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INDUSTRIAL WELFARE COMMISSION

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P R O C E E D I N G S

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(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")

1 COMMISSIONER DOMBROWSKI: The second item on the
2 agenda is closed session, personnel matters. I believe
3 we need to vacate the room.

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

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

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

21 Okay. We'll start with the speakers first. The
22 first speaker is Allen Davenport.

23 MR. DAVENPORT: Good morning, Mr. Chairman,
24 members of the Commission. My name is Allen Davenport.

1 I'm here representing the Service Employees International
2 Union. We're the largest union in the horseracing
3 industry.

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

6 We represent 2,000 pari-mutuel clerks in SEIU
7 Local 280, and about 1,500 assistant starters, jockey
8 valets, veterinarian assistants, janitors, maids, ushers.
9 We're basically the people who bring you the horseracing
10 show in California. And we are also the largest union of
11 immigrant workers in California. We represent over
12 30,000 janitors, almost all of whom are recent immigrants
13 to California.

14 We -- our employers in horseracing are the
15 racing associations who lease the California horseracing
16 tracks and the satellite wagering facilities. We're
17 basically the union representing the grandstand, the
18 front-side workers. The back-side workers are not
19 represented by us or by anybody else. Those are the
20 people in question today. Those are the stable
21 employees. They're the ones who take care of the horses
22 and prepare them for the racing. They work for the
23 trainers on a daily wage basis. And there are about
24 1,000 different trainers who work as independent

1 contractors, essentially, for the horseracing owners
2 themselves.

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

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

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

23 So, with -- in that regard, it would be very
24 useful to us to develop a good working relationship with

1 the employers of these workers. And we are here to ask
2 for the Commission to issue, I guess, what would amount
3 to a special order of some kind that would allow the
4 currently existing exemption to continue for an
5 additional year, another one-year time limit, during
6 which time we're going to make a bona fide effort to
7 organize these workers. We're going to be sitting down
8 with the horseracing owners, the horseracing trainers,
9 the racehorse trainers, and attempt to work out an
10 agreement whereby we can talk to the workers and
11 determine their interest in -- their majority interest in
12 having a union to represent them.

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

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

1 here, if we have the time to do it.

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

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

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

24 That's the essential pitch I want to make here

1 today, is to ask for that special order.

2 COMMISSIONER DOMBROWSKI: Okay. Any questions?

3 (No response)

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

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

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

16 COMMISSIONER DOMBROWSKI: Okay.

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

20 I just wanted to echo what Allen Davenport said,
21 and that is that we have developed a relationship with
22 SEIU. We think it's developing very, very positively.
23 We've invited representatives of the union to go to two
24 different racetracks. They had a meeting at Bay Meadows

1 about six months ago, and then, about a month and a half
2 ago, we took them to the back side of Santa Anita.

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

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

23 And so, we would urge the Commission to grant
24 the extension. We have committed to the union to work

1 with them in a cooperative fashion, to provide them with
2 all information that they need to answer their questions,
3 and, when the time comes, to assist them in their efforts
4 to meet with the employees to determine whether or not
5 they do, in fact, want to organize them.

6 Any questions?

7 COMMISSIONER DOMBROWSKI: Questions?

8 Barry.

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

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

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

20 COMMISSIONER BROAD: Okay. And the one question
21 I've always had about this issue -- and it's pointed out
22 in your letter -- is that most of your employees work,
23 basically, for one hour or so in the morning, and then
24 for some time in the afternoon. Is that what it is,

1 where you have a morning shift and they come back?

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

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

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

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

21 MR. FOX: I think, as a general rule, that's
22 true. But as Charlie said, it depends on whether or not
23 the horse is running or how many horses that that
24 particular trainer has in races during the week. There

1 may be instances where they would come in at five or six,
2 they'd work their three or four hours, and then, in
3 addition to coming back for that hour to feed, they may
4 also have to do additional work to take care of a horse
5 that may be in the race.

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

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

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

23 COMMISSIONER BROAD: And the housing that's
24 provided for them, is it owned by the trainers, by the

1 track? How does that work?

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

4 COMMISSIONER BROAD: Okay. Thank you.

5 COMMISSIONER DOMBROWSKI: Any other questions?

6 (No response)

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

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

12 COMMISSIONER DOMBROWSKI: Right.

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

15 THE REPORTER: Please use the microphone.

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

21 COMMISSIONER DOMBROWSKI: Go ahead.

22 MR. LOCKER: Yes. Okay. And that was how DLSE
23 views the effect of the Living Wage Act of 1996, the --
24 which is in Labor Code Section 1182.11. And the issue

1 there is that that was adopted by proposition, and the
2 language of it -- it says, "Notwithstanding any other
3 provision of this part, on or after March 1st, 1997, all
4 employees shall be paid the minimum wage." And this, I
5 think -- much of this goes specifically to the stable --
6 this probably goes more to commercial fishing, I believe,
7 and I don't know if you want me to deal with that now or
8 hold that.

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

11 MR. LOCKER: Okay, fine.

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

15 COMMISSIONER DOMBROWSKI: Oh, I'm sorry.

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

18 And basically, we've taken the position -- and
19 this is in our current Operations and Procedures Manual -
20 - that a careful reading of the analysis that was
21 prepared by the legislative analyst and contained in the
22 ballot pamphlet mailed to all voters prior to the
23 election indicates that it was not the intent of the
24 proposition to abolish those exemptions. The analysis

1 states, in part, who is covered by the minimum wage. The
2 categories of workers in California covered by the
3 minimum wage have increased over the years, so that most
4 employees are now subject to the law. Some exceptions
5 are actors and actresses, personal attendants, such as
6 babysitters, and employers' family members. Our analysis
7 assumes that the proposal would have no impact on who is
8 covered by the minimum wage in California.

9 And we go on to state, in the manual that we
10 adopted in October, 1998, that it is the position of
11 DLSE, based on this ballot language, that the provisions
12 of the Living Wage Act did not act to deny the exemptions
13 from the minimum wage requirements currently applied. It
14 goes on to say this conclusion is consistent with the
15 views expressed in a letter from Deputy Attorney General
16 Randall Borcharding, counsel to the IWC, dated April
17 16th, 1997. Mr. Borcharding opined that, quote,
18 "Proposition 210 did not change the applicability of the
19 IWC orders."

20 So, that, I think, you know, addresses that.

21 In terms of the stable industry, in terms of the
22 stable employees, that -- the issue there is simply, I
23 believe, different rules on overtime.

24 COMMISSIONER DOMBROWSKI: Right.

1 MR. LOCKER: So, you know, this issue on minimum
2 wage doesn't even come up there.

3 In terms of that, basically, we've, you know,
4 been enforcing the statute as it's written. And in terms
5 of the stable employees, obviously, we will enforce
6 whatever the statute provides and whatever the IWC does
7 to either extend that or not. So, that's -- that's not
8 really a DLSE issue per se.

9 COMMISSIONER DOMBROWSKI: Okay. Questions?

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

15 MR. LOCKER: In terms of whether the Commission
16 could do that after Prop. 210 came into effect, that is,
17 create a lower-than-existing minimum wage under Prop.
18 210, I believe that, looking at the ballot analysis of
19 210, it talks about that 210 was not intended to do away
20 with the existing exemptions to the minimum wage. And I
21 might add -- you know, obviously, commercial fishing
22 being one of them, and another one that I know we were
23 very concerned about, actually, was the -- in Labor Code
24 Section 1191, at 1191.5, that would be the special

1 licenses for people who are mentally or physically
2 handicapped, and also the special licenses for sheltered
3 workshops or rehabilitation facilities, that the Labor
4 Commissioner issues these licenses pursuant to those
5 sections of the Labor Code, and that allows these types
6 of people and these types of facilities to provide -- you
7 want to say employment, but really more in the nature of
8 rehabilitative training, to people who might otherwise
9 not be able to get work at all, because, simply, it's not
10 going to be economically viable for any employer to pay
11 the minimum wage. And I know we were very concerned
12 about, you know, how Prop. 210 was going to impact on
13 that.

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

22 COMMISSIONER DOMBROWSKI: We won't -- and we
23 won't put you too much on the spot right now. But I
24 guess we can talk about this when we get to the

1 commercial fishing, because that's really where it's
2 germane.

3 Thank you, Miles.

4 MR. LOCKER: Yes.

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

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

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

16 Okay.

17 COMMISSIONER DOMBROWSKI: Okay. Thank you.

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

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

22 MS. BECKETT: Good morning. My name is Peggy
23 Beckett, and I grew up in the Midwest and came to
24 California as a young adult in the early '70's. In 1974,

1 my father came to town, and he took me sportfishing on
2 one of the passenger boats. And that was in Sausalito.

3 It was one of those moments that really defined
4 my life. I know it sounds silly, but it's really true.
5 I had never been on the ocean, the weather was less than
6 desirable, and I loved every minute of being there. I
7 came back several times on my own, begging the deck hand
8 to show me how to make baits and do the work. With a
9 grumbly kind of "Girls don't do this kind of stuff"
10 thing, he finally broke down and started showing me how
11 to do a little of what it took to do this.

12 I did a lot of fancy talking, and I finally got
13 someone to take me on and come along so that I could try
14 out. My persistence won out. It's since led to a life
15 involvement for me for fishing on the ocean and in many
16 other forms.

17 When I started, we fished a salmon season that
18 started about February 15th and went through November
19 15th. We didn't do much rock fishing, but I knew that
20 the season was year-round.

21 There have been a lot of factors that have led
22 to the reduction of the fishing seasons we have now, and
23 there are other forums in which we discuss those. The
24 pertinent factors to this item are about wages and how

1 they relate to making a living in this industry and how
2 wages are paid.

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

17 The work's not hard. There were times when it
18 was fast and furious. The days can be long, and there
19 were years when I worked three months straight without a
20 day off. But those were my choices. I could take the
21 time off, but I chose not to. I wanted to be there. I
22 wanted that opportunity to be able to learn the trade, or
23 rather, the fishing traditions and the ocean. And being
24 there every day was the only way that I could accomplish

1 that. I didn't have the advantage of having grown up in
2 an ocean environment.

3 It's been a good life for me. I started as a
4 deckhand in 1974, got my captain's license in the early
5 '80's, bought a boat in 1987, and traded the ocean life
6 for a sportfishing center in 1990. I did both for a
7 while, but I couldn't do both well, and I sold the boat
8 in 1994. The outlook for the fishing seasons was grim,
9 and given the projected reductions in the seasons,
10 selling the boat seemed like the better choice.

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

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

1 whatever is left.

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

12 It would be a lie to say that it wouldn't be
13 nice to make more money. Every one of us has that
14 element of greed in our soul. But in those days, I got
15 \$40 or \$50 a day as a deckhand, and I received tips, and
16 sometimes fish-cleaning money. During the times I had to
17 supplement with other work, it wasn't because of what or
18 how I was paid, but it was because of the seasonal nature
19 and the daily uncertainties of the work.

20 As a captain, I was paid based on a percentage
21 of the people we carried. These days the crew gets \$70
22 to \$85 as a deckhand, plus tips and fish-cleaning money.
23 The captains, on a whole, still work on a percentage-
24 based type of thing, and the wages run from \$100 to \$200

1 a day. It's common practice these days for the captains
2 and the deckhands to split the tip money. It's a good
3 living when you can work.

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

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

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

1 the age of 17, and he's 66 now.

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

5 Thank you.

6 COMMISSIONER DOMBROWSKI: Questions?

7 COMMISSIONER BROAD: Yeah, I have questions.

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

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

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

17 MS. BECKETT: Yeah.

18 COMMISSIONER BROAD: -- commercial fishing boat.

19 MS. BECKETT: It's a commercial passenger
20 fishing vessel.

21 COMMISSIONER BROAD: Okay. I'm mostly troubled
22 by the minimum wage exemption, because this is like the
23 one industry where there's -- where there's a sort of
24 across-the-board minimum wage exemption. The minimum

1 wage is \$5.75 an hour. If people were paid 10 hours at
2 \$5.75 an hour, it's, you know, not a lot of money. What
3 would be so disruptive about applying the minimum wage
4 and guaranteeing that workers in this industry would get
5 the same minimum hourly wage as every other worker in the
6 state?

7 MS. BECKETT: Well, rounding it off to \$6 an
8 hour, if I was to work a four-hour day, I'd be making
9 \$24, as opposed to \$60 or \$70 now. And the same would
10 hold true if I was working as a skipper. I mean, there's
11 nothing to preclude that the owner of an operation
12 couldn't pay me more, but --

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

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

24 COMMISSIONER BROAD: Thank you.

1 MS. BECKETT: Okay.

2 COMMISSIONER DOMBROWSKI: Roger Thomas.

3 Again, please identify yourself and your
4 affiliation.

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

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

24 And that's what's happened throughout our whole

1 industry, is people start out for the love of fishing,
2 and they become deckhands. And they work at that for a
3 number of years, get their skipper's license, become boat
4 owners. The boat owners that I represent, I would say,
5 out of the 70 vessels, there's probably maybe three or
6 four owners that didn't start out as a deckhand and work
7 their way up through the business to learn the business.
8 And it's for a love of that business that we're in it.

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

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

24 In regards to the minimum wage, in northern

1 California our vessels pay from \$75 to \$85, and sometimes
2 \$100 per day, for deckhands. And that more than meets
3 the minimum wage requirement. So, they're presently
4 making that, plus having the opportunity to work and to
5 make the tips and fish-cleaning money. And they have to
6 try to earn a living in the six and a half to seven
7 months that we have the opportunity to work, less weather
8 days that we can't get out.

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

18 COMMISSIONER DOMBROWSKI: Thank you.

19 MR. THOMAS: Thank you.

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

24 MR. THOMAS: Yes, sir. That's correct.

1 COMMISSIONER DOMBROWSKI: Okay.

2 MR. THOMAS: Thank you.

3 COMMISSIONER DOMBROWSKI: Zeke Grader.

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

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

23 But our membership, now in the '50's, organized
24 as fish marketing associations under agricultural codes,

1 allowing them to collectively bargain with fish buyers,
2 because they were dealing with a perishable product and
3 it allowed them around the monopoly situations.

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

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

1 and the fish being available.

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

14 Now, I think the problem we run into, and I
15 think the reason that we do pay people a percentage on
16 the fishing vessels, is just the uncertainty of fishing
17 itself. It's not the same as, typically, an owner of a
18 store or a factory has some idea every day when they open
19 the doors what type of income flow they might be able to
20 expect. In fishing, it's just unknown. There will be
21 days when there's absolutely no fish, that no fish are
22 taken, and you can be out all day. Other times, the
23 fishing will be fantastic. So, the question begins is
24 what constitutes a working day on a fishing boat. If

1 they're sitting -- sitting back in the cabin reading a
2 book waiting for the fish to bite, is that working?
3 Oftentimes they're working on board these boats -- on
4 albacore boats, they can be out -- you can out at sea as
5 much as two months at a time.

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

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

17 So, I think, from that standpoint, you know,
18 trying to apply, as we could, 8-hour standards to the
19 fishing industry, trying to apply overtime, I'm here to
20 say that's not going to break our industry. What it
21 simply will mean is that there will be no more crew
22 members taken. People will either go with their spouses
23 fishing, if they have to have an extra person on board,
24 or a fishing partner, as they do now with crab, where a

1 couple fishing vessel owners will sometimes team up on
2 one boat and go fishing together, it'll be family members
3 going. And I think that would be a real loss, because
4 the people in particular that are going to lose from that
5 are going to be young people who have a chance of
6 adventure, particularly in the salmon fishery, going
7 fishing for a summer and making some big money and having
8 -- doing something that they might never get a chance to
9 do again in their life.

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

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

23 COMMISSIONER DOMBROWSKI: Assume --

24 MR. GRADER: Yeah.

1 COMMISSIONER DOMBROWSKI: Assume that, just for
2 -- assume that you have your exemption for overtime.

3 MR. GRADER: Sure.

4 COMMISSIONER DOMBROWSKI: What about the minimum
5 wage issue?

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

19 Now, is he, then, to pay that person the minimum
20 wage for their being out there during that week and then
21 try and recoup it by lowering the percentage during the
22 week when the fishing is real good? That's the problem.
23 It's a pragmatic problem that we run up against. So,
24 that's -- you know, how do you -- how do you do that?

1 And like I say, yeah, you could require those type of
2 things. I think what the practical effect would be,
3 though, is that people would just stop taking crew. And,
4 you know, they would get around it by -- it would be
5 husband-and-wife teams solely, or it would be fathers and
6 sons. And that's the way much -- much of our situation
7 is right now, is many of them are spouses and brothers
8 and fathers and sons.

9 COMMISSIONER DOMBROWSKI: Commissioner Coleman?

10 COMMISSIONER COLEMAN: I think Barry had a
11 question.

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

16 MR. GRADER: That's correct.

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

20 MR. GRADER: That's right.

21 COMMISSIONER BROAD: Okay. So, there are
22 actually -- there isn't variation within your sector;
23 it's all done by a percentage of the take for crew
24 members.

1 MR. GRADER: Yeah.

2 COMMISSIONER BROAD: Okay.

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

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

9 MR. GRADER: Sure.

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

24 MR. GRADER: That might be possible. Let me say

1 that, that in some of the fisheries right now, that
2 something like that might be doable. I wouldn't say it
3 wouldn't be.

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

13 I think the practical effect would be,
14 unfortunately, is that people would just simply say, "I
15 can't -- I don't know if I can guarantee that right" --
16 now, some people might be able to do that, but I think a
17 lot would simply say, "I can't take that chance. I don't
18 know it. I'm not going to take any crew; I'm going to
19 bring my family members on board, I'm going to partner up
20 and just establish partnerships with people and do it
21 that way," basically getting around the crew situation.
22 And I think the loss that we would incur then, the
23 practical effect, would be the loss for minority
24 employment and youth employment, is what my risk is.

1 I mean, it goes more to the social effects of
2 what happens to the industry. I'm not going to say it's
3 going to break us. I'm not going to.

4 COMMISSIONER DOMBROWSKI: Right.

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

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

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

19 MR. GRADER: Yeah.

20 COMMISSIONER BROAD: -- for two weeks. The
21 question is whether, if the squid fishery collapses and a
22 boat operator asks a crew person to work every day for
23 three months and the person makes no money and is paid
24 nothing, whether we could say we're adequately protecting

1 the sort of health and welfare of those workers, that
2 they're sharing in the risk, the entrepreneurial risk, to
3 the extent that they could go for a significant amount of
4 time and work many, many hours and not earn even a dime.

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

15 COMMISSIONER BROAD: Well, I guess, Zeke, what
16 I'd like you to think about, because I think you make,
17 you know, a -- for your segment of the industry, you make
18 a compelling argument about the way -- you know, you
19 can't control whether there's fish out there, and you
20 have a system where the workers that we regulate, which
21 isn't everybody on that boat -- it's just the employees -
22 - do have an opportunity to make significant amounts of
23 money -- I would like you to think about, and perhaps
24 come back to us with, whether there is some way to

1 fashion coverage under the minimum wage that might not be
2 based on an hourly approach, but perhaps an approach over
3 a period of time that guarantees a minimum wage
4 equivalent --

5 MR. GRADER: Sure.

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

13 MR. GRADER: Let me do this. Yeah, I would be
14 glad to look into that, because we don't want to have
15 those -- any examples of those type of abuses. I can
16 check. There are, on board our boats in southern
17 California -- not on the people we represent, but there
18 are a couple of unions that are involved -- I can
19 certainly talk to them and see, you know, how they've
20 been working to deal with that, because on board even the
21 boats where they're unionized, with the big crews such as
22 on the tuna boats and the fast -- the wet fish fleet and
23 that, there have been some unions. And I can -- I can
24 talk to them and see how they've handled it.

1 Like I say, in our industry, for the most part,
2 we lost people. I mean, most of our people, members,
3 particularly in the salmon fishery, just let crew go
4 because they couldn't afford to hire anybody on,
5 irregardless (sic) of any standards here, just because it
6 was just -- the downturn we saw in the salmon fishery.

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

14 COMMISSIONER BOSCO: Could I ask a question?

15 MR. GRADER: Sure.

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

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

24 (Laughter)

1 COMMISSIONER BOSCO: I'm always on those boats
2 that stay out all day, never come back early with their
3 catch.

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

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

21 But you're right. There is a transient nature
22 to part of it. There's also the youth element that you
23 particularly see in Alaska, to work the summertime jobs
24 in that, which I think is a great opportunity. And then

1 there are the steady people that are crew members for
2 twenty, thirty years, on the same boat, because they're
3 invaluable, they're paid well, and they're -- it's good
4 for the boat and it's good for the crew member.

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

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

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

22 COMMISSIONER BOSCO: Thank you.

23 COMMISSIONER COLEMAN: To sort of follow on the
24 question of the captains of these boats are sort of

1 operating on a risk-reward incentive, it sounds to me the
2 way you're describing this is that the crew members are
3 also operating on that --

4 MR. GRADER: Exactly.

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

7 MR. GRADER: Exactly.

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

13 MR. GRADER: Yeah.

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

21 MR. GRADER: Yeah, I can do that.

22 Unfortunately, over the course of the years, particularly
23 with the downturn in the salmon fishery, we just -- we
24 don't have many crew really left, except for in a couple

1 of our fisheries. But, you know, I'm hopeful. And
2 frankly, it was because of Mr. Bosco's work when he was
3 in the Legislature and that -- now we've got some good
4 programs going on in California. So, we're pretty
5 optimistic about, you know, the rebirth of the salmon --
6 or the return of the salmon fishery in the next couple
7 decades.

8 COMMISSIONER DOMBROWSKI: Any other questions?

9 MR. GRADER: Thank you.

10 COMMISSIONER DOMBROWSKI: Thank you.

11 Tom Rankin.

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

16 I'm sorry.

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

19 COMMISSIONER DOMBROWSKI: Did I miss it?

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

22 MR. RANKIN: Sure.

23 COMMISSIONER DOMBROWSKI: Sorry about that.

24 MR. RANKIN: Okay.

1 Tom Rankin, California Labor Federation.

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

8 So, I'm going to be talking on a more abstract
9 level.

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

18 In terms of the issues, I think the biggest one
19 is the minimum wage. We don't require workers in any
20 other industry -- and there are many risky businesses in
21 this state -- to bear the risk of the business. And I
22 don't think that we should make an exception for this
23 industry. The minimum wage is simply a floor. They can
24 certainly figure out how to give people, you know, the

1 benefits of a good catch and at the same time pay them a
2 minimum wage. So, I would say that is an essential, to
3 somehow figure out how to craft a minimum wage for this
4 industry.

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

14 Thank you.

15 COMMISSIONER DOMBROWSKI: Bob Fletcher. Sorry.
16 Your card got stuck.

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

21 SAC was founded in 1972 by members of the
22 industry who recognized the need to have someone working
23 on issues of common interest and concern for the
24 industry. Our fleet operates between the ports of Santa

1 Barbara in the north and San Diego in the south, and I
2 represent about 175 commercial passenger fishing vessels.

3 The industry is struggling statewide. And I
4 didn't provide the information, but the Department of
5 Fish and Game provides a breakdown. And I only have one
6 copy, Mr. Chairman and others, but I didn't provide that
7 -- this is the only copy. But I thought, later, that
8 this might be of value.

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

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

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

1 to just bring that up before I continue.

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

5 COMMISSIONER DOMBROWSKI: Yes.

6 MR. FLETCHER: -- dated January 27th that talks
7 about the variety of the kinds of fishing trips that my
8 fleet operates, anywhere from a couple-hour whale-
9 watching trip all the way up to a 17- to 20-day long-
10 range trip. And the reason I bring this up is, in part,
11 to respond to Commissioner Broad's comment about could
12 not we work somehow a minimum wage into the framework of
13 the industry. And the problem that we face in my portion
14 of the industry is this variety of trip lengths. And I
15 don't know how we could identify the number of hours
16 during one of those trips that you would identify as
17 hours worked, because sometimes -- this time of year, we
18 have a large fleet of very big boats
19 -- not a large -- it's about fifteen boats, but they're
20 the biggest boats in our fleet -- that travel 1,500 miles
21 to the fishing grounds. It takes them three days or more
22 to get there, and then they're fishing for nine or ten
23 days, and then they come back. During that trip down,
24 there's almost nothing to do except just make sure that

1 the trash is not all over the deck, or that passengers
2 are cared for. But there's almost no activity.

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

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

22 I was born and raised in San Diego. I'm a
23 native son. I grew up on sportfishing boats. I would go
24 out as much as I could force my father and mother to let

1 me go, because it was the thing that I wanted to do more
2 than anything else in my life, so much so that I would
3 put up with being seasick on the way out every day, just
4 because I wanted to catch some fish. I loved it so much.
5 And I went on to become a crew member, then a captain, I
6 was a commercial fisherman, I harpooned swordfish, I
7 caught tuna, I went on, bought a sportfishing boat,
8 operate a sportfishing boat for other people, and then
9 went on from there and now represent the industry. And
10 the people that are there love what they do.

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

17 And one question that Commissioner Broad brought
18 up to me was, "Why was it necessary, in your mind, for
19 the industry to receive the exemption in the first
20 place?" And I will point out that I left the industry in
21 1983 so was not involved directly. But I would believe
22 that the industry felt that because of these very unique
23 operations that it ran, it needed the protection from
24 minimum wage that the exemption provided. And there was

1 never a thought by the industry to get out from under
2 paying a fair wage; it was just to reflect the kinds of
3 unique operations, where a boat may go out for six hours
4 or overnight or for five days. And it would be
5 difficult, if not impossible, for those industries -- and
6 many of them were small businesses -- to be able to pay
7 those crew members minimum wage for that period of time.
8 So, I think it's just very, very difficult.

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

20 So, one -- one point in closing that I would
21 like to bring up is that this is a very small industry.
22 I think, in the whole state, there may be 4,000
23 individuals who are working on the boats in the fleet.
24 And that number is, unfortunately, on the decline because

1 of restrictions, as Roger Thomas talked about. The
2 Council restricted two months of the season for the whole
3 state, for commercial fishermen as well as the
4 recreational passenger fishing fleet. And if additional
5 stocks prove to be identified as depressed, that may
6 increase, those kinds of restrictions. So, there are
7 less opportunities to be on the water.

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

13 And I'll be more than happy to respond to any
14 questions.

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

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

1 COMMISSIONER BROAD: Does that annual salary
2 exceed the minimum wage?

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

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

18 MR. FLETCHER: Absolutely.

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

21 MR. FLETCHER: Yes, sir.

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

24 MR. FLETCHER: If you fashioned it --

1 COMMISSIONER BROAD: Right.

2 MR. FLETCHER: Absolutely.

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

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

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

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

24 COMMISSIONER BROAD: Okay. Yeah. Well, that

1 would be -- I mean, generally, you wouldn't say they have
2 to be paid a guaranteed wage for the year, but it would
3 be based on some weekly basis or monthly basis, or
4 something that's more restrictive in time. Obviously, if
5 people are not working six months out of the year, you
6 can't employ -- you know, hold the employer to paying
7 them for that time on a minimum wage basis.

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

19 The Legislature eliminated the exemption and
20 empowered the Commission to convene a public hearing "to
21 adopt or modify regulations at that hearing pertaining to
22 the industries herein," without convening wage boards.
23 It didn't say that we can -- we could create minimum wage
24 exemptions, new minimum wage exemptions.

1 And what I would be concerned about here, for
2 your industry, which I think you should take a look at
3 with your industry's lawyers, is that if the Commission
4 were to vote to extend your minimum wage exemption and
5 somebody were to bring that to court and it was found to
6 be unlawful, you would be required to pay the minimum
7 wage on an hourly basis for everybody in this industry.
8 And so, it might behoove you -- and it's up to you -- I'm
9 not suggesting that you accept this view -- but it might
10 behoove you to think about whether we can craft a minimum
11 wage equivalent that works for your industry, your part
12 and Mr. Grader's part, that works for your industry but
13 that does not constitute a full-blown minimum wage
14 exemption.

15 MR. FLETCHER: Commissioner Broad, I appreciate
16 what you're saying, and I think that could work. The
17 only point I would like to respond is that some of our
18 crews, due to weather, are not able sometimes to get in
19 four, five, six days in a row. And so, if you are going
20 to require that a boat owner pay his crew whether they
21 fish or not, that creates a problem. And we don't know
22 from one day to the next whether they'll be able to get
23 out or not. So, if it could be flexible so that it could
24 be either based on an 8-hour day equivalent or a weekly

1 equivalent or an annual equivalent, some way that we
2 could look at it from that standpoint that takes into
3 account the vagaries of weather and the closures that
4 we're faced with on some of our fisheries, that would
5 really be helpful.

6 But I understand the points you're bringing.

7 COMMISSIONER BROAD: Thank you.

8 MR. FLETCHER: Thank you.

9 COMMISSIONER DOMBROWSKI: Thank you.

10 Okay. Once again, I think --

11 COMMISSIONER BROAD: Can we have Miles?

12 COMMISSIONER DOMBROWSKI: Oh, I'm sorry.

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

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

17 There may be a little bit of a misconception
18 that some people have in terms of, you know, a minimum
19 wage obligation, that it is something that we would look
20 at on a day-to-day basis. That would only be true if a
21 worker is paid every day. That is, if you have a pay
22 period of each day, then you look each day whether the
23 work did make the minimum wage that day. But generally,
24 in enforcing the minimum wage, we do it on a pay period

1 basis. You take the entire pay period, so that if --
2 let's say -- let's say the worker is paid by a piece rate
3 type system. And let's say, for whatever reason, the
4 piece rate just wasn't happening, there was nothing going
5 on, but the pay period is, let's say, semi-monthly, under
6 Labor Code Section 204. Then what you would do is you
7 would take that entire pay period. And the fact that
8 maybe on other days in that pay period the worker far
9 exceeded the piece rate, hopefully, it would even things
10 out so that you would take the total number of hours
11 worked during that pay period, and then -- you'd have a
12 total number of hours worked, and then apply the minimum
13 wage to that. And as long as the worker was paid the
14 minimum wage for the total number of hours worked in the
15 pay period, there wouldn't be any minimum wage violation.

16 In terms of getting back to how you define hours
17 worked, we would look to, you know, the base definition
18 of hours worked, whether the employer suffered or
19 permitted the work, or whether or not the worker was
20 subject to the employer's control. So, certainly in a
21 situation, let's say, where -- if commercial fishing was
22 subject to the minimum wage, then if you had a situation
23 where a boat is sitting on the dock and the workers
24 aren't on the boat, there's nothing happening that day,

1 you wouldn't have any hours worked that day. It's only
2 when the workers get called to work that the hours worked
3 would start kicking in.

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

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

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

21 COMMISSIONER BROAD: And then my second question
22 is, Mr. Fletcher mentioned that you have a situation
23 where, in a long-range trip like that, you may have crew
24 members who are performing no work, but they're obviously

1 stuck on the boat, they can't go home. How do you
2 generally treat those type of situations?

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

19 COMMISSIONER BROAD: So, then, we would be free,
20 in your view, to say that if a person in this industry
21 was on a boat and was relieved of all duties for a period
22 of time and was just, you know, in their cabin reading a
23 book, that that could be considered non-working time,
24 notwithstanding the fact that they're stuck on the boat.

1 MR. LOCKER: I believe the IWC has probably
2 already done that with respect to, you know, the -- let's
3 say the motel industry, where you have a special
4 definition for hours worked there that differs from the
5 general definition. Yes, the IWC could do that.

6 COMMISSIONER BROAD: Thank you.

7 COMMISSIONER COLEMAN: That was my question.
8 Thanks.

9 COMMISSIONER BROAD: Great minds think alike.

10 COMMISSIONER DOMBROWSKI: Thanks, Miles.

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

20 All right. Next subject is outside sales.

21 Did Tom walk out? Oh.

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

24 MR. RANKIN: Tom Rankin, California Labor

1 Federation.

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

11 This was brought to court by, probably, several
12 cases, but the one that went to the Supreme Court was the
13 Yosemite case, Yosemite Water Company. And the Supreme
14 Court actually came up with somewhat more detailed
15 definition, basically upheld the IWC's definition and
16 added a few provisions to it. And what we would like to
17 see is to have the IWC -- and Patty Gates is here, from
18 the Van Bourg Law Office, who actually has some proposed
19 language on this -- we would like to see the IWC meld the
20 definition that it had previously to the Supreme Court
21 case with the additions that -- the additional
22 clarifications made by the Supreme Court. We feel that
23 would -- that it's a fair definition, and it would also
24 give both workers and employers what they need in terms

1 of clarity, so they could tell when someone actually was
2 working as an outside salesperson and when the person
3 wasn't and was due overtime pay.

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

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

9 MR. RANKIN: Thank you.

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

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

23 One of these fact situations has worked its way
24 to the California Supreme Court, and the California

1 Supreme Court looked at -- very carefully looked at the
2 IWC definition of outside sales and really clarified and
3 expanded upon the definition in a way that I think would
4 be valuable to people -- both to the people who hire
5 delivery people and expect them to do some amount of
6 sales as part of their delivery work, and also to the
7 workers who have been prevented from having any overtime
8 protection at all if they're considered outside
9 salespeople.

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

16 I'm proposing -- and I've given you each a copy
17 of the California Supreme Court decision, Peter Ramirez
18 v. Yosemite Water Company, the case that Tom Rankin just
19 referred to, and also just a very brief -- for me, a very
20 brief, two-page testimony and -- containing both the
21 current definition under the IWC orders and the proposed
22 definition. And what I'm hoping is, with the proposed
23 definition we can take some of the reasoning and -- in
24 fact, the holding of the California Supreme Court, and

1 expand the definition with those exact words. And I
2 gleaned those words from the decision. You can check me
3 on it, because I've given you the decision. But I would
4 -- I would make the proposal that the Industrial Welfare
5 Commission consider redefining their outside sales
6 definition to make it clearer, and also to distinguish
7 tasks that are really delivery tasks from sales tasks.

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

18 So, I'm happy to answer questions if you have
19 any.

20 COMMISSIONER DOMBROWSKI: Any questions?

21 Ron McKune.

22 MR. MCKUNE: (Not using microphone) I wonder if
23 we might change the order. I'm here in support of
24 another presentation.

1 COMMISSIONER DOMBROWSKI: Okay. Well, your
2 choice.

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

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

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

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

16 "Outside salesperson means any person who
17 customarily and regularly works more than half
18 their working time" --

19 -- so far, that's what's in there --

20 " -- away from the employer's place of business,
21 selling," --

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

23 And then, the addition would be:

24 " -- or, regardless of location, engages in

1 activities closely related to and supporting his
2 or her outside selling activities, such as
3 writing up orders, writing sales reports,
4 revising the salesperson's own catalog,
5 contacting prospective customers to arrange
6 meetings away from the employer's place of
7 business, planning itineraries, and attending
8 sales meetings and sales conferences."

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

19 I'm not quite sure why it is necessary to amend
20 the definition to cover that non-selling activity,
21 because the Supreme Court clearly addressed it and ruled
22 that that kind of activity does not come within the
23 existing definition. As I say, we're not opposed to
24 excluding those kinds of people from the exemption.

1 And it -- you know, what it sounds like -- I've
2 wondered until today why the Legislature made a point of
3 putting the outside sales exemption -- making a special
4 point about it. There are so many exemptions in the
5 statute that didn't get that kind of attention. And I
6 guess the explanation is what I heard here today, that
7 the Ramirez case was coming along at the same time as
8 this legislation was coming along, and probably had not
9 been decided when this legislation was finally enacted,
10 so people weren't sure where the Supreme Court was going
11 to go with the Ramirez decision and wanted to affect that
12 kind of category.

13 Well, the Supreme Court did it. I mean, the
14 Supreme Court has given you a very clear ruling that
15 people who engage in service activities -- that the
16 service activities are not selling, and if they don't put
17 50 percent of their time into genuine selling, they're
18 not entitled to the exemption.

19 The Ramirez decision also, however -- and this
20 is the point of my concern -- emphasized 50 percent of
21 the individual's time away from the employer's place of
22 business. Now, there are a lot of activities that a
23 legitimate outside salesperson engages in that can be
24 engaged in at his or her employer's place of business.

1 Those are the kinds of activities, like writing up sales
2 reports, phoning prospective customers, and so forth,
3 those are the kind of activities that I am suggesting
4 here should be included in the definition of an outside
5 salesperson, so that you look at the time that that
6 person spends on the road visiting customers, and then,
7 when that person comes back into the office and writes up
8 a sales report or attends a sales meeting or what have
9 you, that that individual is still engaged in outside
10 selling, and you don't exclude that time.

11 COMMISSIONER DOMBROWSKI: Barry?

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

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

20 MR. TOLLEN: I don't think so.

21 COMMISSIONER BROAD: Well, it says that.

22 MR. TOLLEN: I don't think so. They have to be
23 activities, as I wrote it -- and this is why I wrote it
24 this way -- they have to be activities closely related to

1 and supporting his or her outside selling activities.
2 Now, if the person doesn't engage in any outside selling
3 activities, doesn't go out on the road and try to sell,
4 then there can't be any activities that support it.

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

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

15 You know, a lot of this, a person could do
16 outside the employer's place of business. As I said in
17 the letter, he could do it in his car, he could do it in
18 his home. And the present language in the Ramirez case
19 forces employers to tell outside salespeople, "Don't come
20 into the office to do this kind of work. Write your
21 reports out -- you know, go home and write your reports
22 or whatever, just don't come into the office to do it."
23 And that's silly. If the work is really closely related
24 and supportive of the outside sales activity, it ought to

1 be included in the definition and in the quantitative
2 measure.

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

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

1 drivers, and they are not outside salespersons.

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

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

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

19 COMMISSIONER COLEMAN: I have a question. And
20 I'm not sure if your language was attempting to address
21 this, but there's a huge body of sales right now that is
22 done on the Internet that could be considered outside
23 sales. For example, there's a company that does video
24 conferencing on the Internet, so that you can actually do

1 your presentation to your client in Romania with your
2 computer, and you're actually talking to them at the same
3 time via video conference. And I think that's something
4 we're actually -- we should think about in this
5 definition of outside sales, because this is the fastest
6 growing level of Internet service. The fastest growing
7 type of sales on the Internet is actually business to
8 business, e-commerce. And there's a huge body of
9 Internet companies that -- their sales forces are both
10 virtual and real. They're not necessarily getting in
11 their cars to sell, but the sales are outside.

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

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

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

22 COMMISSIONER COLEMAN: We need to think -- we
23 might want to get some testimony from some Internet
24 companies on this.

1 MR. TOLLEN: But I want to come back to the
2 point on the outside salespeople, that it -- these are
3 activities that the salesperson has control over himself.
4 The salesperson can decide to go back to the office to
5 write the reports or can decide to write the reports at
6 home or in any location. And it just doesn't make sense
7 to say that you're going to force these people to do this
8 kind of activity away from the employer's place of
9 business when it truly is a legitimate part of the
10 selling activity.

11 COMMISSIONER DOMBROWSKI: Thank you.

12 Ron, do you want to speak now?

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

19 And I'm here on behalf of the association to
20 speak in favor of the definition that has been crafted by
21 Mr. Tollen. Let me also say that we're happy to work
22 further with him and with others -- pardon me -- on
23 revising the definition further. We have concerns in the
24 area of e-commerce. This is a new era, a new economy --

1 pardon me -- and the definition should reflect the
2 current state of the economy and the direction which the
3 economy is taking.

4 Thank you.

5 COMMISSIONER DOMBROWSKI: Questions?

6 (No response)

7 COMMISSIONER DOMBROWSKI: Thank you.

8 Guy Halgren.

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

11 Can you hear me okay?

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

20 First of all, I wouldn't necessarily discard the
21 idea of becoming consistent with the federal exemption.
22 Yosemite didn't say the federal exemption was less
23 favorable to employees. And if it had, and if you had
24 concluded that, I could understand why you might not want

1 to go with the federal exemption. But whenever the state
2 can be consistent with the federal, it's a lot easier for
3 employers, as you know, and it's a lot easier for
4 commerce. You don't have to follow two sets of rules.

5 The federal exemption has an 80 percent
6 requirement. You've got to be doing sales-related
7 activities 80 percent of the time, but it broadly defines
8 -- more broadly defines what a sales activity is. The
9 state goes with a 50 percent requirement, more narrowly
10 defines what a sales activity is. I'm not sure either
11 one is more protective of employees. It depends probably
12 on the employee in question. But if it's a wash, maybe
13 we could have the same standard, state and federal, in
14 the State of California.

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

24 Let's say I'm selling windshield wiper displays

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

20 And maybe I could address Mr. Broad's concern,
21 because I have a way to approach that, I think. I've
22 always read Yosemite and the IWC definition found in the
23 wage orders more in the disjunctive, that you needed to
24 spend more than half your time away from the employer's

1 place of business, and you needed to spend more than half
2 your time on sales activity. And I think that's the way
3 to do this, is simply to make that more plain, if it
4 wasn't plain already. You need to spend more than half
5 your time away from the business, and more than half your
6 time on sales activities, some of which activities can be
7 taking place back at the shop, for example, a sales
8 meeting or writing up your orders, communicating by e-
9 mail, which you could do on your laptop at home just as
10 easily as you could be doing it in the employer's
11 facility. And then I think we take care of that concern.
12 It's still outside salespeople, and it's still over half
13 the time in sales activities.

14 Any questions that I could respond to?

15 Thank you.

16 COMMISSIONER DOMBROWSKI: Thank you.

17 Miles, do you have any comments on this subject?

18 MR. LOCKER: I think we had some role -- I don't
19 recall -- I think we might have done an *amicus* brief in
20 the Ramirez case. I know we worked with the attorney who
21 represented Mr. Ramirez. And we are very pleased with
22 the Ramirez v. Yosemite Water decision. We feel it
23 creates a bright-line test that is very useful for
24 enforcement purposes.

1 And, you know, one of our concerns with the
2 different approach taken under the federal law, which
3 allows for incidental activities to be included as sales
4 activities, is it kind of does away with that bright-line
5 approach. We'd like a bright-line approach for
6 enforcement purposes, so, certainly, we're happy with
7 Ramirez v. Yosemite Water and it's -- we think it's very
8 good for our enforcement staff.

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

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

15 COMMISSIONER BROAD: And how does that work?

16 MR. LOCKER: Okay. That is based on employees
17 who would be working -- this would be generally employees
18 in inside sales now, because if you come within the
19 definition of an outside salesperson, you're out of the
20 picture to start with, so this would be employees engaged
21 in inside sales, and this would be under some of the IWC
22 orders, the mercantile order, for example. And it
23 provides that if the employee is paid on a commission
24 basis and is -- let's see

1 -- paid at least one and a half times the minimum wage,
2 that that employee would then be exempt from overtime.

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

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

24 So, I hope I'm making myself somewhat clear.

1 COMMISSIONER BROAD: It's complex.

2 MR. LOCKER: Yes.

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

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

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

23 COMMISSIONER BOSCO: Could I ask, Mr. Chairman?

24 The prior speaker had raised the prospect of

1 conforming California law to the federal law, which, on
2 its face, has some advantages, I guess. Well, could you
3 comment on that?

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

18 The IWC has repeatedly made those
19 determinations, and there are various situations, just in
20 terms of, for example, in enforcement of overtime law,
21 and how you would compute, let's say -- what would -- how
22 you would get to one and a half times the regular rate of
23 pay, that the hours you use for salaried non-exempt
24 employee, where state law is different than --

1 COMMISSIONER BOSCO: No, I'm aware there's many
2 differences between state and federal law. But I think
3 the premise that the prior speaker had used was that it
4 really
5 -- it all comes out in the wash here, that neither the
6 federal nor the state law is any better or worse than the
7 other.

8 MR. LOCKER: No.

9 COMMISSIONER BOSCO: That's what I sort of
10 wanted you to comment on.

11 MR. LOCKER: You know, I think the other speaker
12 -- while he's correct in saying that, with respect to the
13 outside sales, state law uses a 50 percent standard and
14 federal law uses an 80 percent standard, the difference,
15 though -- I think, you know, he pointed to that -- was
16 that there's all kinds of other activities, other than
17 the outside sales, that go in -- that are subsumed within
18 sales activity under federal law. You have this huge
19 area of what I think the federal regulations call
20 "incidental activities." And so, despite an 80 percent
21 level that seems to be more favorable to workers, what
22 you get -- and I think the court in Ramirez addressed
23 that -- is that you could have a situation under federal
24 law where a worker is, in fact, spending very little time

1 away from the employer's premises or engaged in outside
2 sales, and nonetheless, that worker would be considered
3 an outside salesperson under federal law.

4 COMMISSIONER BOSCO: So, would it be your
5 conclusion that California workers in this regard are
6 better protected than --

7 MR. LOCKER: I believe so. And I believe that -
8 - although I think the Ramirez court did not expressly
9 say that California law is more favorable, I think that's
10 what animated the decision. I think the discussion they
11 had about other areas of California law, where California
12 law creates a higher standard, that's the only way you
13 could read that decision, I think. Yes.

14 COMMISSIONER BOSCO: Okay. Thank you.

15 COMMISSIONER BROAD: Well, Mr. Chairman, I'd
16 like to comment on that.

17 Having looked at the Ramirez case very closely,
18 in fact, the fact pattern which gave rise to that is very
19 offensive, in my view. That was an effort by an employer
20 -- and I think it appears to have been an effort by a
21 part of the industry to convert driver salespersons, who
22 deliver potato chips and water, who stock supermarkets,
23 to convert them wholesale into outside salespersons, when
24 everybody in America knows that this is blue-collar

1 delivery work that truck drivers perform. And it is not
2 outside sales work.

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

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

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

21 Robert Jones.

22 We have two speakers on this topic.

23 MR. JONES: Good afternoon again. My name is
24 Robert Jones. I'm with the firm of Jones Durant. I'm

1 here representing the Northern and Southern California
2 Chapters of the National Association of Computer
3 Consulting Businesses.

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

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

19 And that's my entire presentation.

20 COMMISSIONER DOMBROWSKI: Any questions?

21 COMMISSIONER BROAD: Yeah.

22 COMMISSIONER DOMBROWSKI: Barry?

23 COMMISSIONER BROAD: Can we -- can you narrow
24 the definition of who you're talking about here?

1 MR. JONES: Yes.

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

4 MR. JONES: Yes.

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

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

23 So, I could -- if you would like, rather than
24 convene a wage board in the trade of skilled computer

1 industry employees, but to convene a wage board in the
2 area of computer professionals. And I don't want to
3 confuse that with any other type of professional
4 exemption. That's the title that has been used under the
5 federal law for a completely separate exemption, and
6 it's, quote, "computer professionals." And it's the
7 language that we've provided in the past, software
8 engineers and programmers.

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

12 MR. JONES: For computer professionals.

13 COMMISSIONER BROAD: -- to discuss that?

14 MR. JONES: Yes.

15 COMMISSIONER BROAD: Now I have one other
16 question.

17 MR. JONES: Yes.

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

20 MR. JONES: Well, I think that's something for
21 the wage board to take a look at, because I think you can
22 create a wage board that's specific to an industry or a
23 trade or an occupation, and it doesn't have to be a wage
24 board that specifically address an entire wage order.

1 And that's -- and I've taken a look at that, and it
2 doesn't -- I know that the regulations that you've put
3 out said that you have to have a wage board for every
4 wage order. That's fine. But it also, under 1178.5(b),
5 says you can have -- if you want to take an action based
6 on the welfare of the employees, that it can be as to a
7 trade, occupation -- and you have the language there, Mr.
8 Broad.

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

12 MR. JONES: No, (b).

13 MS. STRICKLIN: No.

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

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

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

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

23 COMMISSIONER COLEMAN: If I may, under
24 1178.5(b), it says, "If the Commission finds that the

1 hours or conditions of labor may be prejudicial to the
2 health or welfare of employees in any occupation, trade,
3 or industry, it shall select a wage board composed of
4 equal numbers," et cetera. So --

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

9 MR. JONES: Right.

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

14 MR. JONES: Well, I think you'd --

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

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

1 MS. STRICKLIN: Yeah.

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

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

18 MR. JONES: That's our position.

19 COMMISSIONER BROAD: I understand, but that
20 would require -- what I'm -- I'm not sure about legally
21 is, that suppose we convene this wage board and it comes
22 back and says we ought to do X, Y, and Z. I'm not
23 certain that we could just start inserting that language
24 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

1 of what AB 60 permits and doesn't permit the Commission
2 to do with regard to these wage orders. But there has,
3 in the past, been considerable concern that the
4 Commission actually not keep creating more and more and
5 more wage orders, but rather move in the other direction.
6 And so, I'm concerned that if we kind of start down this
7 thing, we're going to have a little thing for -- like a
8 little special wage order for computer professionals,
9 followed by fishermen, followed by horseracing people,
10 followed by outside salespersons, you know, and that it
11 could get to be a lot, and that the appropriate motion,
12 in my view, would be to convene -- to open Wage Order 4
13 for the limited purpose of discussing this, because
14 that's where -- that's the professional, technical, and
15 clerical wage order.

16 Would that -- does that suit your purpose?

17 MR. JONES: It would suit our purpose if it's
18 for that limited purpose. If, in fact, the -- what I
19 don't understand is, are you going to require the same
20 wage board review all of 4 later on, or could the wage
21 board be convened in a different form at that point in
22 time? That's the problem that --

23 MS. STRICKLIN: It's up to the Commission.

24 MR. BARON: It's up to the charge.

1 COMMISSIONER COLEMAN: It seems to me we could
2 charge this wage board with looking very specifically at
3 this exemption.

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

6 COMMISSIONER COLEMAN: Right.

7 COMMISSIONER BROAD: I --

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

12 COMMISSIONER DOMBROWSKI: Some others might.
13 Let's --

14 MR. JONES: I'm sorry.

15 COMMISSIONER DOMBROWSKI: Do you have more
16 questions, Barry?

17 COMMISSIONER BROAD: No.

18 COMMISSIONER DOMBROWSKI: Let's have Keith
19 Honda.

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

22 By way of background, our attention was brought
23 to this issue by Congressman Zoe Lofgren. And she raised
24 with us major concerns about the impact of the interim

1 wage order on the class of computer professionals that
2 Mr. Johnson (sic) was speaking with.

3 In particular, she put our office in touch with
4 employees, who related to us their concerns about the
5 detrimental effect on their ability to earn their
6 livelihood that the interim wage order would have. And
7 based on that, I'm here today to urge you to hear from
8 these computer professionals and to look at the issue of
9 an exemption for these professionals, and in the forum
10 that we think is best would be to convene a wage board.

11 COMMISSIONER DOMBROWSKI: Any questions?

12 (No response)

13 COMMISSIONER DOMBROWSKI: Thank you.

14 Tom, you want to talk? There's one other
15 speaker who wants to come up.

16 MR. RANKIN: Yeah, on this whole -- Tom Rankin,
17 California Labor Federation.

18 I'd like to point out a couple things. First of
19 all, if you are going to convene a wage board -- and I'm
20 not convinced that you can deal with this problem, as the
21 IWC, of the computer professionals -- but if you are
22 going to convene a wage board, you are required, under
23 1178 of the Labor Code, to make some findings after an
24 investigation. And the findings are that you have to

1 find that, in this case, either that wages paid to
2 employees may be inadequate to supply the necessary costs
3 of proper living -- that's the minimum wage -- or that
4 the hours or conditions of labor may be prejudicial to
5 the health, morals, or welfare of employees. And you
6 have to include at least one public hearing in that
7 investigation.

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

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

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

1 covered by overtime.

2 Thank you.

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

10 MR. RANKIN: 1178.

11 COMMISSIONER COLEMAN: It's 1178 --

12 MR. RANKIN: 1178, period.

13 COMMISSIONER COLEMAN: Got it. Got it. 1178.
14 Thank you.

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

17 COMMISSIONER COLEMAN: Yes, okay. Thank you.

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

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

1 MR. BARON: Well, this is a meeting.

2 COMMISSIONER COLEMAN: This is a meeting,
3 however.

4 MR. JONES: Well, I mean --

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

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

9 COMMISSIONER COLEMAN: Thank you.

10 COMMISSIONER BROAD: Can I just ask a question?

11 COMMISSIONER DOMBROWSKI: Barry.

12 COMMISSIONER BROAD: I -- you know, I -- I know
13 there appears to be some rush to do this, but it seems to
14 me that the point at which Mr. Jones spoke, he spoke just
15 generally, as a member of the public, during a public
16 comment period. There was no agenda item investigating
17 this matter for possible action, which occurred at a
18 public hearing. And it would seem to me that if you want
19 to cover your bases legally, you set this for a public
20 hearing, put it on the agenda, and consider it then.
21 Otherwise, it's possible that if this does not meet the
22 legal standard, and I -- perhaps we should have our legal
23 counsel -- maybe there's some existing law about what is
24 the legal standard

1 -- but if it doesn't meet the legal standard for an
2 investigation that includes at least one public hearing,
3 then we could go all the way down the line of having a
4 wage board meet and the Commission adopt regulations,
5 which were then -- which was then subject to legal
6 challenge, when we could clearly cover our bases legally
7 by setting this thing for a public hearing one month from
8 today, or, you know, in the next month's -- make it a
9 public hearing, put the matter on for an agenda, and then
10 take action, if that's the will of the Commission.

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

19 COMMISSIONER BOSCO: It seems to me that we're,
20 you know, just getting tangled up and condemning
21 ourselves to a lifetime of these hearings.

22 (Laughter)

23 COMMISSIONER BOSCO: And it's -- as I understand
24 it, the wage board would go in far more depth on this and

1 make a recommendation to us, and we could do whatever we
2 want. But the stumbling point is what is the threshold
3 that we have to go through to appoint the wage board to
4 begin with. And as I read the code, it simply is that we
5 have to conduct an investigation. Now, how does a
6 commission conduct an investigation? I'm not sure that
7 these hearings are really investigations either. We
8 certainly hear both sides of something, or at least most
9 of the time we do. But the -- our counsel has advised us
10 that nowhere is it defined what an investigation consists
11 of. And whether it's Mr. Anderson (sic) standing up and
12 making a statement and someone else making the opposite
13 statement, if that's an investigation, then I don't know.
14 But I would suggest that we -- because this isn't the
15 only time this is going to come up, especially with all
16 the work we have ahead of us, we'd probably better think
17 of setting some standard as to what our investigation is
18 going to be. And hopefully, it won't be, at least at the
19 outset, these lengthy hearings.

20 I think we -- you know, if we have to pass some
21 legal threshold, we should decide how we're going to do
22 that in each one of these cases, and when we've conformed
23 to that, then we go ahead with the wage board. My own
24 preference would be to let the wage board do most of the

1 heavy lifting, as far as really investigating what needs
2 to be accomplished, and then we receive our input from
3 them, rather than to presume that these hearings are
4 really going to accomplish too much for us.

5 COMMISSIONER DOMBROWSKI: Thank you.

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

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

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

21 MS. STRICKLIN: You don't even have to have
22 speakers. You could have written statements.

23 COMMISSIONER BOSCO: Well, there's another
24 possibility. Maybe we should adopt that sort of an

1 approach.

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

7 COMMISSIONER COLEMAN: Did we have another
8 speaker?

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

11 Jim? Jim Abrams.

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

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

21 There are plenty of people in the lodging
22 industry who probably qualify as computer professionals
23 who work on reservation systems and things like that. If
24 they are hired as independent contractors -- okay, and I

1 think that's perhaps what Mr. Broad was referring to --
2 then they would probably be covered under Wage Order 4.
3 If they -- if they are employees, though, and work for
4 Hilton or Marriott or somebody like that, they are almost
5 certainly covered under Wage Order 5, regardless of the
6 fact that they may be doing a task that, in and of
7 itself, is covered by Wage Order 4 or some other wage
8 order, because they are working for a hotel.

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

21 COMMISSIONER COLEMAN: And from what I can tell
22 from the federal exemption, it doesn't specify -- it
23 specifies duties, but it doesn't specify particular
24 locations or industries where those duties are performed.

1 COMMISSIONER BROAD: I would actually like Mr.
2 Jones to come back up and comment on that, because the
3 explanation that I had was that these were people that
4 worked for temporary service entities that supplied
5 highly paid computer professionals to service other
6 industries and were paid in the \$80-an-hour range and up,
7 not front desk people or reservation people in motels. I
8 mean, I didn't even know that the breadth of this even
9 covered them.

10 MR. JONES: That's not --

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

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

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

17 MR. JONES: I've got it, though.

18 What he's -- what we're talking about are
19 skilled computer professionals that do exactly what it is
20 that he has just mentioned, and that is, they design
21 computer programs, they design software programs, they do
22 systems analysis. Most of the hourly people who do this
23 do it through brokerage firms, through companies that
24 hire them as temporary employees because of the problems

1 that have arisen as these employees wish to work as
2 independent contractors.

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

12 COMMISSIONER BROAD: They're already exempt.

13 MR. JONES: They're already exempt, as
14 administrative employees.

15 COMMISSIONER DOMBROWSKI: All right.

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

21 COMMISSIONER DOMBROWSKI: Who'll make a second?

22 COMMISSIONER BOSCO: I'll second.

23 COMMISSIONER DOMBROWSKI: Call the roll.

24 MR. BARON: Bosco.

1 COMMISSIONER BOSCO: Aye.

2 MR. BARON: Broad.

3 COMMISSIONER BROAD: Not voting.

4 MR. BARON: Coleman.

5 COMMISSIONER COLEMAN: Aye.

6 MR. BARON: Dombrowski.

7 COMMISSIONER DOMBROWSKI: Aye.

8 MR. BARON: The ayes --

9 COMMISSIONER DOMBROWSKI: Ayes have it.

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

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

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

21 Anything else?

22 All right.

23 MR. BARON: I think that the issue of what you -
24 - how you would -- how and what you would charge the wage

1 board -- you know, I could see that, at this point,
2 coming up, really, at the meeting when you're actually
3 selecting the wage board. For instance, we're now in the
4 process of soliciting nominations for the construction,
5 logging, mining, and drilling. The deadline for, let's
6 say, submitting those are like March 15th. And so, like
7 at the next -- at the next meeting or hearing, I would
8 assume that, let's say, relative to those -- relative to
9 that, that the Commission would issue a charge. The
10 Commission could do the same type of thing, issuing a
11 charge to a wage board, at the same time when you get --
12 when you make the appointments to the wage board.

13 Right now you don't have members of a wage board
14 to charge.

15 COMMISSIONER COLEMAN: So, if we want --

16 MR. BARON: I mean, if you want -- I mean, I
17 could -- I could be -- the process could go forward from
18 here that soliciting nominations to the wage board, I
19 guess, and that the Commission would, at its next -- at
20 its next scheduled meeting or hearing, could then --
21 would make the appointments to the wage board, and at the
22 same time, you can issue a charge to the wage board. And
23 it is true that the wage board has to act very -- very
24 much within the confines of that charge.

1 COMMISSIONER COLEMAN: So, perhaps between now
2 and then, we might be able to work with staff to
3 determine --

4 MR. BARON: What the charge is.

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

7 MR. BARON: We can certainly have those
8 discussions.

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

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

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

22 I'll make the point, Commissioner Broad, that
23 I'm not talking about an exemption from minimum wage.
24 That's not a problem at all for us.

1 I'll try to be brief. I believe that -- I'm
2 hopeful that the letter that I sent your Commission last
3 week is in your packets.

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

12 We feel that an exemption is a prudent and an
13 equitable request, given the nature of our industry.
14 When I look at, as I'm learning about this, the
15 exemptions that are currently out there, specifically as
16 they relate to, for example, the sportfishing industry or
17 the ski industry, many, if not all, of the same
18 requirements and situations exist for us. We are
19 completely dependent upon weather. We have very short
20 seasons. Ninety percent of our business takes place
21 during the months of July and August. Our employees, by
22 and large, need to make a living during that period of
23 time. And as such, the more work they can get, the
24 happier they are.

1 Given an 8-hour day or a 40-hour week as a
2 standard would make it very difficult for my employees to
3 be able to continue to make the kinds of dollars that
4 they make now.

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

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

21 We are small businesses. I -- my own business,
22 we do about \$350,000 a year. I'm considered big in my
23 industry. Our smallest -- our largest outfitter doesn't
24 come close to the smallest ski industry or ski operator

1 or ski resort in California. But we do have a huge
2 impact in the economies of the local areas that we reside
3 in. River rafting drives the economy in Coloma, it
4 drives the economy in Groveland, it drives the economy in
5 Lake Isabella and Kernville. And absent those types of
6 activities and that kind of recreation, those economies
7 would essentially dry up.

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

14 I'm open to any questions that you might have,
15 or concerns.

16 COMMISSIONER DOMBROWSKI: Questions?

17 (No response)

18 COMMISSIONER DOMBROWSKI: Thank you.

19 MR. RANGELL: Thank you.

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

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

1 not on the agenda today.

2 COMMISSIONER DOMBROWSKI: Okay.

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

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

21 Our job is to deal with people 24 hours a day.
22 What -- and our situation is that we work in our
23 facilities ourselves. And since we're required by law to
24 give 24-hour service, therefore we -- 24 hours a day,

1 seven days a week, 365 days a year as a provider -- some
2 of us only work in our homes ourselves, with our mates or
3 whatever else, and we don't have staff. But then there
4 are others of us who may have to have -- like I have two
5 Level 4-R facilities, which is the consumers that have to
6 have one staff per two -- per two consumers. So,
7 therefore, usually when I have six consumers in my home,
8 I have three staff and a supervisor.

9 Now, the way we've basically been paid in the
10 last few years, our industry, because of -- we have -- we
11 are -- we have -- we don't have a mandate as far as
12 residential rates are concerned. Basically, if there's
13 money in the budget for the state, we get raises.
14 Between the time from 1985 to 1995, we had no raises at
15 all, no cost-of-living increases at all. There was even
16 a portion where our consumers got a pass -- a raise in
17 Social Security rates. Those raises were taken from us -
18 - we never got them at all -- until the last two years.

19 The last three years, we have gotten a 3.5
20 percent raise every year. Twelve years, we got no raises
21 at all, so we're about 40 to 50 percent underpaid.

22 Now, I do -- I did pass -- I did pass you a lot
23 of information. First of all, there's an audit from the
24 state auditor showing how our staff, basically, is

1 underpaid by 40 to 50 percent. The average wage in
2 California is about \$18,000. And we're saying that those
3 wages for our staff should be about \$18,000. This
4 includes, basically, a minimum wage, as far as 40 hours
5 per week is concerned, but our special circumstances, our
6 employees quite often do not work 40 hours.

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

18 Like I said -- there is a chart. My vice
19 president, Tony Martinno, will go over some figures as
20 far
21 -- and you have those figures too -- as to the amount of
22 income we have. And we ourselves, if we do the facility
23 ourselves, we get paid much less than minimum wage per
24 hour for the services we give to our consumers.

1 So, what our problem is, is that we don't get
2 enough rates from the state to pay our staff. And with
3 the time and a half and having to pay staff for time that
4 is slept while they're on call, or having to limit our
5 facilities when they're not -- and to pay them because
6 they're on call when they're not working, there are those
7 of us who will go out of business, because we are not
8 getting enough money.

9 We are working on this with the state.

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

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

21 So, how do we -- how do we run a facility,
22 taking care of people -- like, when we talked with the
23 governor years ago, people at the SPCA get paid sometimes
24 \$12 an hour for washing feces out of the cage for dogs

1 and cats, yet we pay our staff minimum wage -- six
2 dollars is sometimes -- well, the average right now is
3 like seven dollars or eight dollars an hour -- and we're
4 taking care of -- we have the life of human beings in our
5 hands.

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

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

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

23 And Tony Martinno would like to make some
24 comments too. And if you have any questions for me, I --

1 COMMISSIONER DOMBROWSKI: Any questions?

2 (No response)

3 COMMISSIONER DOMBROWSKI: Thank you.

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

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

20 So, that's why I guess my question would have
21 been in terms of the exact nature of these employees.
22 But if they are personal attendants -- and I think it was
23 also mentioned earlier, this issue of -- on some of
24 these, in terms of sleeping of when you're on and when

1 you're not, in terms of computing, whether or not you're
2 in -- frankly, the -- in terms of what the Commission has
3 done so far in the interim wage order, it is -- frankly,
4 those weren't touched.

5 So, I mean -- so, I was saying, if you were
6 deeming -- if these employees are deemed personal
7 attendants, in both ways they've been dealt with under
8 wage orders.

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

11 MR. BARON: These are not personal attendants?

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

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

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

22 MR. JACKSON: And so, we could pay, like, for
23 five hours of sleep, uninterrupted sleep, under the state
24 law, and I think the federal law says something

1 different.

2 MR. BARON: Well, I'll tell you what I'd be more
3 than happy to do, if you want to leave for me your, you
4 know, name, address, and phone number, I'll be happy to
5 go
6 -- you know, provide you with more in-depth viewpoint in
7 terms of where the -- in terms of the state and the
8 federal.

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

18 MR. JACKSON: Well, that would help, because
19 what's happening now is the federal government has
20 started, in California -- they've started with the Oregon
21 border, and they are coming into our facilities, auditing
22 our facilities. They have, so far, come up with a
23 million dollars of fines, in homes like ours, so far.
24 They're doing it now in San Francisco, but I understand

1 they'll be moving to the East Bay, where most of us are
2 coming from right now, from the East Bay.

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

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

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

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

24 MR. JACKSON: No, sir.

1 COMMISSIONER DOMBROWSKI: Okay.

2 MR. MARTINNO: No, I -- like Wardell was saying
3 -- my name is Tony Martinno. And you'll see in the
4 letter that I presented to you exactly what's going on.

5 And our concern is the sleeping time and the on-
6 call, with people on call. That's our big concern, as
7 you can see.

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

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

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

1 MR. MARTINNO: Well, thank you.

2 COMMISSIONER DOMBROWSKI: Barry?

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

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

12 COMMISSIONER BROAD: Oh.

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

16 COMMISSIONER BROAD: Thank you.

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

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

24 At your last meeting, there was a bit --

1 COMMISSIONER DOMBROWSKI: We're all friends
2 here.

3 MR. ABRAMS: Nonetheless, you --

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

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

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

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

24 And because there are so many people in the

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

10 So, I had sent to Mr. Baron on Tuesday, in
11 response to that, a petition as a way to raise this
12 before you today. I appreciate you can't take action on
13 it today, under the open meeting law, to, a) clarify to
14 what extent the meal and lodging credits exist today -- I
15 assume that they still exist -- and the main question,
16 then, is: are they the same meal and lodging credits
17 that existed -- the same amounts -- that existed as of
18 December 31st last year, or are they the meal and lodging
19 credits under Wage Order 5-89, as amended in 1993, which
20 are the amounts that the Commission adopted in 1988? And
21 if you conclude that, a) there is no meal and lodging
22 credit, or it is less than it was last December 31st --
23 this was worded in the alternative as a petition -- to
24 please raise the meal and lodging credits back to where

1 they were on December 31st, retroactively to the 1st of
2 this year, so we don't have thousands of employers who
3 have been crediting certain amounts against their minimum
4 wage obligations for meals and lodging finding, at the
5 end of this year or next year, that they've been in
6 violation.

7 That's the substance of the petition.

8 COMMISSIONER DOMBROWSKI: Okay.

9 Do you have any questions?

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

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

15 -- COMMISSIONER BROAD: No, no, I understand.

16 MR. ABRAMS: -- there's no -- there's not been
17 an answer.

18 The thing that concerns me is that I think --
19 I'm just going to -- I'm going to defeat my own case here
20 a little bit -- I think the fairest reading of Assembly
21 Bill 60 is that the -- the wage order 5-98, which has the
22 highest, most recent meal and lodging credits, is no
23 longer in effect. AB 60 says Wage Orders 1, 4 -- or 1,
24 4, 5, 7, and 8, whatever it is, -98, the ones that the

1 Commission adopted, is null and void. And in the case of
2 the public housekeeping industry, it's replaced by Wage
3 Order 5-89, as amended in 1993.

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

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

20 COMMISSIONER BROAD: Right.

21 MR. ABRAMS: The request, therefore, if that is
22 your conclusion, and your legal counsel says, "Yes,
23 that's right," is that you take action. If you feel you
24 need to appoint a wage board, I would suggest to you that

1 the meal and lodging credit doesn't exist just in Wage
2 Order 5. It's in others too; you might want to have a
3 broader wage board. But the request is that you raise
4 the meal and lodging credits back to where they were as
5 of December 31st of last year, and do it retroactively to
6 the 1st of this year.

7 COMMISSIONER DOMBROWSKI: I think Andy has a --

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

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

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

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

21 I must tell you that, looking at the relevant
22 Labor Code sections on petitions, petitions -- the way
23 the IWC -- the kind of proper petitions are petitions
24 that are asking for an amendment, be it a change, be it

1 an adoption. A petition asking for a clarification is
2 not within the general purview of IWC petitions.

3 Now --

4 MR. ABRAMS: I understand.

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

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

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

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

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

24 MR. BARON: I think, though, that -- I was going

1 to say, I think, though, that the proper approach in
2 terms of interpretation or enforcement of what's in there
3 already would involve at least reaching out for the
4 Department of Labor Standards Enforcement. I mean, if
5 you want to --

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

9 MR. ABRAMS: Understood. Understood.

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

15 I share Commissioner Dombrowski's concern that
16 over the last -- over the last months that all of us have
17 been members of this Commission, we've had a lot of
18 people come up here and say, "Could you just clarify
19 something for us?" And it -- I think we've learned,
20 maybe somewhat slowly, that it's probably not our job to
21 sit up here and, you know, sort of vote on
22 clarifications, that there's a division of authority
23 between the Labor Commissioner, which interprets the law,
24 and the Commission, which adopts regulations and changes

1 regulations, but doesn't sit up here and issue
2 clarifications of its own regulations.

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

12 And so, I would urge you to do that. Within the
13 120-day period that this thing is sitting around here, I
14 think you could, clearly, get an answer. And, you know,
15 I would certainly join Mr. Dombrowski and probably the
16 rest of the commissioners in asking our executive
17 director to contact the Labor Commissioner and ask if
18 they could really get this thing expedited.

19 MR. BARON: I'd be happy to.

20 MR. ABRAMS: That's fine. I respect that.
21 That's how I will proceed. I have already today had an
22 opportunity just to give a copy of the petition to Mr.
23 Locker, and I will proceed with him. And I thank you.
24 You have too many of these kinds of issues, as everybody

1 is sorting through what the law means exactly.

2 Thank you.

3 COMMISSIONER DOMBROWSKI: Thank you.

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

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

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

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

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

22 (Laughter)

23 MR. WASHINGTON: I'm agreeing -- that's right.

24 Actually, I'm here because -- I think that you

1 put your finger on it already, Commissioner Bosco -- the
2 fact that the Commission and the law in the State of
3 California is so technically -- it's so technical and
4 complicated that the ordinary person simply cannot
5 understand and comply with the law.

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

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

21 I don't think that you've heard the end of the
22 new technology that is being developed that you are
23 regulating that you hadn't even thought of. This is a
24 relatively slow-moving body. You have a one-time good

1 deal to make a lot of law within a time frame of this six
2 months, until July of 2000. And after that, you go back
3 to business as usual. And I can tell you from my own
4 experience that this is a very slow-moving process when
5 you go through the IWC rulemaking process.

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

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

19 Any questions?

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

1 I guess, but we were -- weren't we just going by
2 industry?

3 COMMISSIONER DOMBROWSKI: We talked about the
4 flexible schedules and the recurring overtime and a lot
5 of other -- yeah, we had the publishing industry. So, we
6 --

7 Barry?

8 COMMISSIONER BROAD: Yeah. I mean, while we
9 have a really good deal here until July 1 to change
10 things and -- without wage boards, we can't -- you know,
11 you -- there's a very clear statutory limit on our power,
12 which is it's an 8-hour -- 8-hour day, daily overtime
13 statute that we're effectuating. And we have a limited
14 authority to carve out flexibility. We can't repeal AB
15 60, much as the employers might want us to. That issue
16 has been decided.

17 I mean, I -- now, we are going to have a hearing
18 on flexible work arrangements, which is mandated by the
19 statute, and which we can deal with, but it basically
20 says you can't schedule employees for work in exceed of
21 10 hours a day without the payment of overtime, and that
22 only when there is an alternative workweek arrangement.

23 So, I think our -- while our process has been
24 expedited for these six months, I'm not sure that our

1 ability to create -- sort of repeal the statute has been
2 given to us.

3 MR. WASHINGTON: I'm not asking to repeal the
4 statute. I'm simply asking you to hear us out. I'm
5 asking you to hear us out.

6 COMMISSIONER DOMBROWSKI: Any other questions?

7 (No response)

8 COMMISSIONER DOMBROWSKI: Thank you.

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

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

20 AEA represents more than 1,400 high-tech
21 companies in California, ranging from the giants of the
22 high-tech industry to small electronics manufacturers and
23 Internet start-ups. Some of our member companies employ
24 upwards of 10,000 employees, others less than 25. There

1 are more than 780,000 high-tech jobs in California. The
2 high-technology industry accounts for \$64 billion of
3 California's \$105 billion in exports. That's 61 percent
4 of the exports out of California.

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

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

24 In the Silicon Valley, the competitive

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

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

14 Thank you. Do you have any questions?

15 COMMISSIONER DOMBROWSKI: Questions?

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

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

23 COMMISSIONER BROAD: Sorry. Your -- what
24 administration?

1 MS. WATTS: The administration of the State of
2 California.

3 COMMISSIONER COLEMAN: So, you're saying that --

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

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

10 MS. WATTS: Yes, please.

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

13 MS. WATTS: I'm sure there will.

14 COMMISSIONER COLEMAN: -- certainly would
15 warrant further discussion.

16 COMMISSIONER DOMBROWSKI: Any other questions?

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

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

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

24 COMMISSIONER COLEMAN: Do we get that to Andy?

1 Is that how we --

2 MR. BARON: If you leave it, I'll be happy to --

3 MS. WATTS: Sure.

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

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

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

16 MS. WATTS: Right.

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

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

24 MS. WATTS: Thank you.

1 COMMISSIONER BROAD: Do you have that today?

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

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

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

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

17 MS. WATTS: I'd be happy to do that.

18 MR. BARON: Okay.

19 COMMISSIONER DOMBROWSKI: I assume Tom would
20 like to speak.

21 MR. RANKIN: Yeah.

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

1 Proposition 210.

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

6 Thank you.

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

10 COMMISSIONER DOMBROWSKI: Right.

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

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

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

24 COMMISSIONER COLEMAN: I would agree. I think

1 the opinions of both sides are going to be important and
2 critical in just helping this Commission decide if we
3 want to go forward and have -- at all on this issue.

4 COMMISSIONER DOMBROWSKI: Okay.

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

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

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

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

1 sales operation.

2 Thank you.

3 COMMISSIONER DOMBROWSKI: Thank you.

4 Any questions?

5 (No response)

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

8 We have some housekeeping. We need to make a
9 finding by the Commission that we have published the
10 interim wage order, Labor Code Section 1183(c), a finding
11 by the Commission that there has been publication of an
12 action taken by the Commission, a required by Section
13 1182.1, entitled "Action Taken to be Published," is
14 conclusive as to the obligation of an employer to comply
15 with the order.

16 And don't ask me what I just said.

17 Do we have a motion?

18 COMMISSIONER BROAD: So moved.

19 COMMISSIONER COLEMAN: Second.

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

22 COMMISSIONER DOMBROWSKI: Take the roll.

23 All in favor, "aye."

24 (Chorus of "ayes")

1 COMMISSIONER DOMBROWSKI: Opposed?

2 (No response)

3 COMMISSIONER DOMBROWSKI: Thank you.

4 The next hearing is scheduled for March 31st, I
5 believe, in Sacramento, if that's --

6 COMMISSIONER BROAD: Perhaps we should have this
7 hearing, considering the request of the American
8 Electronics Association, maybe we should have this
9 hearing in the Bay Area or San Jose or someplace like
10 that.

11 COMMISSIONER COLEMAN: You know, actually, I
12 don't -- I don't think that matters too much. Sort of
13 ironically, Sacramento is one of the top -- I think one -
14 - number one or number two in terms of the fastest
15 growing high-tech cities. So, I think wherever we hold
16 it, we're going to be in a high-tech -- actually, San
17 Francisco is in the top five as well. So, I'm fine. And
18 since there are other agenda items for that meeting, I
19 think it's fine to hold it in Sacramento.

20 COMMISSIONER BROAD: Okay.

21 COMMISSIONER DOMBROWSKI: Okay.

22 Any other business brought up by the
23 commissioners?

24 COMMISSIONER COLEMAN: Staff advised me just to

1 formalize for the record that the wage board that we
2 appointed for the computer consultants is pursuant to
3 Section 1178.5(b), and that it might be prudent to set a
4 deadline for the applications for that wage board of
5 March 20th, if people are comfortable with that.

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

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

20 COMMISSIONER DOMBROWSKI: Okay. Any other
21 business?

22 Do I hear a motion to adjourn?

23 COMMISSIONER COLEMAN: So moved.

24 COMMISSIONER DOMBROWSKI: Second?

1 COMMISSIONER BOSCO: Second.
2 COMMISSIONER DOMBROWSKI: All in favor?
3 (Chorus of "ayes")
4 COMMISSIONER DOMBROWSKI: All opposed?
5 (No response)
6 (Thereupon, at 1:27 p.m., the public
7 meeting was adjourned.)

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11 CERTIFICATE OF REPORTER/TRANSCRIBER

12 --o0o--

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

22

23 Dated: March 12, 2000

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CYNTHIA M. JUDY
Reporter/Transcriber