’re
trying to do, and I don’t disagree with it, but it’s not
quite the right approach. And the formal petition
process is, “We would like you to change the regulations
to say X, Y, and Z.” You may not even have an issue here
that’s worth raising as a petition. You may write to the
Labor Commissioner, get an opinion, and forthwith want to
withdraw that petition.

And so, I would urge you to do that. Within the
120-day period that this thing is sitting around here, I
think you could, clearly, get an answer. And, you know,
I would certainly join Mr. Dombrowski and probably the
rest of the commissioners in asking our executive
director to contact the Labor Commissioner and ask if
they could really get this thing expedited.

MR. BARON: I’d be happy to.

MR. ABRAMS: That’s fine. I respect that.

That’s how I will proceed. I have already today had an
opportunity just to give a copy of the petition to Mr.
Locker, and I will proceed with him. And I thank you.

You have too many of these kinds of issues, as everybody
is sorting through what the law means exactly.

Thank you.

COMMISSIONER DOMBROWSKI: Thank you.

Willie Washington, wanting to speak about flexibility up to 12 hours.

MR. WASHINGTON: Good afternoon, Mr. Chairman, members, commissioners.

Sitting here through the earlier part and all, I found out already that -- with no disrespect to all the members -- I kind of understand why I already like Commissioner Bosco. I happen to join him in this business of being one of those people who never catch any fish, so I understand that completely.

And, Mr. Bosco, I’ve been up here for fourteen years, and ten of that before then with an employer, and I’ve been coming before this Commission all those years, so I really understand your comments about wanting to avoid getting us bogged down, the Commission and employers, in a lifetime of meetings on these issues.

COMMISSIONER BOSCO: So, you agree with me on two things.

(Laughter)

MR. WASHINGTON: I’m agreeing -- that’s right.

Actually, I’m here because -- I think that you
put your finger on it already, Commissioner Bosco -- the fact that the Commission and the law in the State of California is so technically -- it’s so technical and complicated that the ordinary person simply cannot understand and comply with the law.

And while I certainly understand the duties of the Commission and I understand the parties of interest wanting to ensure that their particular constituency is protected or afforded the greatest amount of flexible, I’m really here this afternoon to ask the Commission to take a look at exactly that issue, the issue of flexibility.

I think, when you look at AB 60, and even if you look at the interim regulation that you’ve developed, you’ll note that in all of these areas, protection, protection, protection always appear to be there. And to the extent that protection is there to protect the individual worker, I see no reason why the Commission shouldn’t try to provide and afford the greatest amount of flexibility to employers.

I don’t think that you’ve heard the end of the new technology that is being developed that you are regulating that you hadn’t even thought of. This is a relatively slow-moving body. You have a one-time good
deal to make a lot of law within a time frame of this six months, until July of 2000. And after that, you go back to business as usual. And I can tell you from my own experience that this is a very slow-moving process when you go through the IWC rulemaking process.

So, I wanted to ask the Commission to consider putting the idea of flexibility on its schedule to be talked about and discussed, so that I and other employers and other employees can make their point that, indeed, there ought to be flexibility for those employers and those employees who need it, to work up to 12 hours in a day. And in that regard, I only ask that you give us an opportunity to present our case, explain to you why -- why it’s necessary, and to assure you that the protection for those employees are there.

So, my reason for being here today is to ask you to consider putting on the agenda an opportunity to discuss this, under 515(b)(1).

Any questions?

COMMISSIONER BOSCO: Well, it seems like we did have a lot of that testimony at the last hearing, but we were doing it by industries, weren’t we? I mean, that’s all the nursing people talked about, as I recall. We didn’t -- we didn’t have a hearing just on that subject,
I guess, but we were -- weren’t we just going by industry?

COMMISSIONER DOMBROWSKI: We talked about the flexible schedules and the recurring overtime and a lot of other -- yeah, we had the publishing industry. So, we --

Barry?

COMMISSIONER BROAD: Yeah. I mean, while we have a really good deal here until July 1 to change things and -- without wage boards, we can’t -- you know, you -- there’s a very clear statutory limit on our power, which is it’s an 8-hour -- 8-hour day, daily overtime statute that we’re effectuating. And we have a limited authority to carve out flexibility. We can’t repeal AB 60, much as the employers might want us to. That issue has been decided.

I mean, I -- now, we are going to have a hearing on flexible work arrangements, which is mandated by the statute, and which we can deal with, but it basically says you can’t schedule employees for work in exceed of 10 hours a day without the payment of overtime, and that only when there is an alternative workweek arrangement.

So, I think our -- while our process has been expedited for these six months, I’m not sure that our
ability to create -- sort of repeal the statute has been
given to us.

MR. WASHINGTON: I’m not asking to repeal the
statute. I’m simply asking you to hear us out. I’m
asking you to hear us out.

COMMISSIONER DOMBROWSKI: Any other questions?
(No response)

COMMISSIONER DOMBROWSKI: Thank you.

Kelly Watts, to speak about the high-tech
industry.

MS. WATTS: Good afternoon, commissioners. My
name is Kelly Watts, with the American Electronics
Association. And I’m here today also to reiterate what
Mr. Washington stated, but specifically, I’d like to
request a public hearing to discuss the merits of an
exemption to the daily overtime requirement set forth in
AB 60 by exempting employees who receive a specified
level of income, plus additional benefits such as stock
options, profit-sharing, or variable pay.

AEA represents more than 1,400 high-tech
companies in California, ranging from the giants of the
high-tech industry to small electronics manufacturers and
Internet start-ups. Some of our member companies employ
upwards of 10,000 employees, others less than 25. There
are more than 780,000 high-tech jobs in California. The
high-technology industry accounts for $64 billion of
California’s $105 billion in exports. That’s 61 percent
of the exports out of California.

Quite simply, emerging high-tech companies can
locate almost anywhere. To keep California as the number
one location for emerging high-tech companies, employers
must be able to offer their employees the best package
available, including flexibility in the workplace,
premium benefits such as stock options or profit-sharing,
and competitive wages.

And the key here is flexibility. Increased
flexibility will allow employees who desire to balance
their work and family life to do so. The diversity of
today’s workforce requires employers to utilize new and
innovative approaches managing their human resources and
delivering of services. Eight-hour shifts simply do not
reflect the face of today’s high-tech environment. To
succeed, companies must successfully compete for skilled
workers and must be able to retain them by providing
challenging job opportunities and the flexibility to
accommodate family responsibilities and other activities
outside of the workplace.

In the Silicon Valley, the competitive
environment of the high-tech industry demands flexibility for the hard-to-fill jobs and would help companies successfully recruit and retain qualified workers. We believe that an exemption which is tied to the income and performance of an individual employee will provide the assurance that we are treating our employees well and returning to them the flexibility that they deserve.

I again would like to request that the IWC hold an informational hearing so that we can work together to find a balance on this issue. We do not intend to rob the paychecks of employees. Rather, we want to provide them with the flexibility that today’s workforce needs to excel in a continuously emerging industry.

Thank you. Do you have any questions?

COMMISSIONER DOMBROWSKI: Questions?

COMMISSIONER COLEMAN: I have a question. This idea of an exemption, is this something that you’ve heard from member companies, from employees? Can you talk a little bit about that?

MS. WATTS: Yes. It’s definitely something that we’ve heard from our employees and employers, as well as the administration.

COMMISSIONER BROAD: Sorry. Your -- what administration?
MS. WATTS: The administration of the State of California.

COMMISSIONER COLEMAN: So, you’re saying that --

MS. WATTS: We’ve discussed -- we’ve discussed the issue and the opportunity to meet with all parties involved and discuss an exemption of this nature.

COMMISSIONER COLEMAN: So, you’re requesting that we agendize this, along with the other issues, at the next hearing, for more discussion?

MS. WATTS: Yes, please.

COMMISSIONER COLEMAN: I think there probably will be a lot of controversy on this that --

MS. WATTS: I’m sure there will.

COMMISSIONER COLEMAN: -- certainly would warrant further discussion.

COMMISSIONER DOMBRowSKI: Any other questions?

COMMISSIONER BROAD: Do we have a specific proposal we’re going to be looking at?

COMMISSIONER COLEMAN: Kelly, you have -- do you have language that you want to circulate?

MS. WATTS: We would be happy to circulate some language. That would be a great starting point to discuss the issue.

COMMISSIONER COLEMAN: Do we get that to Andy?
MR. BARON: If you leave it, I’ll be happy to --

MS. WATTS: Sure.

MR. BARON: -- happy to get it mailed to the Commission.

COMMISSIONER DOMBROWSKI: If we schedule a hearing for the 31st of March, I believe we have to get the notice out --

MR. BARON: No, but -- right, we have to get the notice out in terms of that we’ll be dealing with -- you know, it can be like a sentence -- but in terms of getting the -- because, again, you’re saying an informational hearing, so it’s not -- we’re not talking about, even at the March 31st, actually voting on a proposal.

MS. WATTS: Right.

MR. BARON: Particularly since I know that counsel has expressed that anything down this road would involve wage boards as well, assume -- and that’s only if the Commission wishes to go down this road.

So, anything -- anything that’s -- any kind of draft, any kind of proposal you have, I’ll be happy to get it to all the members.

MS. WATTS: Thank you.
COMMISSIONER BROAD: Do you have that today?

MS. WATTS: Yes, I do. I don’t have it to hand out, but I could get that to you today.

COMMISSIONER BROAD: Well, I’d like this to be made available. If we’re going to put this on the agenda for a hearing, I’d like this made available to the public today.

MR. BARON: Right. The other thing is, I have probably a couple of days into the week to notice, so if we could get it out to the public as part of that, even if I would have that --

COMMISSIONER DOMBROWSKI: That’s where I was heading. If we had the language, we could attach it to the notice of the next meeting, so that would be there. So, everybody who gets the notice for the hearing would get the language.

MS. WATTS: I’d be happy to do that.

MR. BARON: Okay.

COMMISSIONER DOMBROWSKI: I assume Tom would like to speak.

MR. RANKIN: Yeah.

Look, you have a lot of work in front of you. You’d better damn well start looking at the minimum wage, for one thing, which hasn’t been increased since
Proposition 210.

If you are going to waste your time taking up a proposal that is designed to totally obliterate what we achieved in AB 60, you are really asking for a lot of problems.

Thank you.

COMMISSIONER BOSCO: Mr. Chairman, can -- I think this might be a good starting point for my suggestion that I was trying to forward a little earlier.

COMMISSIONER DOMBROWSKI: Right.

COMMISSIONER BOSCO: If -- I don’t know if we have to have a motion to have a hearing, but if not, could I recommend that we limit the discussion of this item to two hours, with proponents having one hour and opponents having one hour? I think that would give us sufficient time to conduct our investigation as required, and yet not just open this up absolutely, because I think Mr. Rankin’s point is a very good one. We do have a lot of work to accomplish.

COMMISSIONER DOMBROWSKI: Absolutely. I don’t think we need a motion for that. I think we can just -- we can direct staff to do it.

MR. BARON: We can put that -- all right.

COMMISSIONER COLEMAN: I would agree. I think
the opinions of both sides are going to be important and
critical in just helping this Commission decide if we
want to go forward and have -- at all on this issue.

COMMISSIONER DOMBROWSKI: Okay.

I’ve got one last speaker, one late card, Jim
Ebert from the California Newspaper Association.

MR. EBERT: Well, I’ll keep it brief, in light
of the most recent discussion.

I just want to reiterate Mr. Washington’s
comments about the Commission having a hearing, allowing
employers the opportunity to at least discuss
flexibility. We proposed something formally to the
Commission at its first hearing. We’d like an
opportunity to expand on that a little bit, in light of
some of the implementation of AB 60 since January.

And also, I wanted to briefly comment on Mr.
Tollen’s proposal with regard to outside salespersons.
While we support the notion that maybe the Commission --
it would be appropriate for the Commission to look into
the definition of outside salespersons, we think maybe,
if we can craft something a little bit tighter than maybe
Mr. Tollen proposed, it would be more appropriate. But
we do support the notion that the Commission should look
at duties that are maybe necessarily incidental to the
sales operation.

Thank you.

COMMISSIONER DOMBROWSKI: Thank you.

Any questions?

(No response)

COMMISSIONER DOMBROWSKI: Okay. That concludes the testimony for today.

We have some housekeeping. We need to make a finding by the Commission that we have published the interim wage order, Labor Code Section 1183(c), a finding by the Commission that there has been publication of an action taken by the Commission, a required by Section 1182.1, entitled “Action Taken to be Published,” is conclusive as to the obligation of an employer to comply with the order.

And don’t ask me what I just said.

Do we have a motion?

COMMISSIONER BROAD: So moved.

COMMISSIONER COLEMAN: Second.

COMMISSIONER BOSCO: We’ll now have a five-question quiz on what you just said.

COMMISSIONER DOMBROWSKI: Take the roll.

All in favor, “aye.”

(Chorus of “ayes”)
COMMISSIONER DOMBROWSKI:  Opposed?
(No response)
COMMISSIONER DOMBROWSKI:  Thank you.
The next hearing is scheduled for March 31st, I believe, in Sacramento, if that’s --
COMMISSIONER BROAD:  Perhaps we should have this hearing, considering the request of the American Electronics Association, maybe we should have this hearing in the Bay Area or San Jose or someplace like that.
COMMISSIONER COLEMAN:  You know, actually, I don’t -- I don’t think that matters too much. Sort of ironically, Sacramento is one of the top -- I think one -- number one or number two in terms of the fastest growing high-tech cities. So, I think wherever we hold it, we’re going to be in a high-tech -- actually, San Francisco is in the top five as well. So, I’m fine. And since there are other agenda items for that meeting, I think it’s fine to hold it in Sacramento.
COMMISSIONER BROAD:  Okay.
COMMISSIONER DOMBROWSKI:  Okay.
Any other business brought up by the commissioners?
COMMISSIONER COLEMAN:  Staff advised me just to
formalize for the record that the wage board that we
appointed for the computer consultants is pursuant to
Section 1178.5(b), and that it might be prudent to set a
deadline for the applications for that wage board of
March 20th, if people are comfortable with that.

COMMISSIONER BROAD: Can I just raise a
question? If the Commission moves forward to convene a
wage board on this latest idea, shouldn’t -- don’t we
want to maybe think about combining those issues in one
wage board, rather than creating separate wage boards,
and then have that wage board charged with hearing those
issues? Or do we want to keep it separate?

COMMISSIONER COLEMAN: I thought about that. I
think the computer consultant issue is fairly discrete.
It’s well defined. And I think the idea that was brought
up today is evolving. And so, it seems -- it seems that
we might want to go straight to the wage boards for the
computer consultants, if people are still comfortable
with that.

COMMISSIONER DOMBROWSKI: Okay. Any other
business?

Do I hear a motion to adjourn?

COMMISSIONER COLEMAN: So moved.

COMMISSIONER DOMBROWSKI: Second?
COMMISSIONER BOSCO: Second.

COMMISSIONER DOMBROWSKI: All in favor?

(Chorus of "ayes")

COMMISSIONER DOMBROWSKI: All opposed?

(No response)

(Thereupon, at 1:27 p.m., the public meeting was adjourned.)

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CERTIFICATE OF REPORTER/TRANSCRIBER

--o0o--

I, Cynthia M. Judy, a duly designated reporter and transcriber, do hereby declare and certify under penalty of perjury under the laws of the State of California that I transcribed the three tapes recorded at the Public Meeting of the Industrial Welfare Commission, held on February 25, 2000, in San Francisco, California, and that the foregoing pages constitute a true, accurate, and complete transcription of the aforementioned tapes, to the best of my abilities.

Dated: March 12, 2000

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CYNTHIA M. JUDY
Reporter/Transcriber